Business Council of Australia

submission

Submission to the Department of Treasury on the Final Report of the Competition Policy Review

MAY 2015

Working to achieve economic, social and environmental goals that will benefit Australians now and into the future

Business Council of Australia ABN 75 483 216

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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

This is the Business Council submission to the Department of the Treasury on the final report of the Competition Policy Review (the review).

The Business Council has made three substantive submissions to the review:

- Submission to the Competition Policy Review (July 2014)
- Supplementary Submission to the Competition Policy Review (September 2014)
- Submission on the Competition Policy Review Draft Report (December 2014).

This submission provides a general response to the final report and comments on new or changed findings and recommendations in the final report. It does not comment on recommendations that were substantially unchanged in the final report (the majority of recommendations). It should therefore be read in conjunction with the Business Council's earlier submissions to the review.

Attachment 1 provides a table of the Business Council's position on each of the 56 recommendations in the final report.

Attachment 2 provides a detailed analysis of the competition law recommendations in the final report.

Business Council's general response to the final report

The report sets out a substantive microeconomic reform agenda

The final report of the Competition Policy Review puts forward a substantive microeconomic reform agenda that can set Australia up for continued economic growth and strong job creation.

Overwhelmingly the panel has produced a very good report that identifies the major reforms needed to improve competition policy in Australia. It addresses the competition policy issues that the Business Council considers to be of most importance.

The report demands a comprehensive response from governments

The Commonwealth, state and territory governments should regard the report's recommendations as a package of complementary reforms that need to work together to lift Australia's competitiveness. Governments should avoid cherry-picking the recommendations or favouring some parts of the report over others, as this will compromise the potential economic benefits from implementing the package of reforms as a whole.

The Commonwealth Government's initial response to the report needs to set the platform for a broad intergovernmental competition policy reform agenda that will deliver demonstrable benefits to the economy over time.

The recommendations in the report deserve serious consideration by federal, state and territory governments and opposition parties. The economic benefits will only be fully realised if Australia's governments work together to implement this very detailed and extensive reform agenda.

Reinvigorated competition policy is good for consumers, and good for businesses competing in a global economy and facing substantial digital disruption. Making Australia's markets more competitive will allow Australian companies to innovate, grow and create jobs. A more competitive economy is necessary for growing productivity and incomes and for improving Australia's fiscal position.

The opportunities for reform reflected in the report, combined with opportunities from the government's other reform processes, including tax reform and reform of the federation, can position Australia well for economic growth.

Priorities for competition policy reform

The review has examined in depth whether Australia's competition policies, competition law and competition institutions are fit for purpose. It has rightly identified as its top priority the need to implement microeconomic reforms that will improve competition, and Australia's global competitive position.

Among the areas of competition policy reform identified by the review, the Business Council recommends governments prioritise pro-competition reforms in planning and zoning, major project approvals, coastal shipping, road pricing, retail trading and infrastructure markets. In many of these areas the review has reinforced the need to implement reforms that have been identified in past reviews, but which are yet to be delivered.

The review's proposed changes to the delivery of human services are potentially far reaching and will require extensive program redesign. The benefits to recipients from greater choice and innovation could be significant.

The report contains a number of recommendations to simplify the Competition and Consumer Act (CCA) that should be able to be implemented relatively quickly.

The need for institutional reforms

The recommended changes to Australia's institutional settings can deliver the objective of fit-for-purpose competition policy on an ongoing basis.

The proposed Australian Council for Competition Policy (ACCP) will have a critical role to drive implementation and monitor progress of the reform agenda. This body needs to be independent and have the full support of all governments.

Competition payments should be tied to reform effort and ensure that revenue gains accrue to the jurisdictions undertaking the reform.

The introduction of a national pricing and access regulator will support functional separation, create a centre of excellence for access regulation and should, in time, lead to greater national consistency for businesses operating across jurisdictions.

We agree with the panel's view that there is a need to inject a wider range of views into Australian Competition and Consumer Commission (ACCC) decision making and that governance reforms will be needed to achieve this outcome. The ACCC should also quickly implement the panel's recommendation to establish a media code of conduct.

Some of the changes to Competition Law should be rejected

Some recommendations for law reform seem to be at odds with the otherwise pro-competitive focus of the final report and should not be supported, such as the revised changes to section 46. After careful analysis of the proposed change, including of the potential legislative options to implement it, the Business Council does not think the purported benefits outweigh the clear risks. The proposed changes fundamentally alter section 46 but are not supported by a compelling case for change in the report, or by the proponents, and risk having a detrimental impact on competition, consumer welfare and economic growth. The review acknowledges the risks of capturing pro-competitive behaviour and the transitional costs associated with changing section 46, but has not put forward clearly defined benefits to justify the change in review chapters 17-24. Any changes to the CCA must be subject to a rigorous Regulatory Impact Assessment and cost-benefit analysis.

The review's recommendations now require an action plan

The government and the review panel are to be commended for respectively commissioning this review and for delivering a comprehensive agenda for competition policy reform. Australia's governments should now provide a comprehensive response to the report and commence implementation of the key recommendations.

Governments will need to come together to agree institutional arrangements, with a key early focus on establishing the ACCP, and to set out a robust plan and a detailed time line for implementation. The majority of the recommendations should be implemented within three years, with full implementation of some of the more challenging reforms (including road pricing and human services delivery) starting now but delivered over a longer time period.

National Competition Policy reforms of the 1990s boosted national productivity and set us up for a remarkable period of growth. The response to this review needs to be as forward-looking and bipartisan as it was then.

Business Council recommendations

General recommendations

1. The Australian Government should develop a comprehensive and prioritised response to the final report that gives all recommendations due consideration and sets out an implementation plan to be agreed by all governments. A piecemeal or selective response will compromise the potential benefits from the report and should be avoided.

