

EXECUTIVE OFFICE



29 May 2015

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Dear Mr Dolman

ACCC Submission in Response to Harper Review Final Report

Please find enclosed the ACCC's submission to the Treasury in response to the Harper Review Panel's Final Report.

The ACCC would like to thank the Treasury for the opportunity to comment on the Final Recommendations put forward by the Harper Review Panel. I also wish to again take this opportunity to thank Professor Harper and the panel for giving serious consideration to the matters raised in our earlier submissions.

The ACCC supports the general thrust of the recommendations in the Final Report. However, the ACCC has made a number of recommendations in our submission on areas of concern that we hope will be considered. Notably, this includes potential changes to the cartel conduct provisions and the proposal to separate infrastructure regulation from the ACCC's competition and enforcement functions.

If you have any questions regarding any aspect of the ACCC's submission, please do not hesitate to contact me on (02) 6243 1131. Alternatively, you can contact Richard Home on (03) 9290 6960.

Yours sincerely

A handwritten signature in blue ink that reads 'Rod Sims'.

Rod Sims
Chairman

sent electronically: competition@treasury.gov.au



Australian
Competition &
Consumer
Commission

**Australian Competition & Consumer Commission
Submission to Treasury on the findings of the
*Competition Policy Review***

29 May 2015

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Introduction

The ACCC welcomes the opportunity to comment on the Final Report of the Competition Policy Review Panel (March 2015) (Final Report). This submission follows previous submissions made by the ACCC to the Review Panel's Issues Paper (14 April 2014) and Draft Report (22 September 2014).¹

The ACCC is providing only a brief submission on the Final Report, limited to the key issues where the ACCC considers further consideration of the recommendations in the Final Report is necessary.

Even though the ACCC approaches this submission by exception, the ACCC notes that the Review Panel's Final Report contains a large number of pro-competitive reforms which, if adopted, could significantly enhance Australia's economic productivity over the years ahead.

This submission sets out some concerns the ACCC has with the Final Report's recommendations on:

- Cartel conduct prohibition
- Exclusive dealing coverage
- National Access Regime

In addition, this submission provides further comment and observations on:

- Liner shipping
- Price signalling
- Misuse of market power
- Resale price maintenance
- Mergers
- Private actions
- Trading restrictions in industrial agreements

The ACCC's submission also provides some additional comment on the Review Panel's competition institutions and governance recommendations.

The ACCC's views on issues not raised in this submission are set out in detail in previous submissions made to the Review Panel by the ACCC.

The ACCC would be happy to provide further detail on any of the issues raised in this or earlier submissions, and to respond to issues of interest to Treasury.

¹ ACCC submissions in response to Review Panel's Issues Paper are available at the [ACCC's website](#).

1 Competition Laws

The ACCC directionally supports a large number of the Review Panel's recommendations on the operation of the *Competition and Consumer Act 2010* (Cth) and considers that many of the proposed amendments are suitable for direct implementation.

However, the ACCC has significant differences with the Review Panel with respect to its recommendations on:

- Cartel conduct prohibition (Final Recommendation 27)
- Exclusive dealing coverage (Final Recommendation 33)
- National Access Regime (Final Recommendation 42)

1.1 Specific ACCC concerns

1.1.1 Cartel conduct prohibition

Final Recommendation 27 — Cartel conduct prohibition

The prohibitions against cartel conduct in Part IV, Division 1 of the CCA should be simplified and the following specific changes made:

- The provisions should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia.
- The provisions should be confined to conduct involving firms that are actual or likely competitors, where 'likely' means on the balance of probabilities.
- A broad exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.
- An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

ACCC view on Recommendation 27

The ACCC is concerned to ensure that the CCA clearly outlaws collusive behaviour between competitors involving bid rigging, price fixing, market allocation or agreements to restrict supply or acquisition.

- The draft legislation dealing with the extra-territorial reach of the CCA is welcomed.
- The simplified drafting used to describe hard core cartel conduct is welcomed, although some aspects of the drafting create a risk that conduct currently captured by the provisions will fall outside the scope of the new prohibitions.
- The Panel intended to remove conduct which may be beneficial from the scope of the

cartel prohibitions so that it may be assessed by reference to whether it substantially lessens competition. However, the exceptions contained in the Panel's model legislation are susceptible to abuse and may prevent outright cartel conduct being addressed as criminal behaviour under the CCA.

The Panel's model legislation is likely to take Australia backwards in its ability to take effective action against hard core cartel conduct. The ACCC does not expect that the Panel intended such a result.

The ACCC recommends these issues be addressed through changes to the draft legislation proposed by the Panel. In the alternative, the ACCC suggests it is better to leave the current provisions in place, despite their complexity, to ensure Australia can take effective action against hard core cartel conduct.

Simplifying the description of cartel conduct

In response to a range of submissions criticising the complexity of the drafting of the cartel provisions (including from the ACCC), the Panel has sought to simplify the drafting of the section used to describe cartel conduct (currently section 44ZZRD; proposed section 45B). The question arises as to whether matters of substance have been lost through the redrafting.

While a number of such matters arise and may be considered to be potential drafting issues, the ACCC particularly notes the proposed simplification of the wording of the bid rigging provision² may make it harder to capture conduct by way of an agreement to withdraw or not proceed with a bid.

Case Study – Obeid v ACCC

Mr Moses Edward Obeid and Mr Paul Obeid challenged the validity of notices issued to them by the Chairperson of the ACCC under section 155 of the CCA³ in relation to the cartel prohibitions.⁴

A critical issue for the Federal Court, and the Full Federal Court on appeal, was the definition of cartel conduct in section 44ZZRD. The Full Federal Court held that the words 'in the event of a request for bids' did not contain a temporal restriction such that the bid rigging conduct had to occur prior to the bids being put in.

The proposed change in wording to 'in response to a request for bids' and the deletion of the definition of 'bid' currently found in section 44ZZRB (which includes preliminary steps in a bidding or tendering process) may reopen this issue for further debate and could have led to a different outcome in that matter.

