The voice of Australia's leading retailers

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Submission in Response to the Competition Policy Review Final Report

Australian National Retailers Association

The voice of Australia's leading retailers

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About ANRA

The Australian National Retailers' Association (ANRA) represents Members that lead the retail industry delivering to customers across all types of retail goods and services. They are leading employers who contribute to local communities and regional development and strongly interrelate with other Australian industries.

The current members of ANRA are:

Best & Less

Bunnings

The Co-op

Coles Group
Supermarkets | Convenience | Liquor

Costco

David Jones

Dymocks

Forty Winks

Harvey Norman
Homewares | Electrical

Just Group
Fashion | Stationery

Luxottica
Optometry | Fashion | Budget Eyewear

Petbarn

Super Retail Group
Auto | Sports | Recreation

Woolworths
Supermarkets | Liquor | General Merchandise
Home Improvement

7-Eleven

Retail is Australia's largest private sector employer, accounting for around 1.25 million jobs. The members of ANRA employ more than 500,000 people or 41 per cent of the retail workforce and 4.4 per cent of the Australian workforce, with approximately 100,000 of these employees located in regional and rural Australia. The sector supports a further 500,000 jobs in associated industries including agriculture, manufacturing, transport & logistics and construction & property maintenance.

In terms of industry value added, the retail trade industry contributed around 4.44 per cent to the national economy in 2013 to 2014. Combined turnover reached more than $270 billion across the retail industry in 2013 to 2014, which is equivalent to 17.2 per cent of Australia's nominal Gross Domestic Product (GDP).

ANRA established in 2006 following a desire by the founding member companies to contribute, at an industry level, to the development and support of public policy that would boost productivity, support employment growth, foster a competitive environment and ultimately, make the sector stronger.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACCP	Australian Council for Competition Policy (proposed body)
ANRA	Australian National Retailers' Association
CCA	Competition and Consumer Act 2010
COAG	Council of Australian Governments
EU	European Union
GDP	Gross Domestic Product
PIR	Parallel Import Restrictions
RPM	Resale Price Maintenance
SLC	Substantial Lessening of Competition
the Commonwealth	Commonwealth of Australia
the Draft Report	Competition Policy Review Draft Report
the Final Report	Competition Policy Review Final Report
the Panel	Competition Policy Review Panel

Executive Summary

ANRA welcomed the release of the Competition Policy Review Final Report (the Final Report). The Panel has delivered a report with recommendations and a timetable for implementation that importantly address the unfinished business of previous reviews and identified new opportunities to extend the principles, practice and benefit of competition policy across the whole economy - including service delivery in areas such as education, health and infrastructure.

As an industry that contributed around 4.44 per cent of the national economy last year, is the private sector's largest employer and is working hard to keep prices growth below inflation, we welcome any moves by government to assist with the removal of unnecessary costs of doing business. Conversely, government decision making that adds costs to our business has a direct impact on our contribution to GDP, ability to generate new jobs and keeping prices growth below inflation.

ANRA's response to the Review's Draft Report outlined the commitment of ANRA's members to participating in a competitive environment that protects consumers and delivers economic growth for the national economy. Our key submission themes that were positively picked up within the Final Report included:

- Competition law is about protecting competition and not individual competitors;
- Australia has an effective competition policy regime;
- Competition policy should be economy-wide not sector specific;
- Competition could be enhanced by removing outdated regulations; and
- The performance of regulators needs to be measured and evaluated.

Table 1 summarises the recommendations from the Final Report supported by ANRA without qualification. These recommendations are consistent with ANRA's position on fundamental competition principles; the unfinished business of microeconomic reform; and removing unnecessary regulation.

ANRA members are growing impatient on the unfinished business of retail trading hours deregulation, removal of parallel import restrictions, planning and zoning reform and removal of restrictions on pharmacy ownership and location. The case for reform has long been made before the recommendations in the Final Report, going back 20 years to the Hilmer Review and numerous reviews since. ANRA members' welcome the final report's recommendations that Government should deliver these reforms within a few years. It is ANRA's hope that business and consumers will finally see an end to the politicisation of these barriers and an opening of competition that the evidence shows will benefit consumers.

ANRA supports the Panel's position that the ACCC should stick to enforcement and consumer protection. Any take up of adopting an advocacy and policy role crosses over into the political realm and domain of the Parliament.

ANRA is also encouraged by statements within the Final Report of the Panel's view that on the basis of the evidence presented no changes are necessary to the existing provisions for creeping acquisitions or unconscionable conduct, no foundation to introduce divestiture, or mandatory codes of conduct.

ANRA believes there are a number of Recommendations, as listed in Table 2, that have merit or merit in part. However, ANRA believes greater clarification and/or further consultation – in keeping with COAG's agreed Principles of Best Practice Regulation – needs to be conducted before ANRA would support any changes to guidelines, or reform of legislation.

ANRA supports the Panel's calls to progress and re-energise the policy reform agenda. ANRA believes the momentum for reform has slowed, impacting growth nationally and in the retail sector particularly. ANRA is supportive of ensuring structures are in place to deliver reform without creating duplication or unnecessary layers of government intervention.

ANRA questions the appropriateness of the ACCC conducting a guideline review with respect to 155 notices and instead favours an independent review on this important practical issue.