2. The Australian Council for Competition Policy should be established as a priority so that the necessary institutional arrangements are in place across the federation for developing and implementing the recommendations.

3. The government should subject any legislative changes resulting from the review to a full Regulation Impact Statement (RIS) assessment. The problem to be addressed must be clearly identified and the costs and benefits fully assessed. A full RIS must be completed for any changes to the Competition and Consumer Act.

Prioritisation of reforms

4. The Business Council recommends governments prioritising the report's pro-competitive reforms in planning and zoning, major project approvals, coastal shipping, road pricing (by first completing the COAG heavy vehicle charging reforms), retail trading and infrastructure markets, as well as the proposed competition-based changes to the delivery of human services.

BCA supports all recommendations, by exception

5. The Business Council recommends the government proceed to develop all of the report's recommendations for implementation, as drafted in the final report, with the exception of the recommendations below. These are recommendations where we either:

    5.1 disagree with the review panel's recommendation, or

    5.2 suggest changes or additions that we believe will enhance the review panel's recommendation.

Competition policy reform exceptions

6. The Business Council recommends that governments complete the COAG heavy vehicle charging and investment reforms as a practical first step towards implementing the review's road pricing reforms. (Final Report Recommendation 3)

7. The Business Council does not support the review's recommendation to change air cabotage restrictions. (Final Report Recommendation 5)

8. The Business Council recommends that consideration of whether to repeal the intellectual property exemption in the CCA should be referred to the proposed Intellectual Property Review. (Final Report Recommendations 6 and 7)

9. The 'priorities for regulation review' should include the following items not mentioned elsewhere in the review: the Australian Jobs Act; labour market testing under the Migration Act and health regulations. (Final Report Recommendations 8 and 10)

10. The planning and zoning changes should be expanded to also improve the performance of approvals processes, to speed up decisions and reduce costs on business (as these changes will also enhance competition).
(Final Report Recommendation 9)

11. The informed choices recommendation needs to be qualified with a recommendation that costs must be minimised. (Final Report Recommendation 21)

Competition law reform exceptions

12. The Business Council does not support the introduction of a new prohibition on 'concerted practices' in the *Competition and Consumer Act 2010* (CCA). (Final Report Recommendation 29)

13. The Business Council does not support changing the 'misuse of market power' provisions under section 46 of the Competition and Consumer Act. (Final Report Recommendation 30)

14. The Business Council recommends subjecting resale price maintenance to a 'substantial lessening of competition' test in the Competition and Consumer Act. (Final Report Recommendation 34)

15. The Business Council recommends that vertical restrictions should be excluded from section 45 and assessed exclusively under section 47. It does not support the proposed removal of section 47. (Final Report Recommendation 33)

16. The Business Council does not support enabling proceedings to be brought against persons making admissions of fact under section 83. (Final Report Recommendation 41)

17. The Business Council recommends that the obligation for the ACCC to frame notices in the narrowest form possible should be enshrined in section 155 itself. A Ministerial Direction should also require the ACCC to review and update its guidelines to ensure that they are consistent with this principle. (Final Report Recommendation 40)

18. The Business Council recommends that declaration under the national access regime in Part IIIA should be confined to airports and any other former publicly-owned multi-user facilities that do not have an access regime. (Final Report Recommendation 42)

19. The Business Council recommends that merits review of declaration decisions under Part IIIA should be unfettered with respect to criterion (f). (Final Report Recommendation 42)

Competition institution reform exceptions

20. The Business Council supports the proposed Access and Pricing Regulator on the condition that there will be clear institutional separation of the declaration, arbitration and policy development functions associated with infrastructure access regulation. (Final Report Recommendation 50)

21. The Business Council is concerned that part-time ACCC commissioners would have limited influence with a full-time Chair and commissioners and recommends the government examine alternative governance changes to meet the objective of injecting wider views into ACCC decision making. (Final Report Recommendation 51)

22. The ACCC should not be resourced to 'test the law on a regular basis' to ensure that the law is working. The law should only be tested if doing so is likely to be in the public interest. (Final Report Recommendation 53)

Table 1: Summary of Business Council positions

Competition Policy (Recommendations 1-21)	**Competition Law (Recommendations 22-42)**	**Competition Institutions (Recommendations 43-56)**
Recommendations 1-21 are supported with these exceptions or subject to these changes: • Prioritise the implementation of heavy vehicle charging reforms as a practical and realistic first step towards road pricing reforms for all vehicles. (R3) • Do not adopt the review's recommendation on air cabotage restrictions. (R4) • The recommendation to repeal the intellectual property exemption in the CCA should be referred to the proposed Intellectual Property Review. (R7) • Planning and zoning changes should be expanded to also improve the performance of approvals processes, speed up decisions and reduce costs on business (as these changes will also enhance competition). (R9) • The informed choices recommendation needs to be qualified with a recommendation that costs must be minimised. (R21) • The 'priorities for regulation review' should include the Australian Jobs Act, labour market testing under the Migration Act and health regulations. (R8&10)	Recommendations 22-42 are supported with these exceptions or subject to these changes: • Do not change section 46 dealing with the 'misuse of market power'. (R30) • Do not introduce a prohibition on concerted practices. (R29) • Remove the *per se* prohibition on resale price maintenance and subject it to a significant lessening of competition test. (R34) • Do not extend Section 83 to admissions of fact. (R41) • Vertical restrictions should be excluded from section 45 and assessed exclusively under section 47. Do not remove section 47. (R33) • Declaration under the national access regime in Part IIIA should be confined to airports and any other former publicly owned multi-user assets. (R42) • Merits review of declaration decisions under Part IIIA should be unfettered with respect to criterion (f). (R42)	Recommendations 43-56 are supported with these exceptions or subject to these changes: • The National Access and Pricing regulator is supported but declaration, arbitration and policy functions should be institutionally separated. • The national access regime should be amended so that: ➢ it applies only to airports and formerly publicly owned multi-user infrastructure facilities that do not already have an access regime ➢ the merits review of criterion (f) should be unfettered. • The proposed part-time ACCC commissioners would have limited influence with a full-time chair and commissioners. The government should examine alternative governance models that will better meet the objective of injecting wider views into ACCC decision making. (R51) • The ACCC should not be resourced to 'test the law on a regular basis' to ensure that the law is working. The law should only be tested if doing so is likely to be in the public interest. (R53)

Business Council comments on the final report

This submission comments on new or changed findings and recommendations in the final report.