Narrowing the meaning of 'likely' / when firms are 'likely' competitors

The Panel recommends a raising of the threshold of when firms are considered to be in competition with each other for the purpose of the cartel provisions than is currently the case. The recommendation itself is in clear terms and states that the 'likely' threshold should now be 'assessed on the balance of probabilities (that is more likely than not)'. Raising the

² Model legislation, paragraph 45B(1)(d).

³ Where the Commission, Chairperson or Deputy Chairperson, has reason to believe a person is capable of producing documents or giving evidence in relation to a matter that constitutes or may constitute a breach of the CCA, a notice can be served under section 155 of the CCA requiring a person to provide documents or evidence to the ACCC.

⁴ Obeid v ACCC [2014] FCAFC 155

threshold in the way proposed will narrow the types of agreements that potentially fall within the cartel provisions.

However, that recommendation is not reflected in the Panel's model legislation, which leaves the term 'likely' undefined. As such, the ACCC expects the word 'likely' in subsections 45B(2) and (3) would be interpreted as meaning "a real chance or possibility" as it has in a number of Federal Court cases (e.g. section 4D - News Ltd v ARL, section 45D - Tillmans Butcheries, section 50 – AGL, Global Sportsman v Mirror Newspapers, section 52 TPA / 18 ACL).

The ACCC does not support the meaning of 'likely' being raised to a higher level in the cartel prohibitions than in any other section of the CCA. It would allow firms engaging in conduct that meets the OECD's definition of a hard core cartel to escape sanction under the cartel provisions. Further, and as noted by the Commonwealth Director of Public Prosecutions, such an approach would be potentially problematic in matters of bid rigging where the alleged collusion occurred after the companies submitted their bids.⁵

Joint venture defence

The Panel's proposed joint venture defence, proposed section 45I, is intended to take legitimate joint venture conduct outside the scope of the cartel prohibitions. This is laudable as legitimate joint ventures allow parties to embark on pro-competitive projects that might not otherwise be undertaken.

However the Panel's proposed section 45I creates a substantial risk that hard core cartel activity is moved outside of the cartel prohibitions, by allowing the defence to protect arrangements that have nothing to do with legitimate joint venture activity.

- The Panel has recommended the joint venture defence be expanded to include legally unenforceable **arrangements or understandings** between competitors purely for **acquisition or marketing**, in addition to those already within the scope of the defence; namely joint ventures for production or supply where any restriction on competition is contained in a legally enforceable contract.
- Given that a joint venture, at its simplest, is an activity in trader or commerce 'carried on jointly by two or more persons'⁶, this potentially creates a very broad exception to the cartel prohibitions.

The Panel's joint venture defence contains three potential filters to guard against abuse; namely that the provision:

- (i) relates to the goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture, *or*
- (ii) is reasonably necessary for undertaking the joint venture, *or*
- (iii) is for the purpose of the joint venture.

It is unlikely that these filters will be effective to stop the joint venture exception being used as a cover for cartel conduct, particularly in the criminal context.

- First, a defendant in a criminal cartel prosecution would no longer have any evidential onus in respect to the existence of a joint venture as unlike current section 44ZZRO, proposed section 45I would only place an onus on persons claiming the defence in civil proceedings.

⁵ Commonwealth Director of Public Prosecutions, 17 November 2014 submission to the Competition Policy Review.

⁶ CCA, section 4J.

- Second, as the matters are expressed in the alternative, a respondent in civil proceedings would only need to point to one of the matters to successfully invoke the defence.
- Moreover, it is not incumbent on a respondent to even establish any of these matters in civil proceedings; rather a respondent bears only an onus to raise evidence as to the existence of the matters, following which the ACCC must disprove the matter. In contrast, the Canadian *Competition Act* places a higher burden on defendants claiming the equivalent defence in a criminal proceeding, to establish all the elements that comprise the defence on the balance of probabilities.⁷

The Panel also recommends the removal of other filters in the defence which were designed to guard against abuse, lifting the requirement on a person to give written notice of an intention to rely on the defence soon after they are committed for trial and to provide documents and the names and addresses of witnesses to back up their claim.

In practice, every cartel member could well gain the benefit of the proposed joint venture defence as the Commonwealth Director of Public Prosecutions may have to positively disprove the existence of a joint venture beyond reasonable doubt in any criminal cartel prosecution if proposed section 45I is brought into law.

Proposed section 45I is particularly prone to abuse as it allows competitors to fix the price for the goods that they would otherwise sell in competition with each other, as a straight joint venture to 'market' their products. This could be claimed even if the parties to the arrangement or understanding cannot enforce their obligations to each other in a court of law.

In the ACCC's view the proposed joint venture defence to cartel conduct goes too far.

The ACCC suggests this could be rebalanced by providing a defence for legitimate joint ventures; that is where the obligations between parties to jointly produce or supply goods or services are legally enforceable. Activity which is ancillary to the lawful agreement, such as the business parties agreeing on a price to acquire items that are needed to produce or supply a new product, or marketing the fruits of the joint venture, can be exempted from the cartel prohibition.

The ACCC's experience is that parties to a legitimate joint venture will quickly point to matters that establish they are not in a cartel. Under the ACCC's proposal, legitimate joint venture parties would point to the contract that governs their relationship whereas the cartel member would have difficulty in constructing a cartel joint venture defence after the fact.

Exemptions for vertical supply or acquisition arrangements (proposed s45J)

Proposed section 45J would ensure a restriction on competition imposed by a supplier on the acquirer, or by the acquirer on the supplier, is considered outside of the cartel provisions.

The exemption seems intended to exclude all arrangements imposed in a supply relationship from the cartel provisions, without recognising that businesses that are in a supply or acquisition relationship may also be in competition with each other. For example a threat to drive a competitor out of the market, unless they agree to cease production and instead become only a customer, would probably be exempted under proposed section 45J.

Further, in what appears to be a drafting oversight, proposed section 45J does not confine the scope of the exemption to agreements containing a cartel provision *between* the supplier and acquirer. This opens up the possibility of cartel arrangements between competitors which impose a restriction on competition on a customer of one of the cartel members as potentially evading liability under the cartel prohibitions. This does not appear to be intended.