With so many stakeholders involved a diversity of opinion regarding the 'fit for purpose' of recommendations is not to be unexpected. ANRA has particular concern in regards to recommendations 30, 34, 45 and 46 as listed in Table 3. ANRA believes these recommendations are not in the best interests of fostering a healthy competitive environment and the cases for reform in these areas have not been made.

An independent paper commissioned by ANRA from Pegasus Economics and previously provided to Panel members and the Review Secretariat outlines convincingly in ANRA's view that there is no case for change with respect to section 46.

We agree with the Panel's approach when guiding their consideration of whether Australia's competition laws are fit for purpose. We believe, however, with respect to the recommendation 30 that consumer wellbeing will not be enhanced over the long term; that Section 46 as it is currently interpreted by the courts demonstrates that it already protects competition rather than protecting individual competitors despite how it is couched in the Act; that Section 46 strikes the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship as evidenced by the successful cases brought by the ACCC; and recommendation 30 if implemented will remove this balance, casting a wide net over business and capturing pro-competitive behaviour, bringing on regulatory failure; and make the law less clear, less simple and less predictable for business – manifesting in years of costly and lengthy legal battles.

With respect to the introduction of the substantial lessening of competition test as proposed in Recommendation 30, ANRA cautions against the approach that reform is simply to bring it into line with other prohibitions, this ignores the fact that section 46 deals with unilateral acts, where as other prohibited behaviour is multilateral.

Proposals to include an effects test to section 46 are not new and have been considered and rejected on several occasions (Hilmer 1993, Dawson 2003) because of the well accepted 'chilling effect' this would have on competition and the downstream negative impact on the consumer.

This Review presents to Government, the opportunity to remove a number of unnecessarily restrictive aspects of the CCA and Regulations external to the Act to ensure that the balance between consumer protections and business operations is achieved.

Any simplification of the current Act should not be at the cost of clarity and predictability of the law; and should not be used to justify changes to the law that would indirectly damage consumer welfare in practice – for example, the changes proposed in Recommendation 30.

Table 1: Summary of Recommendations ANRA Supports

No.	Recommendation Outline	ANRA position	Reference
1	The Australian Government, state and territory and local governments should commit to the following principles: • Competition policies, laws and institutions should promote the long-term interests of consumers ⋮ • Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.	**Support**	Addressed in ANRA submission in response to Draft Report
8	All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed.	**Support**	Addressed in ANRA submission in response to Draft Report
9	Further to Recommendation 8, state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test, such that the rules should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the rules can only be achieved by restricting competition.	**Support**	Addressed in ANRA submission in response to Draft Report
12	Remaining restrictions on retail trading hours should be removed.	**Support**	p. 12
13	Restrictions on parallel imports should be removed unless it can be shown that: • the benefits of the restrictions to the community as a whole outweigh the costs ; and • the objectives of the restrictions can only be achieved by restricting competition.	**Support**	p. 13
14	The Panel considers that current restrictions on ownership and location of pharmacies are not needed to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy products and services, and the ability of providers to meet consumers' preferences.	**Support**	Addressed in ANRA submission in response to Draft Report
18	All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes.	**Support**	p. 14
22	The central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are	**Support**	Addressed in ANRA submission

No.	Recommendation Outline	ANRA position	Reference
	appropriate to serve the current and projected needs of the Australian economy.		in response to Draft Report
26	Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.	**Support**	Addressed in ANRA submission in response to Draft Report
32	Third-line forcing (subsections 47(6) and (7) of the CCA) should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.	**Support**	p. 14
35	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. 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.	**Support**	Addressed in ANRA submission in response to Draft Report
37	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.	**Support**	p. 15
38	The authorisation and notification provisions in Part VII of the CCA should be simplified to: • ensure that only a single authorisation application is required for a single business transaction or arrangement; and • empower the ACCC to grant an exemption from sections 45, 46 (as proposed to be amended), 47 (if retained) and 50 if it is satisfied that the conduct would not be likely to substantially lessen competition or that the conduct would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.	**Support**	Addressed in ANRA submission in response to Draft Report

No.	Recommendation Outline	ANRA position	Reference
39	A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA.	**Support**	Addressed in ANRA submission in response to Draft Report
48	The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction. If disproportionate effects across jurisdictions are estimated, competition policy payments should ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.	**Support**	Addressed in ANRA submission in response to Draft Report
49	Competition and consumer functions should be retained within the single agency of the ACCC.	**Support**	Addressed in ANRA submission in response to Draft Report
52	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.	**Support**	Addressed in ANRA submission in response to Draft Report
53	The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.	**Support**	p. 17
55	The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.	**Support**	p. 17
56	The Productivity Commission should be tasked with modelling the recommendations of this Review as a package to support discussions on policy proposals to pursue.	**Support**	p. 17

Table 2: Summary of Recommendations ANRA Supports in Principle or in Part

No.	Recommendation Outline	ANRA position	Reference
21	Governments should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice.	**Support in principle**	p. 18
23	The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions.	**Support in principle**	Addressed in ANRA submission in response to Draft Report
25	The current definition of 'market' in section 4E of the CCA should be retained but the current definition of 'competition' in section 4 should be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.	**Support in principle**	Addressed in ANRA submission in response to Draft Report
29	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.	**Support in part**	p. 19
40	The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings. The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice. The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the Australian Securities and Investments Commission Act 2001.	**Support in part**	p. 20
43	The National Competition Council should be dissolved and the Australian Council for Competition Policy (ACCP) established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.	**Support in principle**	Addressed in ANRA submission in response to Draft Report