It does not comment on recommendations in the final report that were substantially unchanged from the review's draft report (the majority of recommendations). The Business Council's earlier submissions to the review provided substantive comment on most of the unchanged recommendations, so this submission needs to be read in conjunction with those earlier documents.

Attachment 1 provides a summary table of the Business Council's position on each of the 56 recommendations in the final report.

The BCA's comments are sorted according to the three core sections of the final report:

- Competition Policy
- Competition Law
- Competition Institutions

As stated earlier, the Business Council supports the majority of the recommendations in the final report. The comments below relate mostly to recommendations where we either:

- disagree with the review panel's recommendation, or
- suggest changes or additions that we believe will enhance the review panel's recommendation.

Greater weight has been given in this submission to commenting on some of the review's competition law recommendations, in particular the proposed changes to section 46, as these are the areas of the report where the Business Council is concerned the proposed changes may not be beneficial to competition, consumer welfare and economic growth.

Attachment 2 provides a more detailed assessment of the review's proposed changes to competition law in these areas.

1. Competition policy

Road transport (Final Report Recommendation 3)

The Business Council supports the review's recommendations on road pricing reform. We recognise that the reforms will require substantive policy development and consultation with the community, but if done well can generate significant economic benefits. As a first practical step the government should reinvigorate COAG's heavy vehicle road charging reform process and set out clear time lines for its implementation. In particular, governments should commit to practical pilots and trials that apply and test the design work done to date, and generate tangible results.

Air cabotage (Final Report Recommendation 5)

The Final Report includes a new recommendation that:

> ... current air cabotage restrictions should be removed for all air cargo as well as passenger services to specific geographic areas, such as island territories and on poorly served routes, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the restrictions can only be achieved by restricting competition.

The recommendation did not appear in the Draft Report and has not been subjected to proper stakeholder consultation.

The economic and legal issues around air cabotage rights are complex and varied. The review has not sought to provide evidence that removing air cabotage restrictions as proposed would lead to substantial efficiency gains. Nor has it considered the implications for the application of other Australian laws to foreign airlines operating domestically, or the costs or potential unintended consequences for investment certainty and consumer welfare. All of these matters require careful consideration and consultation with industry and the wider community. In the absence of this more considered analysis the Business Council does not support the review's recommendation.

Regulation review and review priorities (Final Report Recommendations 8 and 10)

The regulation review program should be prioritised to remove restrictions on competition where there are the largest potential gains to the economy (at least in the first round of legislative reviews). A preliminary assessment should be undertaken to identify those regulations.

In addition to the priorities listed in the final report, the Business Council argues that the following areas for legislative review be targeted:

- completing energy and water market reform
- legislation associated with introducing a cost-reflective system of road pricing
- deregulating retail trading hours
- removing red tape associated with industry participation plans
- occupational licensing restrictions
- private health insurance and prosthetic price regulation.

Planning and zoning (Final Report Recommendation 9)

In addition to the proposal for all Australian governments to remove restrictions on competition in planning and zoning regulations, the Business Council recommends governments also give consideration to:

- speeding up the implementation of one-stop shops for major project environmental approvals

- the adoption of a consistent national approach to major project approvals by all Australian governments, to improve the efficiency of the approvals process.

Further information on these proposals is set out below.

Environmental approvals

The Business Council recommends that Australian governments better coordinate and streamline their approval functions for major projects by:

- accrediting state government assessment and approval processes to meet the required environmental standards
- implementing an assurance framework that meets environmental outcomes, while reducing unnecessary regulatory burdens
- allowing for only a single set of conditions, covering matters by state and Commonwealth, and a single environmental offset
- establishing a one-stop shop for environmental approvals for offshore oil and gas developments in Commonwealth and coastal waters
- properly resourcing approval functions by personnel with appropriate commercial and regulatory skills.

Consistent national approach to major project approvals

The Business Council recommends improving state government planning and major project approvals processes by:

- identifying major industrial, energy, resource and infrastructure land uses in state strategic plans and establishing statutory mechanisms to require that strategic plans are reflected in regional and local land use schemes
- establishing a lead agency framework that can compel timely responses from referral agencies
- removing all concurrences for declared major projects and reducing referral requirements
- establishing a single assessment and approval framework for major energy, resource, infrastructure and industrial projects, including:
  - automatic declaration of major project status based on capital value and industry characteristics
  - standard, industry-specific terms of reference for impact assessments
  - risk-based assessment guidelines that implement the Australia–NZ standard for risk assessment
  - a six-week, statutory time frame for decision once an assessment report has been received by the responsible agency

- where necessary, standard, industry-based conditions on approval
- no merits review where the decision maker is the minister, and standing for judicial review limited to the project proponent and third parties who are directly affected by the proposed project.

Government procurement and other commercial arrangements (Final Report Recommendation 18)

In addition to this new recommendation for all Australian governments to improve their procurement policies and other commercial arrangements, the Business Council recommends:

- Repeal of the Australian Jobs Act to remove an anti-competitive requirement that capital projects over $500 million produce Australian Industry Participation Plans.
- The ACCP should be tasked with providing advice on ensuring privatisations are preceded by appropriate structural reforms, so competition is introduced wherever possible into former monopoly markets, with minimal need for ongoing regulation.