⁷ *Competition Act* (R.S.C., 1985, c. C-34) (Canada), subsection 45(4).

It is also very concerning that proposed section 45J could potentially introduce a market test into criminal prosecutions of cartel conduct.

- A number of the subsections in section 45J also include the words ‘goods or services that are substitutable for or otherwise competitive with the goods or services’.
- While the Panel agreed it would be inappropriate to require a jury to adjudicate upon market issues, this aspect of the draft legislation would potentially require a jury to consider such issues (and be convinced beyond reasonable doubt whether particular goods or service are, or are not substitutable with other goods or services) if that aspect of the exemption is claimed by a defendant.

The ACCC strongly cautions against the introduction of a market test into the cartel prohibitions for the reasons set out in the ACCC’s 26 November 2014 submission to the Competition Policy Review.

An acquisition and supply exemption is necessary to ensure that ordinary commercial relationships between a supplier and an acquirer are taken outside the cartel prohibitions. New Zealand’s Bill to criminalise cartel conduct takes a different approach to that recommended by the Panel, proposing to broadly exempt vertical supply contracts from the cartel provisions, where the dominant purpose is not to lessen competition (to any extent) between the parties to the contract.⁸ The UK *Enterprise Act* rules out price fixing as cartel conduct if it involves agreement on price for the article supplied between the parties.

It is critical to confine the scope of the exemption to the agreement *between* the parties in a supply or acquisition relationship, rather than allow a carteliser to impose a cartel provision upon their customer.

Final Recommendation 28 — Exclusionary provisions

The CCA should be amended to remove the prohibition of exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i), with an amendment to the definition of cartel conduct to address any resulting gap in the law.

ACCC view on Recommendation 28

The ACCC supports Recommendation 28 although notes that Panel’s proposal to narrow the meaning of ‘likely’ within the cartel prohibitions would result in the full scope of the prohibition on exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i) not being carried across.

As noted previously, the Panel has recommended the ‘likely’ threshold should be ‘assessed on the balance of probabilities (that is more likely than not)’. This would reduce the scope of the provisions imported into the cartel prohibition given the interpretation of the Full Federal Court that a lower threshold than balance of probabilities would apply in determining whether businesses are likely to be competitors in relation to section 4D / [subparagraphs 45(2)(a)(i) and 45(2)(b)(i)] (*News Limited v Australian Rugby League Football Ltd* (1996) FCR 410 at 564-565).

⁸ Commerce (Cartels and Other Matters) Amendment Bill (NZ), section 32

1.1.2 Exclusive dealing coverage

Final Recommendation 33 — Exclusive dealing coverage

Section 47 of the CCA should be repealed and vertical restrictions (including third-line forcing) and associated refusals to supply addressed by sections 45 and 46 (as amended in accordance with recommendation 30).

ACCC view on Recommendation 33

The ACCC does not support the repeal of section 47 as section 45 and amended section 46 will not address all the gaps created in its absence.

The ACCC supports a simplification of section 47 although notes the simplified section 47 put forward by the Panel may inadvertently expand the ambit of this section.

The Panel's recommendation to repeal section 47 is predicated on the view that there will be no gaps created in the law, with sections 45 and an amended 46 providing equivalent protection. However, the ACCC considers there will be gaps in the law in addressing anti-competitive unilateral conduct, including the ability to consider whether similar conduct by a firm will cumulatively have the effect or likely effect of substantially lessening competition (SLC).

In prohibiting anti-competitive vertical restraints, section 47 addresses *offers* or *refusals* to supply or acquire, whereas section 45 addresses *agreements* entered into. As such, section 45 is unlikely to address a great deal of conduct currently falling within section 47 where no agreement is reached. Additionally, anti-competitive unilateral refusals to supply / acquire are also unlikely to fall within section 45.

Contrary to the Panel's view, there may be circumstances where unilateral conduct undertaken by a firm without a *substantial* degree of market power would have the purpose, or the effect or likely effect, of SLC. In *Universal Music v ACCC*, the Court found the respondents had the purpose of SLC in breach of section 47, but the respondents were not held to have a substantial degree of market power under section 46.⁹ This case also illustrates that even where the purpose or effect of SLC is found to exist, it can be extremely difficult to establish that a firm has a substantial degree of market power in a highly differentiated product market.

Further, section 47 provides a mechanism to prevent conduct that amounts to an attempt to monopolise through exclusive dealing. That is, section 47 prevents offers to supply or acquire that could foreclose competitors and have the likely effect of SLC by a firm which would only attain a substantial degree of market power from the implementation of the conduct. In contrast, section 46 does not address such an attempt to monopolise unless the firm already has a substantial degree of market power.

Additional gaps arise in relation to the ability of sections 45 and 46 to address exclusive dealings which cumulatively have the effect of SLC.

- Subsection 47(10) provides an explicit provision for the aggregation of 'other conduct of a same or similar kind' that can be taken into account when assessing whether the corporation's conduct has the effect of SLC. This subsection allows the Court in its assessment of the effect of the specific conduct in question to look at both the conduct in question and 'other conduct' which may be similar in kind or the same

⁹ *Universal Music Australia Pty Ltd & Others v ACCC* [2003] FCAFC 193.

(e.g. several different offers to supply by the one party), to see whether “together” all of this conduct has the effect of SLC.

- This is different to the current and proposed section 46. Proposed section 46 will address whether conduct (including a course of conduct) has the effect of substantially lessening competition, with no provision for “other conduct” of a similar kind to be aggregated into the assessment of the effect of the conduct in question.
- Although subsection 45(4) does provide for an aggregating provision for agreements or proposed agreements that cumulatively have the effect or likely effect of SLC, it is unlikely to address unilateral refusals to supply or acquire – as no agreement is reached or proposed.

Given these gaps, the ACCC does not support the repeal of section 47.

The ACCC supports the steps towards simplifying section 47. However, the Panel’s simplified version of section 47 substantially broadens the scope of the existing provision. It does so by making almost any form of condition within an offer to supply or acquire, such as the price of supply, reviewable under section 47.¹⁰

By contrast, the current formulation of section 47 specifically identifies specific types of conditions that attract the prohibition (e.g. conditions relating to acquisition from a competitor, re-supply to a competitor etc.). The simplified version is likely to create uncertainty as to the scope of conduct captured by section 47, and would be particularly problematic if current anti-overlap provisions are ultimately retained. This appears to have been inadvertent and something that can be addressed as a drafting issue.