44	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.	**Support in principle**	Addressed in ANRA submission in response to Draft Report
47	The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.	**Support in principle**	Addressed in ANRA submission in response to Draft Report

Table 3: Summary of Recommendations ANRA Opposes or Has Concerns About

No.	Recommendation Outline	ANRA position	Reference
30	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.	**Oppose**	p. 22
34	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, but notification should be available for RPM conduct.	**Oppose**	p. 28
45	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.	**ANRA has concerns**	p. 28
46	All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy (ACCP) to undertake a competition study of a particular market or competition issue. All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the ACCP.	**ANRA has concerns**	p. 29

1. Recommendations supported by ANRA

This section provides some brief comments on the Recommendations that are either new or amended from the Draft Report.

ANRA supports in full.

Recommendation 12

ANRA supports Recommendation 12.

> *'Remaining restrictions on retail trading hours should be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day, and should be applied broadly to avoid discriminating among different types of retailers.'*

The regulation of retail trading hours:

- is detrimental to consumer choice and convenience;
- is increasingly out of line with modern expectations;
- distorts competition in retail markets;
- restricts employment[1]; and
- prevents businesses from making independent operating decisions.

ANRA notes this recommendation is consistent with the recent findings of several state and federal inquiries into the retail sector and also follows recommendations in the Hilmer Review – representing long overdue reform.[2]

Retailers welcome the Panel's recognition that *'the need for reform is well established and long-standing*' and that this is an area for immediate reform. [3] Deregulation should therefore occur immediately and not over the proposed two year transitional period.

Retailers look forward to making the decision of when to trade for themselves and not having regulation dictate store opening hours. ANRA members would welcome the implementation of legislation that follows closely Victoria's *Shop Trading Reform Act 199*6 to deliver this important reform.

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[1] *See Ernst & Young (2014) Liberalisation of Retail Trading Hours, p.20*

[2] *See NSW Government (2012), Queensland Competition Authority, Office of Best Practice Regulation (2013), Economic regulation Authority (2014) and Productivity Commission (2011 and 2014).*

[3] Harper et al. (March 2015), *Competition Policy Review Final Report*, p.156

Draft Recommendation 13

ANRA supports Recommendation 13.

> *'Remaining restrictions on parallel imports should be removed unless it can be shown that:*
>
> - *the benefits of the restrictions to the community as a whole outweigh the costs; and*
> - *the objectives of the restrictions an only be achieved by restricting competition'*

The general impacts of parallel import restrictions (PIR) include:

- Artificial limits on wholesale sourcing channels;
- Creating an uneven playing field between domestic and international retailers not subject to PIR (that can therefore offer lower retail prices);
- Creating the settings for wholesale prices in Australia to be higher than they otherwise might; and
- A reduction in competition, which is not in the public interest.

ANRA notes the intent of this draft recommendation is consistent with the findings of several Productivity Commission inquiries – in the context of Books and the Retail sector generally – over the past five years.[4] The Panel also found that reviews of these regulations consistently found that removing parallel import restrictions will result in lower prices for consumers.[5]

ANRA disagrees with the Australian Publishers' Association (APA) view that PIR are *'not fundamentally anti-competitive'*.[6] The APA appears to confuse availability with competition. Under the 'speed to market' agreement between the APA and Australian Booksellers Association to reduce the 30/90-day rule to a 14/14 day agreement in practice, there still exists a mechanism that excludes parallel imports (an anti-competitive outcome) and while a title may be available, this is only through a single seller so the publisher maintains an effective monopoly over the domestic supply channel for that particular title (the same anti-competitive outcome).

It is also important to remember that the combination of prevailing indirect tax arrangements (specifically the $1000 low value import threshold) and advances in modern technology make it increasingly more favourable for Australian consumers to avoid the negative consequences of PIR by purchasing books online from international websites. This undermines the efficacy of the entire book supply chain in Australia to meet consumers' needs.

While ANRA supports the Panel's Recommendation, the proposed three year transition period for the implementation of reform is too long in light of the numerous inquiries where reform has been

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[4] *Restrictions on the Parallel Importation of Books (2009), The Economic Structure and Performance of the Australian Retail Sector (2011) and Relative Costs of Doing Business in Australia: Retail Trade (2014).*

[5] Harper et al. (March 2015), *Competition Policy Review Final Report, p. 171*

[6] *APA (2014), Submission on Competition Policy Review Draft Report,* p. 6

considered and recommended. The distortive and protectionist outcomes of PIR should not persist for a further three years; this delay would only act to compound the damage already done to Australian book retailers that cannot afford to wait.

Recommendation 18

ANRA supports Recommendation 18.

> *'All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes.'*

Promoting objective-focused tender processes and competition principles whenever markets are 'touched' by Government (commercially oriented) activities should act to:

- Promote innovation in designing projects to meet Government objectives;
- Provide greater choice to Government regarding potential service providers; and
- Increase competition between potential service providers to Government and also within that market itself.