Informed choice (Final Report Recommendation 21)

The final report contains a new recommendation 'to allow consumers to access information in an efficient format to improve informed consumer choice.' This recommendation is supported in principle, subject to non-legislative means being preferred. There should be full consultation with industry to enable flexible approaches to data collection and provision to minimise business costs, and to maximise net benefits to the community.

2. Competition law

The Business Council agrees that Australia's competition law is in many aspects unnecessarily complex and overly prescriptive. It supports many of the review's recommendations and commends them to the government. The Business Council does not however support the following recommendations:

- proposed changes to section 46 'misuse of market power' (Recommendation 30)
- introduction of a new law covering 'concerted practices' (Recommendation 29)
- removal of section 47 on exclusive dealing (Recommendation 33)
- retention of the *per se* prohibition on resale price maintenance (Recommendation 34)
- extending section 83 of the CCA to agreed admissions of fact. (Recommendation 41)

In addition to the discussion below, a detailed assessment of these recommendations is provided in Attachment 2.

Misuse of market power (Final Report Recommendation 30)

The review panel has presented in the final report a second version of its proposal to transform Section 46 of the CCA, which governs the 'misuse of market power', by introducing an 'effects' test, removing the 'take advantage' element that embodies the concept of 'misuse', and replacing the current exclusionary purposes with a general 'substantial lessening of competition' test.

The review argues that:

> The Panel finds that section 46, dealing with the misuse of market power, is deficient in its current form. It does not usefully distinguish pro-competitive from anti-competitive conduct. Its sole focus on 'purpose' is misdirected as a matter of policy and out of step with international approaches.

The Business Council does not agree with the review's finding and considers the law is appropriately framed to address misuse of market power and is well understood.

The Business Council maintains its view that:

- the current section 46 is fit for purpose and is well understood
- there is no evidence of a systemic problem that warrants change
- there would be considerable economic costs and regulatory uncertainty arising from implementing the review panel's changes
- no substantive benefits from changing section 46 have been identified that would outweigh the costs.

Throughout the course of the review there has not been a satisfactory explanation of why a change to section 46 is needed. No examples have been given of misconduct going unchallenged under the current provision. The ACCC has never lost a section 46 case because it failed to prove 'purpose' and has lost very few cases outright. The courts have generally applied the 'take advantage' test without difficulty.

Numerous previous reviews have considered the workability of section 46 and rejected the need for change, affirming both that purpose should be an essential element in any formulation and that an effect of substantially lessening competition (as proposed by the review) is not an appropriate test. Previous reviews have also found that the 'take advantage' element is not unduly difficult to prove, and that the link between conduct and market power is essential to section 46.

The review acknowledges that the changes will 'involve some transitional costs, as firms become familiar with the prohibition and as the courts develop jurisprudence on its application' and that there is a need to 'minimise the risk of inadvertently capturing pro-competitive conduct' (pp. 341-2). These risks and costs are likely to be understated. Benefits from the change are asserted but not clearly specified in the report.

The review's revised section 46 proposal also appears at odds with the otherwise pro-competitive focus of the final report.

The review's blueprint to extend competition into new areas of the economy will have the greatest impact if participants in these new markets – including larger participants – are able to compete vigorously to lower prices and increase choice. The review's proposal would put that at risk by introducing considerable regulatory uncertainty for competing businesses that could dampen competitive behaviour.

It has the potential to compromise outcomes for consumers and the economy overall, including in those newly competitive sectors contemplated by the Final Report.

The Business Council considers that the present section 46, and its interpretation by the courts, provide the clarity and certainty necessary to allow businesses to compete vigorously while avoiding any conduct that is likely to damage the competitive process.

The proposed version of section 46 by comparison is less clear, will introduce uncertainty around how it will be interpreted by the courts (including the interpretation of the substantial lessening of competition test in relation to unilateral actions) and risks overreaching by capturing pro-competitive activity.

Furthermore, there is little consensus among the proponents of change on why change is needed nor how a revised section 46 should be framed. Without a clear consensus there are clear risks that best practice regulation could be compromised were any changes to be made to section 46.

The rest of this section:

- explains why the arguments for change are unfounded
- spells out risks and costs of changing section 46
- examines the deficiencies in the proposed legislative guidance.

Table 2: Section 46 comparison

Current version	The version proposed by the review
Section 46 of the Competition and Consumer Act 2010 (CCA) prohibits corporations that have a substantial degree of market power from taking advantage of that power for the purpose of: • eliminating or substantially damaging a competitor, • preventing the entry of a person into a market, or • deterring or preventing a person from engaging in competitive conduct.	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.

The arguments for changing section 46 are unfounded

Throughout the competition policy review, the review panel and other proponents of change have put forward a number of arguments for changing section 46.

The Business Council considers that the arguments put forward by proponents for change are worthy of consideration in a comprehensive review of competition policy, but are ultimately unfounded. The arguments are considered and addressed below.

- **The ACCC is not constrained by purported 'deficiencies' in section 46.** The ACCC has provided no examples of cases that it has failed to investigate or litigate due to concerns with section 46. The ACCC has won almost two-thirds of the section 46 cases it has run. In the past 25 years the ACCC has brought twice as many section 46 cases as the United States Department of Justice has instituted monopolisation cases. In most of the remaining cases the ACCC has won on other provisions in the Competition and Consumer Act (sections 45 and 47).