1.1.3 National Access Regime

Final Recommendation 42 — National access regime

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

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

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

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

ACCC view on Recommendation 42

The ACCC does not support the Review Panel’s formulation of declaration criteria (a) and

¹⁰ See paragraph 47(2)(a) of the model legislation which defines ‘supplier condition’ to include a condition ‘relating to the supply of those or other goods or services by the supplier to the acquirer.’ Similarly broad wording is used when defining the ‘acquisition condition’ in paragraph 47(4)(a) of the model legislation.

(b) in Part IIIA.

The ACCC supports the Productivity Commission's view that:

- criterion (b) should be amended to reflect a 'natural monopoly' test rather than a 'privately profitable' test; and
- criterion (a) should not be amended to replace 'material' with 'substantial' or to require that the dependent market be 'nationally significant'.

The Review Panel's recommendations on declaration criteria (a) and (b) are a significant departure from the Productivity Commission's (PC) recommendations in its 2013 report on the national access regime.¹¹ During the course of its 12 month review, the PC considered over 76 submissions, and conducted roundtables and public hearings. In particular, the PC concluded that:

- a 'natural monopoly' test in criterion (b) would better target the economic problem, namely enduring lack of effective competition in markets for infrastructure services;
- inserting a requirement that criterion (a) may only be satisfied where the market in which competition will be materially promoted is of national significance would complicate assessment of declaration applications because there is no objective threshold as to what defines a nationally significant market. Moreover, even significant competition benefits in a small market could still produce overall gains for the community; and
- rather than increasing the threshold in criterion (a) from 'material' to 'substantial', the most effective way to target the economic problem that Part IIIA is intended to address is to reframe criterion (a) to focus on whether declaration (not access) would promote competition.

As set out in detail in the ACCC's submission on the Draft Report (pp 81-86), the ACCC considers that there is no reason for the government to depart from the PC's recommendations on these issues.

1.2 Further ACCC comments

While broadly supportive of the Review Panel's direction, the ACCC has some additional comments on the following four recommendations:

- Liner shipping (Final Recommendation 4)
- Price signalling (Final recommendation 29)
- Misuse of market power (Final Recommendation 30)
- Resale price maintenance (Final Recommendation 34)
- Mergers (Final Recommendation 35)
- Private actions (Final Recommendation 41)
- Trading restrictions in industrial agreements (Final Recommendation 37)

¹¹ Productivity Commission, *National Access Regime* (Inquiry Report No. 66, 25 October 2013).

1.2.1 Liner shipping

Recommendation 4 — Liner shipping

Part X of the CCA should be repealed.

A block exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features (see Recommendation 39). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers, their representative bodies and the liner shipping industry.

Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation, as needed, by the ACCC.

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

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

ACCC view on Recommendation 4

The ACCC supports the recommendation to repeal Part X of the CCA.

The ACCC notes the view of the Panel that a block exemption granted by the ACCC should be available for liner shipping arrangements that meet minimum pro-competitive features.

Should the ACCC be provided with the ability to issue block exemptions as recommended by the Panel the ACCC would consult with interested parties including shippers, their representative bodies and the liner shipping industry to establish the minimum pro-competitive features that would apply to the specific block exemption.

As noted by the Panel, a block exemption issued by the ACCC, in consultation with industry, would be an effective way to deal with shipping conference agreements that contain certain minimum standards and pro-competitive features in the event that Part X of the CCA is repealed and the liner shipping industry is subject to the operation of the CCA.

The existing authorisation and notification framework in the CCA would also be available for agreements or conduct that did not meet the features specified in the block exemption but nonetheless was likely to result in a net public benefit.

The ACCC agrees that a transitional period is important to enable the specific block exemption to be established, following consultation with industry; for the industry to identify the agreements that meet the features of the block exemption; and if necessary to seek any additional authorisation from the ACCC.

1.2.2 Price signalling

Final Recommendation 29 — Price signalling

The “price signalling” provisions of Part IV, Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

Section 45 should be extended to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

ACCC view on Recommendation 29

The ACCC supports:

- the recommendation that section 45 be extended to include the concept of “concerted practices”
- the Panel’s view that a statutory definition of “concerted practice” should not be included in the CCA.

If the recommendation is implemented by the Government, the ACCC will engage with stakeholders and issue guidelines on its approach to enforcement of the concerted practices provision.

The ACCC welcomes the Panel’s recommendation of an economy wide prohibition against concerted practices. If implemented, the prohibition would only be enlivened when a concerted practice has the purpose, effect or likely effect of SLC, which is a relatively high hurdle. However, it should lead to a more competitive marketplace by raising the standard of business dealings.

The Panel’s proposed approach, to avoid a statutory definition of concerted practice, has much merit. Attempting to prescriptively define the concept of a concerted practice is fraught with difficulties, as is shown from Australia’s experience in introducing the “price signalling” provisions into Part IV of the CCA.

If the Panel’s recommendation is accepted, Australia would, like the European Union rely on case law, rather than the wording of the statute / EC Treaty to define the scope of the prohibition on concerted practices.

Prior to the introduction of the price signalling provisions the ACCC engaged with the banking industry to develop guidance on how the ACCC would approach enforcement of those provisions. As with other jurisdictions which have adopted a concerted practices prohibition, the ACCC would similarly look to issue guidance materials, with the benefit of stakeholder views, to minimise uncertainty for business on the ACCC’s approach to enforcement of the new provisions. Guidance on the scope of the prohibition will also be able to be drawn from European case law.

1.2.3 Misuse of market power

Final Recommendation 30 — Misuse of market power

The primary prohibition in section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening

competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined. Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

This recommendation is reflected in the model legislative provisions in Appendix A.