ANRA is also supportive of the Recommendation's caveat that procurement and privatisation policies should not restrict competition unless there is a net benefit to the community and the objectives of such a policy can only be achieved by restricting competition.

ANRA supports the Panel's recommendation to initiate reviews of commercial policies over the next 12 months.

Recommendation 32

ANRA supports Recommendation 32.

> *'Third-line forcing (subsections 47(6) and (7) of the CCA) should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.'*

The current 'per se' prohibition on 'third line forcing' under section 47 of the CCA:

- Creates unnecessary notification expenses, for practices that are rarely anti-competitive ;
- Impedes competitive behaviour that often delivers benefits to consumers; and
- Is out of step with economic principles.

ANRA also notes that Recommendation 32 reflects both the Hilmer Review (1993) and Dawson Review (2003) positions on removing the 'per se' prohibition on third line forcing.

ANRA looks forward to the implementation of recommendation 32 over the next 12 months as proposed by the Panel.

Recommendation 37

ANRA supports Recommendation 37.

> *'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.'*

ANRA sees no reason for industrial instruments that are negotiated with employee associations as a party to negotiations, to be completely excluded from the CCA. The existing restrictive clauses within sections 45E and 45EA of the CCA:

- Provide scope for employee associations to require terms within an industrial agreement that artificially constrain a firms' ability to make decisions, notably with respect to:
    - Decisions on engaging alternative labour sources; and
    - Decisions on potential suppliers of auxilliary goods and services.

ANRA looks forward to the implementation of recommendation 37 over the next 12 months as proposed by the Panel.

Recommendation 52

ANRA supports Recommendation 52.

> *'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.'*

The ACCC has an established record of making public statements about its investigation intentions and on relevant matters before the courts.[7]

There is also evidence that sections of the media use the ACCC's actions to generate 'guilty verdicts' within the public psyche ahead of any formal action by the ACCC or court determinations. These are unfair outcomes (for the accused party) that would be tempered if the ACCC demonstrated more discipline it its use of public statements.

Making public statements to the media (or in any public forum for that matter) about the conduct of a corporation or individual in the absence of either an admission of guilt or court determination:

- significantly undermines the perception of ACCC impartiality;
- is grossly unfair and highly prejudicial;
- is a particularly disturbing form of 'official lynch justice'; and
- unnecessarily risks significant and costly consequences for falsely accused parties, including;
    - poorer customer perceptions of the brand; and
    - possible withdrawal of support from suppliers and/or investors.

ANRA notes the Dawson Review (2003) also recommended the ACCC develop a media Code of Conduct in consultation with interested parties to govern its use of the media, and in particular that it should decline to comment on investigations.

ANRA looks forward to the implementation of recommendation 52, this should occur at a very minimum over the next 12 months as proposed by the Panel.

[7] *For example, see Bezzi (2013), Competition Watchdog's investigation into major supermarkets, Court (2013), Enforcement priorities at the ACCC and Sims (2014), Food and grocery and Australia's competition law.*

Recommendation 53

ANRA supports Recommendation 53.

> *'The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.'*

Small businesses are important participants in the Australian economy and often act as suppliers to larger businesses. Building the awareness of, and connecting small business to remedies, including alternative dispute resolution:

- builds trust between small business and public authorities;
- promotes awareness of the law and other supportive mechanisms, such as an applicable industry code; and
- could significantly lower the legal costs for small businesses with a legitimate complaint.

ANRA supports the panel's proposed six (6) month window for implementation of this reform.

Recommendation 55

ANRA supports Recommendation 55.

> *'The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.'*

ANRA agrees with the Panel's view that implementation will be enhanced through co-operation between governments.

Recommendation 56

ANRA supports Recommendation 56.

> *'The Productivity Commission should be tasked with modelling the recommendations of this Review as a package (in consultation with jurisdictions) to support discussions on policy proposals to pursue.'*

ANRA agrees with the Panel's view that modelling the economic effects of the review's recommendations will assist governments' in determining the gains from and prioritising reforms.

ANRA supports the panel's proposed six (6) month window for requesting the Productivity Commission undertake this task.

2. Recommendations supported in principle or in part by ANRA

This section provides some brief comments on those Recommendations that ANRA supports in principle or in part.

Recommendation 21

ANRA supports Recommendation 21 in principle.

> *'Governments should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice.'*

Providing consumers with the means of making more informed purchase or service selection decisions will act to:

- Increase consumer understanding and confidence with respect to the consumption decisions they make;
- Allow consumers to better ration their limited resources and raise their own standard of living;
- lower the cost of Government commissioned service delivery as consumers' engage in better targeted engagement with service providers; and
- Promote competition and innovation between providers of Government commissioned services.

ANRA is supportive of this recommendation with the understanding that a low cost and efficient way of accessing consumer data is developed in conjunction with the businesses and Government service providers that collect the data.

Any attempts to impose unnecessarily complicated or rigid formats for data presentation on businesses will generate unnecessary implementation and maintenance costs and could ultimately act to the detriment of consumers if prices have to rise or services lowered in response to the higher cost base this initiative generates.