- **The 'take advantage' test is a crucial element.** The review panel says the meaning of the 'take advantage' element is 'subtle and difficult to apply' and should be removed. The 'take advantage' element of section 46 serves a key purpose of requiring a connection between a corporation's market power and its actions. Without this nexus, a corporation with market power could be prevented from engaging in conduct that has a perfectly legitimate business justification. Legislative guidance is in place to assist interpretation. The 'take advantage' test should not cause any concerns as long as it is

applied with adequate precision, and there is no evidence of widespread misapplication of the test.

- **The Act already focuses on competition, not competitors.** The review panel says the prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process, not competitors. Yet the courts have had no difficulty reconciling the ultimate goal of protecting competition and consumer welfare with the current prohibition of conduct that has the purpose of eliminating, damaging or excluding competitors. Although the 'substantial lessening of competition' test favoured by the review is found elsewhere in the law, this does not necessarily make it suitable for unilateral conduct under section 46. There are clear and recognised differences between the regulation of multilateral and unilateral conduct (i.e. misuse of market power) and no reason why they should be subject to the same test.

- **The test of 'purpose' does not require the addition of an alternative test of 'effect'.** The review is not clear on why it favours an 'effects test' *per se*. The ACCC acknowledges that it has never lost a case on the basis of failing to prove 'purpose'. Professor Hilmer's comments in 1993 on the introduction of an effects test remains relevant today: 'it is not clear that the final result would differ from the existing interpretation of s.46, or that any such difference would constitute an improvement.' Previous reviews have considered proposals very close or identical to the review's proposal and consistently rejected them.

- **Australia's law is not out of step with the rest of the world.** The review panel claims Australia is 'out of step' with international approaches and presents its proposal as more consistent with similar provisions internationally. This is not supported by analysis of the relevant provisions overseas, many of which treat purpose as an essential element and use effects as an additional test, not an alternative. The review's proposal is broader, more uncertain and more likely to capture conduct with a legitimate business justification than any test found overseas. The existing provision is more in line with international practice than the proposed provision.

A number of important stakeholders have argued against the need for change, given the significant downside risks.

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia said in response to the Draft Report:

> The Committee supports the retention of s46(1) in its current form. It works effectively and with a substantial body of jurisprudence explaining its application which would be lost if the provision was replaced... The Committee is concerned that the proposed provision may have unintended regulatory impacts. (p. 12)

The Productivity Commission, in an earlier submission to the review, highlighted the absence of a sufficient reason for change and the risks of change:

> While some have argued the evidentiary burden for the current purpose test is too high (which risks allowing anticompetitive conduct), the Commission considers that a high evidentiary burden is not sufficient, in itself, to justify changing the legislation. Changing the legislation to include an effects test would itself bring regulatory risks, particularly if the threshold to make the test were too low.

Former ACCC members Graeme Samuel and Stephen King have criticised the review's most recent proposal predicting that business activity would 'drown … in a sea of uncertainty'[1] under the new model.

The proposed change would create significant costs and uncertainties

The review has acknowledged that there would be costs associated with its proposal to change section 46. These costs are likely to be understated.

The widening of the section to include effects as well as purposes, along with the other changes to the provision, will require a business to look beyond its own intentions and strategies – which are certain – and predict the effects of its conduct – which are not.

This regulatory uncertainty is deeply problematic for a dynamic, competitive economy.

The new test would increase the risk of investigation and litigation by the ACCC and third parties. Businesses competing on their merits will not be assured that they can engage in vigorous competition without the risk of regulatory or third-party intervention. They will need to regularly commission advice to assess the legality of their actions. This will be expensive and time consuming – and any advice will need to be heavily qualified.

The Business Council and other stakeholders remain concerned that this will discourage innovation, investment and low pricing from competition on its merits, with the result that consumers will pay more for less. Disadvantaged consumers would include other businesses, including small businesses, that are purchasing intermediate inputs to supply final goods and services to their own customers, and whose own competitiveness will be affected as a result.

The review's suggestion that business should seek prior authorisation from the ACCC under section 46 for day-to-day commercial decisions would in many cases be impractical and costly.

These are unnecessary costs to impose on the economy.

The legislative guidance is unclear

The review acknowledges that businesses may have trouble assessing whether their conduct has the purpose or effect of substantially lessening competition under its proposal. Its solution is to complement the test with a set of factors for courts – and by extension businesses – to assess. This replaces a set of defences laid out in the proposed version in the draft report.

However, the legislative guidance proposed will not solve these problems and will only introduce more uncertainty. Consider the words of the new section 46 in Table 2 above. In effect the proposed provision says that: when determining whether conduct has the purpose, effect or likely effect, of *substantially lessening competition* the court should assess the extent to which the conduct has the purpose, effect or likely effect of

1. Samuel G and King S, 'Let companies and consumers take the gains', *Australian Financial Review*, 7 April 2015

increasing competition in the market and the extent to which the conduct has the purpose, effect or likely effect of *lessening competition* in the market [italics added].

This is a confusing set of instructions to interpret, and that members of the legal profession will struggle to understand, let alone most business people, even with the examples of conduct provided.

It is likely that the terms of the new provision will take many years to be defined by the courts, adding to the costs on the economy and putting at risk business innovation.

The proposed guidance provides very little protection for conduct with a legitimate business purpose or justification – certainly nothing like the protection offered in the United States or Europe, and nothing like the protection offered by the current section 46.

Requiring courts to 'have regard to' these potentially conflicting purposes and effects does not provide sufficient guidance to the courts or certainty to businesses. As a result, the proposed guidance is not likely to be any more effective than the defence that was abandoned from the Draft Report. In fact, it appears to be a step backwards.

Given the guidance appears to be designed to ensure the provision applies only to exclusionary behaviour of the type that is adequately captured under the current provision, it is hard to understand why the review thinks these changes are worth the trouble and cost they will entail.

The review's difficulty in designing a revised section 46 only adds to the argument that no change should be undertaken.