ACCC view on Final Recommendation 30

The ACCC strongly endorses the proposed, simplified reformulation of section 46 to prohibit unilateral conduct of a firm with substantial market power where that conduct has the purpose, effect or likely effect of substantially lessening competition in any market (SLC test). The ACCC also supports the proposal to introduce authorisation for conduct that may breach this provision.

The ACCC considers the legislative guidance proposed by the Final Report is unnecessary. It militates against the simplification objective highlighted by the Harper Panel, and risks leading the courts into trying to distinguish the meaning of SLC in section 46 from its already well-established meaning in sections 45 and 47.

As suggested by the Final Report, the ACCC proposes to publish guidelines on its approach to the enforcement of section 46.

In addition, the ACCC supports simplification of section 46 through the repeal of unnecessary parts of the provision.

The ACCC considers that the proposed reformulation of the substantive provision to an SLC test (s46(1)), along with the other proposed simplifications, and the availability of authorisation in relation to section 46, amounts to a highly desirable set of changes to the misuse of market power provisions.

As the ACCC outlined in its submissions to the Review, the SLC test is the most appropriate mechanism to distinguish anti-competitive unilateral conduct by dominant firms from that which is pro-competitive.¹²

Simplification is achieved in model provision 46(1)

The Final Report clearly states that Australia's competition laws would benefit from simplification while retaining their underlying policy intent.¹³ In the ACCC's view, section 46(1) of the model provision is precise and simplified drafting, consistent with the aims of the Final Report, as well as existing provisions such as sections 45 and 47.

Whilst there have been some concerns publicly aired regarding a lack of certainty such a change would entail, the ACCC notes that businesses have dealt with the SLC standard in

¹² As it addresses the two key deficiencies with the current provision namely, its failure to capture unilateral conduct which has a deleterious purpose or *effect* on the competitive process (as opposed to individual competitors); and second, the way in which the '*take advantage*' limb of the test is currently being applied.

¹³ Final Report, pp307-308.

sections 45 and 47 for a significant period of time without hindering vigorous competitive behaviour.

The meaning of SLC is established without the need for legislative guidance

The Final Report also proposes the introduction of legislative guidance in section 46(2) of the model provision. While the ACCC considers this guidance identifies considerations relevant to the assessment of whether particular conduct by a firm with substantial market power breaches the SLC test, in the ACCC's view it is both unnecessary and potentially damaging to codify this in the legislation.

The first reason for this is simply that, as described above, the ACCC considers the SLC test defines the scope of the prohibition appropriately and simply.

Indeed, inserting the proposed guidance into the legislation is an example of what the Harper Panel itself cautioned against:

Some of the complexity in the law has arisen from amendments and additions made in response to calls for more 'effective' regulation (for example, following judicial interpretation of the words of section 46 of the CCA) or where there has been a perceived shortfall or over-reach resulting from a court judgment. The certainty provided by specific drafting must be balanced against the complexity that arises from attempts to address all possible contingencies.¹⁴

Legislative guidance creates scope for inconsistency

Secondly, although proffered as "guidance", the model provision of section 46(2) as drafted presents the text as a mandatory consideration by using the words 'the court must have regard to'.

By contrast, other provisions utilising the SLC test to address anti-competitive conduct, such as sections 45 and 47, do not have legislative guidance to assist with their interpretation.

It follows that - precisely because there would be words in section 46(2) that are not present in sections 45 or 47 - courts would likely seek to put the words of the guidance to work. This in turn directly creates the risk of an SLC test developing for section 46 which is inconsistent with other provisions. This would substantively undermine the intention of bringing the re-formulated section into line with the rest of Part IV.

Legislative guidance creates an onerous hurdle

In addition to running counter to the simplicity and uniformity of the model provision of section 46(1), the introduction of the proposed legislative guidance would pose a significant practical difficulty. This is because in establishing that a substantial lessening of competition has occurred, the applicant may also be required to discharge an additional evidentiary burden by positively disproving the nature and relevance of any pro-competitive aspects of the conduct in question, which is not necessary under the current interpretation of the SLC test.

The role of ACCC guidelines

The ACCC considers that ACCC enforcement guidelines would better address any remaining issues of uncertainty associated with the provision as well as providing further transparency.

As outlined in the ACCC's submission to the Draft Report, any concerns about uncertainty will be mitigated by the ACCC publishing guidelines, as it was when the merger test in section 50 was amended to an SLC test in 1993.

¹⁴ Final Report, p308.

The ACCC currently publishes educative materials which are tailored for big and small business regarding many of the provisions of the CCA and the types of conduct that are likely to be unlawful.¹⁵ In this regard, it is intended that the introduction of ACCC guidelines will outline the ACCC's approach to enforcement of section 46 and will draw on existing jurisprudence provided on the SLC test in sections 45 and 47.

The ACCC will also be guided by useful approaches used internationally, such as the EU's guidance on its enforcement priorities in applying the prohibition on exclusionary conduct by dominant undertakings which sets out economic concepts relevant to the prohibition and the Commission's enforcement approach to the application of such concepts.

Similarly, the ACCC's guidelines will be in sufficient detail to avoid a significant volume of initial authorisation applications being made under the provision and perhaps, even more importantly, it will bring our SLC approach even further into line with the practices of our international counterparts.¹⁶

1.2.4 Resale price maintenance

Recommendation 34 – Resale price maintenance

The prohibition on resale price maintenance (RPM) in section 48 of the CCA should be retained in its current form as a per se prohibition. However, notification should be available for RPM conduct.

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

ACCC view on Recommendation 34

The ACCC supports retaining RPM in its current form as a per se prohibition. It also supports an amendment to cater for related bodies corporate.

The ACCC does not object to making the notification process available for RPM however, based on the ACCC's significant experience with the notification process, the ACCC strongly recommends that:

- the ACCC be able to impose conditions when allowing an RPM notification to stand.
- there is a 60 day period before an RPM notification would come into force.

The assessment of whether or not RPM is in the public interest will be heavily dependent on the facts and circumstances of each case. While some RPM can be efficiency enhancing such conduct can also cause significant harm to the competitive process.

¹⁵ The ACCC also previously had section 46 guidelines following the decision in *Queensland Wire Industries v Broken Hill Pty Ltd* (1989) 167 CLR 177.