ANRA would welcome the opportunity to participate in consultations for delivering recommendation 21, but is mindful that six months may not be enough time in light of the lack of detail concerning the exact format and display of data to consumers.

Draft Recommendation 29

ANRA supports Recommendation 29 in part.

> *'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.'*

The current 'price signalling' provisions of Division 1A of the CCA:

- have (banking) sector-specific application, which contradicts the panel's support for economy-wide application of the law;[8] and
- prevent public price disclosure that:
  - informs consumer choice; and
  - promotes competitive response.

ANRA supports economy wide application of competition law and supports the repeal of the 'price signalling provision'.

However, ANRA does not support the recommendation as it relates to 'concerted practices'.

ANRA noted in its submission in response to the Draft Report that there were two definitions used to define a 'concerted practice' in the Draft Report – 'a regular practice'[9] and 'a regular and deliberate activity'[10]. In ANRA's view, there existed significant uncertainty for application, because the described approach in the Draft Report was quite broad and could capture information sharing that is for the purposes of benchmarking or determining best practice – both of which are legitimate business practices that could result in substantial consumer benefit.

ANRA believes that Recommendation 29 in its final form generates even greater uncertainty in application because all detail has now been effectively removed; and substituted with general guidance for the courts to apply a substantially lessening of competition test.

ANRA maintains that public stakeholder consultation, with regards to the definition of concerted practices and its implementation, including guidelines – should be undertaken before any change to the Act is made in this respect. ANRA sees no reason why the proposed 12 month window for consultation on the draft legislation for amendments and further 12 months to finalise amendments would not be enough time.

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[8] *Harper et al. (2014), Competition Policy Review Draft Report. p.38*

[9] *Harper et al. (2014), Competition Policy Review Draft Report. p.42*

[10] *Harper et al. (2014), Competition Policy Review Draft Report. p.229*

Recommendation 40

ANRA supports Recommendation 40 in part.

> *'The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings.*
>
> *The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice.*
>
> *The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the Australian Securities and Investments Commission Act 2001.'*

In members' experience the ACCC's current approach to issuing 155 notices:

- might only reflect simple suspicion, rather than having reasonable grounds for investigation;
- is unnecessarily broad and vague;
- is based on unrealistic timeframes (that require subsequent negotiation);
- is inappropriately used for investigating matters concerning a third party;
- can be extremely costly to comply with (which is an anti-competitive outcome in itself); and
- sometimes delivers no clear outcome (which reinforces the perception the notice was served as a fishing exercise).

ANRA therefore welcomes the Panel's guidance that 'the ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the matter being investigated'. Whilst supportive of a review, ANRA believes this should be conducted independently and not reflect the ACCC simply reviewing its own practices.

ANRA is supportive of the proposal to introduce a defence for notice recipients. This will act to:

- mitigate notice recipients' unease at being in the invidious position of balancing compliance with a notice against incurring significant costs for their employer; and
- place limits on the scope of any speculative inquiries conducted by the ACCC.

ANRA has concerns about this Recommendation's proposal to extend the scope of section 155 notices, given members' experience with ACCC section 155 notices to date. This could have practical consequences of significantly greater compliance costs for businesses targeted by the ACCC.

ANRA notes that part of this discussion is rendered somewhat redundant; after considering Part 9 of the *Competition and Consumer Amendment (Deregulation and other measures) Bill 2015*, currently before Parliament. ANRA understands the Bill seeks to permit the ACCC to seek a court order to direct a person to comply with a section 155 notice. This was considered by the Panel in

its deliberations, and despite the ACCC calling for such powers in its submission to the review, was not ultimately embodied in the panel's final recommendations.

ANRA believes 12 months should be enough time for the ACCC to amend its approach to framing and issuing section 155 notices; and notes that if enacted the relevant components of the *Competition and Consumer Amendment (Deregulation and other measures) Bill 2015* would bypass the Panel's proposed timeline for implementation.

3. Recommendations that ANRA opposes or has concerns about

This section provides comments on the Recommendations that ANRA opposes or has serious concerns about. ANRA believes the following recommendations are not in the best interests of fostering a healthy competitive environment and the cases for reform in these areas have not been made.

Recommendation 30

ANRA opposes Recommendation 30.

> *'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.*

Proposals to include an effect's test in relation to section 46 are not new and have been considered and rejected on several occasions.[11] A warning from the Dawson Review (2003) is particularly telling:[12]

[11] *Pegasus Economics (2014b), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.18*

[12] *Dawson et al. (2003), Review of the Competition Provisions of the Trade Practices Act. p.86*

> *'As with the introduction of an effects test, the reversal of the burden of proof would discourage corporations from engaging in competitive conduct for fear of being unable to discharge the reversed onus. It is likely that greater caution would be taken to avoid litigation under section 46, which would discourage rather than encourage competitive behaviour.'*

It is this 'chilling effect' of an effects test that would:

- dampen the competitive environment;
- have the effect of keeping unnecessary costs and inefficiencies in a business; and
- reduce competition; and deliver reduced benefits to consumers.