Recommendation

The Business Council recommends that the government does not adopt the review's proposal to change section 46.

Price signalling and concerted practices (Final Report Recommendation 29)

The Business Council supports the review's recommendation to repeal the current price signalling provisions, which are complex, arbitrarily limited to a single sector, and risk capturing information disclosures of the kind that are necessary for the efficient operation of the market.

However, the Business Council does not support the review's recommendation to extend section 45 to cover 'concerted practices'. The change will create uncertainty and additional costs for all businesses (including small businesses) without delivering any clear benefits to consumers. There are risks it could capture legitimate information sharing between businesses where cooperation is necessary, for example, in the financial services sector where banks need to share information on loans, payments, and clearing and settlement services.

The ACCC has won, and continues to pursue, cases involving information exchanges under the existing section 45. The fact that it has not won every legal action or pursued every borderline case does not by itself demonstrate a failing of the competition law.

The Final Report itself appears to acknowledge that the argument for change has not been made convincingly, where it questions "whether that concern is realistic might be debated" (p. 370).

A concern that is only 'debatably realistic' is not a sound basis for the potentially far-reaching change to the law subsequently proposed by the review. Furthermore, as the review finds, the concerns can already be dealt with under the current Act. The Business Council urges the government to take this opportunity to more carefully consider, or recommend a further inquiry to carefully consider, the full range of options available for dealing with information exchanges – including under the existing law without the price signalling amendments.

If a careful evaluative process were to conclude that a concerted practices element should be added to section 45, the Business Council considers that, at a minimum:

- a more considered legislative definition of 'concerted practice' should be developed through public consultation
- the ACCC should develop guidelines setting out its approach to what is to be considered a 'concerted practice', capturing the appropriate nuance of the European jurisprudence, and also through public consultation
- it should be an essential element of proving a contravention that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

Vertical restrictions (Final Report Recommendation 33)

The Business Council supports the simplification of section 47, which in its current form is difficult for businesses to understand and apply.

However, the Business Council does not support the removal of section 47. Leaving the regulation of vertical arrangements to a general prohibition of contracts, arrangements and understandings that have the purpose or effect of substantially lessening competition would not provide business with sufficient certainty over which type of conduct is likely to breach the law.

While the Business Council does not propose all vertical restrictions should be *per se* legal in Australia, it considers that the prohibition should be limited to specific forms of vertical restraint that have the purpose or effect of substantially lessening competition. Accordingly, it recommends that vertical restrictions should be excluded from section 45 – just as they are excluded from the cartel provisions – and assessed only under section 47.

Resale price maintenance (Final Report Recommendation 34)

The Business Council remains concerned that the *per se* prohibition of resale price maintenance is out of step with competition policy principles.

There are many circumstances in which resale price maintenance arrangements are efficiency-enhancing and not anti-competitive. This is particularly the case in industries where inter-brand competition is more important than intra-brand competition – a situation

that has long existed in many industries and is becoming more common as manufacturers increasingly vertically integrate at a global level.

The Business Council considers that no case has been made that resale price maintenance should be prohibited *per se* or that a change to a substantial lessening of the competition test would fail to capture any anti-competitive conduct. On the contrary, the evidence shows that in many cases, resale price maintenance can enhance efficiency with no overriding public detriment.

If the Final Report's other recommendations were implemented, resale price maintenance would be the only form of conduct prohibited *per se* in the CCA, apart from the recognised categories of hard-core cartel conduct: price-fixing, bid-rigging, market-sharing and restricting output. This is surely an anomaly.

In any case, the Business Council supports the review's recommendation to extend the notification process to resale price maintenance, and to exempt resale price maintenance arrangements between related bodies corporate.

Formal merger processes (Final Report Recommendation 35)

The Business Council supports some streamlining of the formal exemption process. However, the Business Council recommends keeping the formal clearance process with the Australian Competition and Consumer Commission (ACCC) and the formal authorisation process with the Australian Competition Tribunal in the first instance in order to retain the existing choice between alternative formal processes depending on the nature of the acquisition in question.

The Business Council supports the Final Report's Recommendation 35 insofar as it relates to the formal clearance process, in particular that:

- 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 (subject to the Business Council's comments on the ACCC's investigative powers below).
- The formal process should be subject to strict time lines 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 time lines.

In respect of the last point, the review of formal clearances should be a full merits review and not restricted to a 'review on the documents'. This will allow the tribunal to consider all aspects of a merger and both proponents and opponents of a merger to adduce all available relevant information.

The Business Council supports the review panel's view that the specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC. It also supports the ex-post evaluation of merger decisions by the Australian Council for Competition Policy in order to increase confidence in ACCC decision making.

The ACCC's investigative powers (Final Report Recommendation 40)

The Business Council agrees with the review that 'the ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated'.

The panel's view would be better reflected if the obligation to frame notices in the narrowest form possible, consistent with the scope of the matter being investigated, were enshrined in section 155 itself.

A Ministerial Direction could also require the ACCC to review and update its guidelines to ensure that they are consistent with this principle, including with regard to the increasing burden imposed by notices in the digital age.

Private enforcement and admissions of fact (Final Report Recommendation 41)

The review's recommendation to amend section 83 of the CCA to extend to agreed admissions of fact, in addition to findings of fact made by the court, raises significant concerns.

Agreed admissions or statements of fact are presented to the court by parties wishing to reduce the costs and uncertainties of litigation. They have been used in the majority of ACCC legal actions and have accounted for the majority of ACCC penalties awarded. However, agreed admissions will be substantially less appealing to respondents if they are used to facilitate private litigation, including class actions, by constituting prima facie evidence in these subsequent actions.

The additional advantage that might be provided by the recommendation is not worth overturning the principles identified by the courts or the clear benefits of effective settlement to the enforcement process.