¹⁶ The utility of guidelines has also been recognised by the ICN as an important part of interpretation and enforcement of dominance laws internationally: International Competition Network (Unilateral Conduct Working Group), 'Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws', p14 (Presented at the 11th Annual ICN conference Rio de Janeiro, Brazil, April 2012), p.15. For further examples of approaches to guidelines, see for example, NZ, EU, Singapore, Hong Kong and Canada.

Therefore the ACCC's assessment of RPM notifications is likely to be more complex than that involved with the majority of third line forcing notifications and some modifications to the existing notification regime will enable the ACCC to more effectively consider the competition issues in particular circumstances.

Currently, the ACCC can only allow, or object to, a notification. If concerns are identified that could otherwise be addressed by amendments to the proposed conduct, the ACCC is not able to allow the notification subject to conditions, and so currently must object to the notification in these circumstances. Providing the ACCC with an ability to impose conditions on RPM notifications would be consistent with the legislative reforms proposed for collective boycott notifications.

The model legislative provisions do not include a time period and exclusive dealing notifications (not involving third line forcing) currently come into force on the day the notification is lodged. To provide the ACCC with adequate time to assess the notified RPM conduct there should be a period of 60 days before the protection provided by the notification would come into force. This will provide the ACCC with an opportunity to obtain and take into account relevant information and submissions from interested parties. The experience of the ACCC to date in assessing the net public benefits from RPM conduct demonstrated the complexity of the issues that can arise and which are difficult to fully consider in a shorter time period. A 60 day period is consistent with the timeframe proposed as part of the legislative reforms for collective boycott notifications.

1.2.5 Mergers

Final Recommendation 35 — Mergers

Informal merger review process – further consultation

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

Procedural changes to the merger approval process

The formal merger exemption processes (i.e., the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use.

The specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC.

However, the general framework should contain the following elements:

- The ACCC should be the decision-maker at first instance.
- The ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.
- The formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.

- Decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines. The Panel notes that this change could be implemented without increasing the current maximum statutory time period of six months for the determination of a merger authorisation, by allowing the ACCC and the Tribunal each a maximum of three months to make their respective determinations. The review by the Australian Competition Tribunal should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason.

ACCC view on Recommendation 35

The ACCC supports the finding that the informal merger review process be retained.

The ACCC supports the recommendation to combine the formal merger clearance process with the merger authorisation process (together, the formal merger exemption process), that the ACCC be the first instance decision-maker, that decisions of the ACCC should be subject to merits review by the Tribunal, that the ACCC be empowered to require the production of business and market information, and that the formal merger exemption process timelines be able to be extended with the consent of the merger parties.

While the ACCC supports reducing the level of prescription associated with information requirements under the existing formal merger process, it does not support the recommendation that the formal merger exemption process not be subject to any prescriptive information requirements. In this regard, the ACCC agrees with the Panel's endorsement of the New Zealand Commerce Commission's clearance application form for merger approval which requires applicants to provide a minimum set of basic factual information.

The ACCC agrees that review by the Tribunal should be based upon the material that was before the ACCC. The ACCC considers that exceptions to introduce new evidence should be strictly limited, clearly defined and occur only in exceptional circumstances (i.e. genuinely new information not available to the ACCC or the merging parties during the ACCC's review).

Minimum set of key factual information requirements

The ACCC considers that there is a balance to be achieved between reducing prescriptive requirements imposed on applicants seeking formal merger clearance and ensuring that the ACCC has sufficient information to commence a review at the time of receiving an application for formal merger clearance.

The provision of a minimum set of key factual information is a necessary requirement aimed at aiding the efficiency and timeliness of the new formal clearance process by enabling the ACCC to gain an understanding of the relevant aspects of the industry and an appreciation of the key issues to be tested shortly after commencement of the process.

The ACCC acknowledges that in a formal clearance regime where the onus of proof rests with the applicant to establish there is no substantial lessening of competition or that the merger would result in net public benefits, merger parties will have an incentive to provide relevant information. However, in the absence of any prescription, information provided at the absolute discretion of merger parties will generally be focussed on information supportive of the merger parties' position in seeking clearance and does not ensure the provision of all information required to commence the ACCC's review.

The provision of key factual information up-front promotes an informed assessment of the relevant issues within strict time limits and is consistent with international best practice. The ACCC considers that a similar approach to information requirements should be taken as currently occurs in New Zealand.

While the Panel maintains the view that it should not be necessary to burden merger approval processes with prescriptive information requirements, it also agrees that the clearance application form published by the New Zealand Commerce Commission is a useful illustration of the Panel's proposed approach. The ACCC agrees with the Panel's endorsement of the New Zealand Commerce Commission's clearance application form for merger approval which requires applicants to provide a minimum set of basic factual information.

In addition to requiring that an applicant provides a base level of information, the New Zealand Commerce Commission's form titled 'Notice seeking clearance' sets out general guidance for applicants seeking clearance for mergers and acquisitions.¹⁷ Such guidance as to the necessary information to be provided with an application for formal merger clearance is likely to be valued by applicants. Further, the New Zealand formal merger clearance application form requires that applicants submit supporting documents regarding the proposed merger and requires a declaration from an officer or director of the notifying party that all information relevant to the notice has been provided and is accurate.

The ACCC supports reform to remove unnecessary restrictions and requirements that might have impeded use of the existing formal merger clearance process and merger authorisation process. While the prescriptive nature of the existing formal merger clearance application requirements in Australia (Form O) should be dispensed with, the ACCC strongly supports the view that a minimum set of key factual information be provided by applicants before commencing a formal merger review.

Exceptions to introduce new evidence on review by the Tribunal

The Panel recommends that the Tribunal's review of a merger clearance or authorisation decision be based upon the material that was before the ACCC, but that the Tribunal should have the discretion to allow further evidence if satisfied there is sufficient reason.

The ACCC agrees that review by the Tribunal should be based upon the material that was before the ACCC. In order that applicants have the appropriate incentive to provide all relevant information to the ACCC for its consideration of the merger, exceptions to introducing new evidence should be strictly limited, clearly defined and allowed only in exceptional circumstances (i.e. genuinely new information not available to the ACCC or the merging parties during the ACCC's review).