We agree with the Panel's approach when guiding their consideration of whether Australia's competition laws are fit for purpose[13]. We believe however with respect to Recommendation 30 that:

- consumer wellbeing will not be enhanced over the long term;
- Section 46 as it is currently interpreted by the courts demonstrates that it already protects competition rather than protecting competitors despite how it is couched in the Act;
- Section 46 strikes the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship as evidenced by the successful cases brought by the ACCC, and Recommendation 30 if implemented will remove this balance casting a wide net over business and capturing pro-competitive behaviour, bringing on regulatory failure; and
- This Recommendation if implemented makes the law less clear, less simple and less predictable for business and could culminate in years of costly and lengthy legal battles.

As with previous reviews, ANRA is not convinced the case for change has been made.

An independent paper commissioned by ANRA from Pegasus Economics[14]and previously provided to Panel members and the Review Secretariat outlines convincingly that there is no case.

We share a common view with the Panel, ACCC and others that competition law should be directed towards protecting the competitive process rather than individual competitors. It would appear that those supporting the changes believe the current section 46 protects individual competitors, and that is case enough for change. However, section 46 has not been interpreted by the courts in this manner. The High Court decisions in both Queensland Wire and Boral are good examples.

When considering 'fit for purpose' we can look to international experience; however ANRA is always careful of pointing to international experience and saying, 'because they do, we should too'.

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[13] Harper et al. (2015), *Competition Policy Review Final Report*, p.7

[14] *Pegasus Economics (2014), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power.*

What can be often overlooked is both the complex and subtle differences in market characteristics – including structure and participants and the evolution of law to respond to those jurisdictional specifics. For example the Pegasus Report highlights the difference between the current proposal and the international experience including highlighting the higher benchmark of dominance in the EU.

With respect to the introduction of the substantial lessening of competition test as proposed in Recommendation 30, ANRA cautions against the approach that reform is simply to bring it into line with other prohibitions, this ignores that section 46 deals with unilateral acts, where as other prohibited behaviour is multilateral.

Just as the case for change has not been made, nor has it been demonstrated the proposed changes would be better suited for capturing genuinely anti-competitive conduct than the existing provisions. Even if they did, this must be weighed up against the risk of regulatory failure; that is, of capturing pro-competitive conduct, deterring innovation and creating unnecessarily higher compliance costs for business – all of which are not in the long-term interest of consumers.[15]

The Test

The requirements to prove both an anticompetitive purpose and a use or 'taking advantage' of market power in the current test have been successfully used by the courts to help distinguish conduct that manifests competition from conduct that damages competition.

Recommendation 30 aims to make the same distinction as above but by instead using a 'substantial lessening of competition' (SLC) test. Despite SLC provisions in other sections of the CCA, ANRA believes it is not clear what a SLC means within the context of section 46 because of the distinction between multilateral[16] and unilateral conduct.

It is not true that with respect to Recommendation 30 business can be comforted by their compliance of SLC in other sections. The ACCC has frequently asserted there would be no SLC under the new section 46 where product innovation or sustained price reductions arising from efficiencies resulted in the exit of one or more competitors;[17] but if the ACCC takes guidance from the application of SLC in sections 45, 47 or 50 it is likely a large amount of pro-competitive conduct will be caught.

For example, in the merger context, the ACCC has often found that a reduction in the number of competitors in a market would result in a SLC and have subsequently rejected applications. Therefore, conduct that both increases efficiency and hence total welfare may also lessen competition by seeing a company leave the market and section 46 may apply.[18] As a result, the basis on which the ACCC or a court would judge unilateral conduct that resulted in the exit or

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[15] *Pegasus Economics (2014), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.iii*

[16] *sections 45, 47 and 50 of the CCA.*

[17] *Sims (2014), Bringing more economic perspectives to competition policy and law.*

[18] *Trindade et al. (2014), Building better mousetraps: Harper's re-write of section 46. P. 4*

prevented the entry of a competitor remains difficult to predict – despite the presence of the SLC test in other parts of the CCA.

The authors of the Pegasus report could not find any evidence within Australian jurisprudence to suggest the establishment of efficiency negates a finding of an SLC effect:

> *'The only mechanisms currently available to argue efficiencies reside within the taking advantage and purpose elements in the existing section 46 provision'.*[19]

One thing that is clear from the proposal is that if the ACCC's narrowest market definitions are adopted – sometimes as confined as a single suburb[20] – then any business incumbent in a local market may be considered to have market power and therefore bears a high risk of prosecution.

The Defence

The Panel has attempted to address the challenge of distinguishing pro-competitive behaviour from anti-competitive behaviour by introducing a defence.

Given the objective of the CCA is to promote consumer welfare, ANRA's remains concerned that conduct that can be proven to enhance efficiency, innovation, product quality or price competitiveness might still also act as a deterrent towards new entrants into the market (because competition is strong) and therefore fails the test for the defence.

Possible Outcomes

The proposed section 46 and the proposed defence would greatly increase uncertainty and compliance costs for businesses judging proposed conduct against this new legal standard.

Table 4 below outlines two scenarios, Scenario 1 and 2, demonstrating the possible chilling effect on competition. This outlines the difficulty in relying on the ACCC's word that 'competition on its merits' would be protected given the way it interprets the same outcomes. That is, a change in market structure might be deemed as anti-competitive under other sections of the CCA.