National access regime (Final Report Recommendation 42)

The review comments that 'imposing an access regime upon privately developed single-user infrastructure is more likely to produce inefficiency than efficiency, impeding the competitiveness of Australian industry' (p. 431). The Business Council agrees with this conclusion. The review however does not then go on to make a recommendation to confine the application of the National Access Regime in accordance with its conclusion.

To give effect to the review's conclusion, and for the reasons outlined in our earlier submission, the Business Council recommends that Part IIIA of the Act be amended so that the declaration regime is confined to airports and any other former publicly owned multi-user facilities that do not have an access regime. The Business Council recommends that other processes under Part IIIA be retained, including provision for the lodgement of access undertakings.

The Business Council considers that the review should have addressed the risk posed by the High Court judgement in the Pilbara Infrastructure case, and the prospect that this may politicise future declaration decisions under the National Access Regime. The Business Council views access regulation as principally a form of economic (rather than social) policy and recommends that Part IIIA be amended to clarify that decisions of the

minister in respect of the 'public interest' under s.44H(4)(f) involve an overall assessment of the economic costs and benefits of declaration – and that this decision be subject to review by the tribunal.

3. Competition institutions

To drive continuous improvement in our business environment, the Business Council strongly supports establishing institutional arrangements and incentives to drive ongoing implementation of competition policy.

Australian Council for Competition Policy (ACCP) (Final Report Recommendations 43–48)

The Australian Council for Competition Policy (ACCP) should be established as a priority so that the necessary institutional arrangements are in place across the federation to implement the recommendations in the Final Report.

The proposed ACCP would share funding and governance arrangements between the Commonwealth, state and territory governments, and this will ensure all governments take ownership of the ongoing competition policy reform program.

Access and pricing regulator (Final Report Recommendation 50)

The Business Council supports the establishment of a dedicated access and pricing regulator, independent of the ACCC, for the reasons outlined in our earlier submission on the Draft Report.

The Business Council however does not agree with the panel's view that the declaration functions of the National Competition Council should be transferred to the new access and pricing regulator. There should remain clear institutional separation between declaration functions (and other similar regulatory functions) and arbitration functions.

If the ACCP is instituted according to the review's recommendations, the Business Council sees benefit in that new body taking on any declaration role, to the extent that the declaration process is retained under Part IIIA, with the new pricing and access regulator taking over responsibility for the ACCC's current role of arbitrating disputes and accepting access undertakings under Part IIIA.

This would mirror the current separation between the declaration decision (National Competition Council) and decisions relating to the terms of access (ACCC). The Business Council considers that this separation enables the determination of terms of access (through arbitration) to more independently assess and respond to any costs of providing access.

The Business Council considers that the quality of substantive decision making by the new access and pricing regulator would be improved by:

- the establishment of a board (as recommended by the review)
- the re-introduction of merits review for final decisions – including the ability of the tribunal to hear direct evidence

- the establishment of a new requirement that the access and pricing regulator consult upon, and periodically publish, a strategy document. This document would set out its regulatory objectives, including how it plans to reduce regulatory burdens over time (in order to provide transparency and certainty for industry).

ACCC governance (Final Report Recommendation 51)

The final report introduces a new recommendation to appoint part-time commissioners to the ACCC to inject wider views into decision making. The Business Council supports the review panel's conclusion that this is needed.

However, we question whether this will be achieved by requiring half of the ACCC commissioners to be appointed on a part-time basis. Part-time commissioners would be expected to be less influential than a full-time chair and commissioners.

The government will need to test the effectiveness of appointing part-time commissioners against alternative options for governance reform that might better meet the review's objective of injecting wider views into ACCC decision making. For instance the review had originally suggested a board could be established, as it has recommended for the proposed new Access and Pricing Regulator.

Small business access to remedies (Final Report Recommendation 53)

The Business Council does not support the review's recommendation that access to justice would be improved by the ACCC being resourced to 'test the law on a regular basis'. The law should be tested only if doing so is likely to be in the public interest.

Enforcement decisions are part of the ACCC's overall remit to administer the law, which includes resourcing to enforce the law when necessary, as well as inform regulated entities of what compliance looks like, to minimise non-compliance and as a result, lower enforcement costs.

The statement 'test the law on a regular basis' presumes undue reliance on a punitive, rather than educative approach to administering regulation, inconsistent with best practice regulatory administration.[2]

2. ANAO (Australian National Audit Office), *Administering Regulation – Achieving the Right Balance, Better Practice Guide*, June 2014

Attachment 1: Table of Business Council positions against the 56 recommendations in the Final Report

Competition Policy Review – Business Council of Australia position on final report recommendations

No		Business Council of Australia position
	Competition Policy	
1	**Competition principles** 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. • Legislative frameworks and government policies and regulations binding the public or private sectors should not restrict competition. • Governments should promote consumer choice when funding, procuring or providing goods and services and enable informed choices by consumers. • The model for government provision or procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and should encourage a diversity of providers. • Governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities. • Government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership. • A right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest. • Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers. Applying these principles should be subject to a public interest test, such that legislation or government policy should not restrict competition unless: • the benefits of the restriction to the community as a whole outweigh the costs; and • the objectives of the legislation or government policy can only be achieved by restricting competition.	Support

No		Business Council of Australia position
2	**Human services** Each Australian government should adopt choice and competition principles in the domain of human services. Guiding principles should include: • User choice should be placed at the heart of service delivery. • Governments should retain a stewardship function, separating the interests of policy (including funding), regulation and service delivery. • Governments commissioning human services should do so carefully, with a clear focus on outcomes. • A diversity of providers should be encouraged, while taking care not to crowd out community and volunteer services. • Innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.	Support. The Australian Council for Competition Policy (ACCP) should be tasked with advising governments on implementation.
3	**Road transport** Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and revenues used for road construction, maintenance and safety. To avoid imposing higher overall charges on road users, governments should take a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Australian Government grants to the States and Territories.	Support, and implement the COAG heavy vehicle charging and investment reforms as a practical first step towards comprehensive road pricing reform.
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.	Support