It is appropriate that applicants have the necessary incentive to place all relevant information before the ACCC during its review of the merger in the first instance so it can be tested during market consultation, rather than subsequently introduce new evidence before the Tribunal on review. The integrity of the ACCC's formal merger review and the timeliness of the Tribunal's review is likely to be impacted if merger parties can introduce new evidence. Only genuinely new information or information provided in order to clarify existing information should be allowed.

The ACCC should also have the opportunity on review by the Tribunal to make submissions as to the appropriateness of the additional material proposed to be filed.

¹⁷ <http://www.comcom.govt.nz/dmsdocument/11963>

Onus of proof

The ACCC agrees with the Panel's view that the onus of proof must rest with the applicant to satisfy the ACCC (and the Tribunal on review) that the merger would not substantially lessen competition or would give rise to net public benefits. This is appropriate in a formal clearance regime which is subject to strict timelines and the merger parties are not subject to strict information requirements.

If the onus was on the ACCC to make a positive finding that the merger would substantially lessen competition or would not result in public benefits that outweigh the anti-competitive detriments, there would be no incentive for the merger parties to cooperate and provide relevant information to facilitate the assessment.

It follows that under the new formal merger process, to provide the necessary incentives for merger parties to cooperate and provide relevant information, it should be deemed that merger clearance or authorisation is declined if a decision is not made within the statutory timeframe (or any extended timeframe to which the merger parties have consented). This is consistent with the existing formal merger process in Australia, and also the New Zealand merger process where, if a decision is not made within the statutory timeframe, it is deemed to have been declined.

Production of business and market information

The ACCC supports the recommendation that the ACCC be empowered to require the production of business and market information and considers that the legislation should reflect the ability of the ACCC to rely upon mandatory information gathering powers under section 155 to obtain information, documents and evidence from the merger parties and other relevant parties in the course of considering an application for formal merger clearance or merger authorisation.

While the ACCC considers that mandatory information gathering powers are an important feature of the formal merger process, the scope for using such powers is limited by the strict time constraints of the process. The provision for such powers should not be regarded as an effective substitute for the ACCC receiving a minimum set of key factual information up-front.

1.2.6 Private actions

Final Recommendation 41 — Private actions

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

ACCC view on Recommendation 41

The ACCC supports the recommendation.

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

Section 83 and admissions of fact

This recommendation should facilitate greater access to justice, particularly for businesses who have been impacted by anti-competitive conduct.

If implemented, both the admissions of fact made by a person in proceedings brought by the ACCC, together with the findings of fact made by the Court, will be available for persons willing to take private action for the harm suffered from anti-competitive conduct. This has

some potential to simplify and expedite the process for private litigants as the essential issues that were relied upon by a Court in finding a contravention in the regulator's proceeding would be prima facie evidence of those matters in a subsequent private action.

Redress for victims

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

While the Review Panel did not comment on this proposal for extension of the power of the Court to order redress, the ACCC continues to consider it could, in appropriate cases, provide a cost effective way to provide redress to victims of breaches of the competition law.

1.2.7 Trading restrictions in industrial agreements

Final Recommendation 37 — Trading restrictions in industrial agreements

- Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.
- Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed. These recommendations are reflected in the model provisions in Appendix A.
- The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.
- The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

ACCC view on Recommendation 37

The recommended amendments to sections 45E and 45EA of the CCA represent a significant expansion of the current provisions.

The ACCC notes below some practical and other concerns about the Review Panel's proposed amendments and in light of those concerns does not consider that the Panel's recommendations will lead to efficient regulation of the kinds of agreements that are the subject of the Panel's concerns.

Amending sections 45E/EA so that they apply to awards and industrial agreements

By seeking to extend the application of sections 45E and 45EA to awards and industrial agreements, the Review Panel appears to contemplate extending these provisions to

contracts, arrangements or understandings between *employers and employees* (as these are typically the parties to enterprise agreements). The ACCC is concerned that this would be a significant broadening of the current statutory framework, which only captures contracts, arrangements or understandings between persons and *organisations of employees* i.e. unions.

Removing the ‘has been accustomed, or is under an obligation,’ to deal

The ACCC has considerable concerns about the Review Panel’s recommendation to remove the “has been accustomed, or is under an obligation” to deal requirements. On top of the broadened coverage of the provision (as noted above), removing these requirements would significantly lower the threshold for intervention. This threshold would be materially lower than other prohibitions in the CCA, and as such is arguably inappropriate.

The current “has been accustomed, or is under an obligation” to deal requirements mean that sections 45E and 45EA are only triggered if conduct interferes with an existing or contractual acquisition/supply situation. In a sense, this is a proxy for the interference being “significant” or “substantial.” This is consistent with the overall legislative scheme of the CCA that recognises it is only appropriate to intervene on competition grounds when there is a substantial or significant impact on trade. By way of illustration, the other boycott provisions have either a “substantial lessening of competition”, a “substantial loss or damage” or a “substantially hindering” trade or commerce threshold (ss45D, 45DA, s45DB).

Granting the ACCC a right to intervene in Fair Work Commission proceedings

In light of the above issues, the ACCC considers that significant further thought is needed on how the Review Panel’s proposed role for the ACCC in Fair Work Commission applications would work in practice, as such arrangements would potentially add significant complexity and uncertainty for all parties.

The proposed additional role for the ACCC would likely create a very high volume of work and require significant additional resources. The resources required to undertake merger pre-assessments provides a good illustration of the possible resource requirements were the ACCC asked to perform an additional role in matters before the FWC. The ACCC notes that in 2013-14, the ACCC considered close to 300 mergers under section 50 of the CCA, of which 242 were pre-assessed, involving approximately 8-9 full-time equivalent members of staff.

The ACCC notes that in the FWC’s 2013-14 annual report, there were approximately 6800 EA approval applications finalised in that financial year, and the FWC has completion KPI’s of 32 days.