As an example of outcomes, companies could do any of the following when faced with commercial decisions that would save costs and could benefit consumers, but also restrict or exclude competitors:

- make commercial decisions that save costs, but not pass the benefits onto consumers in the form of lower prices which would reduce benefits of competition;
- Not make commercial decisions, instead taking a risk averse approach which could keep inefficient costs in a business and could have the effect of driving up consumer prices;
- take the gamble of making a commercial decision and then be prepared to mount a substantial, lengthy and costly legal defence involving economic evidence about the conduct that enhanced innovation and efficiency (but deterred new market entrants),

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[19] *Pegasus 2014, Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.10.*

[20] *ACCC (2013) ACCC to oppose Woolworths' proposed acquisition of Glenmore Ridge site.*

whilst dealing with the negative consequences to brand and thereby eroding shareholder value.

All would have either an immediate or long-term 'chilling effect' on competition. None are desirable given the interests of the consumer and all are avoidable with a rethink of this particular recommendation.

Table 4: Scenarios of Unintended Consequences in relation to Recommendation 30

Scenario 1: Disincentive to pass on cost savings to customers Company A is a major retailer across Australia, carrying in excess of 30,000 product lines. It makes thousands of decisions each year about product ranging and pricing. These decisions are driven by customer demand and are typically focused on delivering better value, quality and service to the customer. If Company A considers lowering the price of paper towel (a low cost but bulky item) because it has made significant improvements to its supply-chain logistics; the proposed new section 46 would also require Company A to be in a position to predict whether other retailers showed similar initiative and are able to compete on similar terms. If not, other retailers might not be able to make similar offers and might stop ranging paper towel. That might well be seen to result in a SLC in the market for paper towel, despite the actions of Company A clearly being in the interests of consumers. Company A is therefore reluctant to pass on the cost savings to consumers. The proposed changes to section 46 will complicate and create uncertainty about whether Company A's pricing or ranging decisions would or could result in a SLC in a market. To require Company A to make predictions of the likely market effects of routine decisions would make business decision-making unwieldy, introduce untold complexity to its daily operations and put at risk outcomes that could improve consumer welfare.
Scenario 2: Inefficient firm enjoys protection from competition Company B sells widgets and procures most of its widgets inventory from a major supplier called Widdings. Widdings is one of only two suppliers in Australia. Company B has suffered inadequate service from Widdings for some years; including consistent failure to meet delivery schedules, an unwillingness to innovate in packaging and generally being difficult to deal with. This costs Company B time and money and is ultimately reflected in retail prices that could otherwise be lower. Company B is considering whether it should swap to the other major supplier of widgets and to cease dealing with Widdings. Widdings relies heavily on Company B as its major customer. Company B currently buys 90% of its production. If Company B ceases to deal with Widdings, Widdings is likely to fail. This leaves only one major producer of widgets in Australia. The one remaining producer will not produce enough volume for the market so prices are likely to increase. The decision of Company B may result in a SLC in the wholesale widgets market. Company B would therefore be exposed to the risk of contravening the new section 46. Company B may or may not ultimately be able to establish the two elements of the new defence – both are speculative and would require detailed legal and economic advice. This means making and implementing the decision would be costly and take several extra months. Company B may therefore be dissuaded from making this decision, retaining Widdings as a supplier causing ongoing inefficiencies in the relevant markets. Company B's shareholders also suffer detriment as a result of this decision.

Recommendation 34

ANRA opposes Recommendation 34.

> *'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, but notification should be available for RPM conduct.'*

There is an overwhelming weight of literature demonstrating that RPM:

- can deliver pro-competitive outcomes;
- can incentivise retailers to invest in post-market services for consumers; and
- does not always facilitate collusion within supply chains or excludes willing participants in a market.

ANRA appreciates the Panel has proposed the introduction of a less costly means to engage in legalised resale price maintenance (RPM) by permitting notification (in contrast to the more costly authorisation process that is the only legal means currently available). However, ANRA does not share the Panel's conclusions on why the existing per se prohibition against RPM should be retained in favour of a competition based test.[21]

ANRA believes this matter is somewhat analogous to the circumstances being considered under Recommendation 32 with respect to third-line forcing. ANRA is confident that future experience under the proposed notification framework will prove the per se prohibition unnecessary; and will therefore have simply added cost and delay for business wishing to conduct RPM for legitimate and not anti-competitive purposes.

Draft Recommendation 45

ANRA has concerns about Recommendation 45.

[21] Harper et al. (2015), *Competition Policy Review Final Report.* P.64-65.

> *'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.'*

Whilst ANRA understands the Panel's intent is to engage the States and Commonwealth on these issues in a central body, ANRA remains concerned about the overlap, duplication, and a possible increased burden on business to participate.

ANRA also notes:

- The ability to do as suggested already sits within the powers (including information gathering) of the Productivity Commission; and
- In ANRA's view ACCC's assessments of competition in markets require improvement (notably on the understanding of competition in a market) and therefore ANRA is reluctant to support another body attempting to conduct this exercise before the primary body assigned with such tasks demonstrates greater capability in conducting competition assessments.

Recommendation 46

ANRA has concerns about Recommendation 46.