2 Competition institutions and governance

2.1 Access and pricing regulator

Final Recommendation 50 — Access and Pricing Regulator

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national Access and Pricing Regulator:

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

Other consumer protection and competition functions should remain with the ACCC. Price monitoring and surveillance functions should also be retained by the ACCC.

The Access and Pricing Regulator should be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) should be appointed on a part-time basis.

Decisions of the Access and Pricing Regulator should be subject to review by the Australian Competition Tribunal.

The Access and Pricing Regulator should be established with a view to it gaining further functions if other sectors are transferred to national regimes.

ACCC view on Recommendation 50

Separating infrastructure regulation from competition and consumer enforcement runs contrary to the objective in the Final Report of reinvigorating Australia's competition policy.

For the reasons set out in detail in the ACCC's submissions on the Issues Paper (section 5.2.1) and Draft Report (section 3.2), the ACCC considers that the proposed competition policy reform agenda is best supported by retaining a single economy-wide body responsible for competition enforcement, consumer protection and economic regulation with the single objective of making markets work to enhance the welfare of Australians.

2.2 ACCC governance

Final Recommendation 51 — ACCC governance

Half of the ACCC Commissioners should be appointed on a part-time basis. This could occur as the terms of the current Commissioners expire, with every second vacancy filled with a part-time appointee. The Chair could be appointed on either a full-time or a part-time basis, and the positions of Deputy Chair should be abolished.

The Panel believes that current requirements in the CCA (paragraphs 7(3)(a) and 7(3)(b)) for experience and knowledge of small business and consumer protection, among other matters, to be considered by the Minister in making appointments to the Commission are sufficient to represent sectoral interests in ACCC decision-making.

Therefore, the Panel recommends that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

The ACCC should report regularly to a broad-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics.

Final Recommendation 52 — Media Code of Conduct

The ACCC should establish, publish and report against a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law. The Code of Conduct should be developed with reference to the principles outlined in the 2003 *Review of the Competition Provisions of the Trade Practices Act*.

ACCC view on Recommendations 51 & 52

The ACCC supports the recommendations in relation to the:

- appearance by the ACCC before a broadly-based Parliamentary Committee such as the House of Representatives Standing Committee on Economics; and
- development by the ACCC of a code of conduct in its dealings with the media.

The ACCC does not support appointing Commissioners on a part-time basis nor the removal of the requirement to have a Commissioner with small business expertise and a Commissioner with consumer protection expertise.

As set out in the ACCC's submission on the Draft Report (section 3.3), ACCC Commissioners are full-time due to the number of decisions that they are required to make. The work load involved and the fast moving nature of ACCC matters means that it would be impossible for decisions to be made collegiately by a body that includes part-time members. In practice, having half of the ACCC Commissioners appointed on a part-time basis would necessitate extensive delegation of the ACCC's decision-making functions. Another important difficulty with decisions being made by part-time Commissioners is that such members are more likely to have a conflict of interest.

The ACCC also sees value in having Commissioners with expertise in small business and consumer protection matters. As the Review Panel notes, these sections of the community are more likely to lack the resources to ensure their views are heard. The appointment of

small business and consumer Commissioners assists the ACCC to take into account the diversity of views.

2.3 Market studies and advocacy

Final Recommendation 44 — Australian Council for Competition Policy — Role

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

- advocacy, education and promotion of collaboration in competition policy;
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design issues, regulatory reforms, procurement policies and proposed privatisations;
- undertaking research into competition policy developments in Australia and overseas; and
- ex-post evaluation of some merger decisions.

Final Recommendation 45 — Market studies power

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

The ACCP should have mandatory information-gathering powers to assist in its market studies function; however, these powers should be used sparingly.

ACCC view on Recommendations 44 & 45

The ACCC supports the recommendation to create a body responsible for driving the reform agenda. The ACCC strongly disagrees with the view expressed in the Final Report that the ACCC should not perform an advocacy or market study function.

The competition policy reform agenda proposed by the Review Panel has the potential to deliver major benefits for Australians. As set out in the ACCC's submissions to the Issues Paper (section 5.1) and Draft Report (section 3.1), the ACCC agrees with the Review Panel that there is a need for:

- a body such as the ACCP to drive the reform agenda if governments consider such an institution would assist reform development and implementation; and
- the Productivity Commission to inform government policy through its inquiries into regulatory regimes and key policy issues impacting on Australia's economic performance and community wellbeing.

However, the Review Panel strongly emphasised the importance of having durable institutions advocating the benefits of competition. In this context, the ACCC sees little need to limit the number of agencies with such a mandate.

Regardless of what roles the ACCP ultimately takes on, the ACCC strongly disagrees with the view expressed in the Final Report that, as an enforcement agency, the ACCC should not advocate for reform, nor undertake market studies. As detailed in the ACCC's submission to the Draft Report (section 3.1.1), this view is completely inconsistent with international experience.

Advocacy is a core responsibility for most overseas competition agencies due to the expertise gained by the agency in enforcing the competition law on a daily basis. This is also reflected in the examples provided in the ACCC's submission to the Draft Report (section 3.1.1) of where governments have requested advice from the ACCC to inform a policy process.

Market studies are regarded as an essential part of the portfolio of tools for many overseas competition authorities as explained in the ACCC's submissions to the Issues Paper (section 5.2.1) and Draft Report (section 3.1.2). As the UK Competition and Markets Authority (CMA) puts it, market studies and investigations are regarded as sitting alongside competition rules by allowing the competition authority to focus on the functioning of the market as a whole rather than on the conduct of particular firms within it. The ACCC's supplementary submission to the Issues Paper (15 August 2014 – section 4) outlined how a market study function might operate in practice based on the price inquiry function that the ACCC already performs under Part VIIA of the CCA. The ACCC is not proposing the UK model where the CMA, if it identifies a competition problem in a market investigation, can impose legally enforceable remedies. Nor would the ACCC's findings bind policy-makers, or substitute for the core policy-making process. Rather, market studies would be one consideration for the ultimate decision-makers.

The performance by the ACCC of a market study function should therefore not be regarded as an unusual suggestion; rather it is needed to bring Australia in line with OECD recommendations, and to complement the work of the Productivity Commission and any ACCP.