> *'All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy to undertake a competition study of a particular market or competition issue.*
>
> *All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the ACCP.*
>
> *The work program of the ACCP should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.'*

ANRA is concerned about the prospect of politically motivated requests for market studies to be undertaken:

- The threshold for issuing a reference for a competition study should be determined by the number of jurisdictions and/or market participants the study covers;
- The threshold for requesting studies across multiple or all Australian jurisdictions should be higher than a single state or market participant;

- Furthermore, the reference to conduct a market study must also come from the jurisdiction(s) or market participants being studied. The majority of jurisdictions or stakeholder groups likely to be involved might be an appropriate threshold for national studies.

4. Implementation of Reform

ANRA has offered its views on implementation of the specific reforms that it supports in full, in principle, or in part within the body of this submission. This section provides ANRA's views on all recommendations that ANRA has a position on, as detailed in Tables 1, 2 and 3 of this submission.

Table 4: Summary of Recommendations ANRA Supports

No.	Recommendation Outline	Comment on Implementation
1	The Australian Government, state and territory and local governments should commit to the following principles: • Competition policies, laws and institutions should promote the long-term interests of consumers ⋮ • Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.	Support the proposed six (6) month window.
8	All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed.	Support the proposed 12 month window to agree on a new round of reviews and nominate priority areas.
9	Further to Recommendation 8, state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test, such that the rules should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the rules can only be achieved by restricting competition.	Planning and zoning rules should be assessed against the public interest test over the next 12 months and not the next two (2) years as proposed.
12	Remaining restrictions on retail trading hours should be removed.	Reform should be implemented immediately and not over the proposed two (2) year window.
13	Restrictions on parallel imports should be removed unless it can be shown that: • the benefits of the restrictions to the community as a whole outweigh the costs ; and • the objectives of the restrictions can only be achieved by restricting competition.	Reform should be implemented immediately and not over the proposed almost three (3) year window.
14	The Panel considers that current restrictions on ownership and location of pharmacies are not needed to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy	The proposed two (2) year window for implementation is appropriate.

No.	Recommendation Outline	Comment on Implementation
	products and services, and the ability of providers to meet consumers' preferences.	
18	All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes.	Support the proposed 12 month window to review commercial policies.
22	The central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and projected needs of the Australian economy.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
26	Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
32	Third-line forcing (subsections 47(6) and (7) of the CCA) should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
35	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. 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.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
37	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	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.

No.	Recommendation Outline	Comment on Implementation
	whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.	
38	The authorisation and notification provisions in Part VII of the CCA should be simplified to: • ensure that only a single authorisation application is required for a single business transaction or arrangement; and • empower the ACCC to grant an exemption from sections 45, 46 (as proposed to be amended), 47 (if retained) and 50 if it is satisfied that the conduct would not be likely to substantially lessen competition or that the conduct would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
39	A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
48	The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction. If disproportionate effects across jurisdictions are estimated, competition policy payments should ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.	The six month window for a request to the Productivity Commission to undertake the proposed study is adequate.
49	Competition and consumer functions should be retained within the single agency of the ACCC.	No implementation required.
52	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.	This recommendation should be implemented by the ACCC at the very minimum over the proposed 12 month window.
53	The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.	The proposed six (6) month window for the ACCC to implement is appropriate.
55	The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.	No implementation required.

No.	Recommendation Outline	Comment on Implementation
56	The Productivity Commission should be tasked with modelling the recommendations of this Review as a package to support discussions on policy proposals to pursue.	The six month window for the Productivity Commission to undertake the proposed study is adequate.

Table 5: Summary of Recommendations ANRA Supports in Principle or in Part

No.	Recommendation Outline	Comment on Implementation
21	Governments should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice.	ANRA would welcome the opportunity to participate in consultations, but is mindful that six months may not be enough time in light of the lack of detail concerning the exact format and display of data to consumers.
23	The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
25	The current definition of 'market' in section 4E of the CCA should be retained but the current definition of 'competition' in section 4 should be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
29	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.	The 12 month window to draft legislation and a further 12 months to finalise and enact as law is appropriate.
40	The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings. The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice. The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering	ANRA believes 12 months should be enough time for the ACCC to amend its approach to framing and issuing section 155 notices; and notes that if enacted the relevant components of the *Competition and Consumer Amendment (Deregulation and other measures) Bill 2015* would bypass the Panel's

No.	Recommendation Outline	Comment on Implementation
	powers in the Australian Securities and Investments Commission Act 2001.	proposed timeline for implementation.
43	The National Competition Council should be dissolved and the Australian Council for Competition Policy (ACCP) established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.	The 12 month window to establish arrangements to create the ACCP is appropriate.
44	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.	The 12 month window to establish arrangements to create the ACCP is appropriate.
47	The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.	The 12 month window to establish arrangements to create the ACCP is appropriate.

Table 6: Summary of Recommendations ANRA Opposes or Has Concerns About

No.	Recommendation Outline	Comments on Implementation
30	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.	ANRA opposes the draft legislation in full.
34	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, but notification should be available for RPM conduct.	ANRA opposes the draft legislation in full.
45	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.	ANRA's concerns about the remit of the ACCP would need to be addressed before providing comment on implementation.
46	All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy (ACCP) to undertake a competition study of a particular market or competition issue. All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the ACCP.	ANRA's concerns about the remit of the ACCP would need to be addressed before providing comment on implementation.