No		Business Council of Australia position
5	**Cabotage — coastal shipping and aviation** Noting the current Australian Government Review of Coastal Trading, cabotage restrictions on coastal shipping should be removed, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the government policy can only be achieved by restricting competition. The current air cabotage restrictions should be removed for all air cargo as well as passenger services to specific geographic areas, such as island territories and on poorly served routes, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the restrictions can only be achieved by restricting competition. Introducing an air cabotage permit system would be one way of regulating air cabotage services more effectively where necessary.	Support removal of cabotage restrictions under the Coastal Trading Act. Do not support the review's recommendation on air cabotage restrictions.
6	**Intellectual property review** The Australian Government should task the Productivity Commission to undertake an overarching review of intellectual property. The Review should be a 12-month inquiry. The review should focus on: competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements. A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements. Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.	Support
7	**Intellectual property exception** Subsection 51(3) of the CCA should be repealed.	Refer consideration of the repeal of the subsection to the Intellectual Property review in Recommendation 6 above.

No		Business Council of Australia position
8	**Regulation review** All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed. Legislation (including Acts, ordinances and regulations) should be subject to a public interest test and 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 legislation can only be achieved by restricting competition. Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators. Jurisdictional exemptions for conduct that would normally contravene the competition law (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent. The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform. The review process should be overseen by the proposed Australian Council for Competition Policy (see Recommendation 43) with a focus on the outcomes achieved rather than processes undertaken. The Australian Council for Competition Policy should publish an annual report for public scrutiny on the progress of reviews of regulatory restrictions.	Support and recommend the review program prioritise the removal of restrictions on competition where there are the largest potential gains to the economy (at least in the first round of legislative reviews). A preliminary assessment should be undertaken to identify those regulations.

No		Business Council of Australia position
9	**Planning and zoning** 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. The following competition policy considerations should be taken into account: • Arrangements that explicitly or implicitly favour particular operators are anti-competitive. • Competition between individual businesses is not in itself a relevant planning consideration. • Restrictions on the number of a particular type of retail store contained in any local area is not a relevant planning consideration. • The impact on the viability of existing businesses is not a relevant planning consideration. • Proximity restrictions on particular types of retail stores are not a relevant planning consideration. • Business zones should be as broad as possible. • Development permit processes should be simplified. • Planning systems should be consistent and transparent to avoid creating incentives for gaming appeals. An independent body, such as the Australian Council for Competition Policy (see Recommendation 43) should be tasked with reporting on the progress of state and territory governments in assessing planning and zoning rules against the public interest test.	Support and also: • adopt the BCA's recommendations for a consistent national approach to major project approvals processes. • Implement full inter-jurisdictional coordination of environmental approval processes under the Environment Protection and Biodiversity Conservation (EPBC) Act, based on the one-stop shop model for major project approvals.
10	**Priorities for regulation review** Further to Recommendation 8, and in addition to reviewing planning and zoning rules (Recommendation 9), the following should be priority areas for review: • **Taxis and ride-sharing**: in particular, regulations that restrict numbers of taxi licences and competition in the taxi industry, including from ride-sharing and other passenger transport services that compete with taxis. • **Mandatory product standards**: i.e., standards that are directly or indirectly mandated by law, including where international standards can be adopted in Australia.	Support and add as priorities: • Repeal of the Australian Jobs Act due to anti-competitive requirements to produce industry participation plans • Repeal of labour market testing for 457 visas under the Migration Act • Occupational licensing restrictions • Private health insurance and prosthetic price regulation.
11	**Standards review** Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, Australian Standards that are not mandated by government should be subject to periodic review against the public interest test (see Recommendation 8) by Standards Australia.	Support

No		Business Council of Australia position
12	**Retail trading hours** 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. Deregulating trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing or gambling services in order to achieve the policy objective of harm minimisation.	Support
13	**Parallel imports** 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. Consistent with the recommendations of recent Productivity Commission reviews, parallel import restrictions on books and second-hand cars should be removed, subject to transitional arrangements as recommended by the Productivity Commission. Remaining provisions of the Copyright Act 1968 that restrict parallel imports, and the parallel importation defence under the Trade Marks Act 1995, should be reviewed by an independent body, such as the Productivity Commission.	Support

No		Business Council of Australia position
14	**Pharmacy** 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. The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access to medicines and quality of advice regarding their use that do not unduly restrict competition. Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to implement a further targeted relaxation of the location rules, as part of a transition towards their eventual removal. If changes during the initial years of the new agreement prove too precipitate, there should be provision for a mid-term review to incorporate easing of the location rules later in the life of the next Community Pharmacy Agreement. A range of alternative mechanisms exist to secure access to medicines for all Australians that are less restrictive of competition among pharmacy service services providers. In particular, tendering for the provision of pharmacy services in underserved locations and/or funding through a community service obligation should be considered. The rules targeted at pharmacies in urban areas should continue to be eased at the same time that alternative mechanisms are established to address specific issues concerning access to pharmacies in rural locations.	Support
15	**Competitive neutrality policy** All Australian governments should review their competitive neutrality policies. Specific matters to be considered should include: guidelines on the application of competitive neutrality policy during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities. The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Recommendation 43).	Support

No		Business Council of Australia position
16	**Competitive neutrality complaints** All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum: • assigning responsibility for investigation of complaints to a body independent of government; • a requirement for government to respond publicly to the findings of complaint investigations; and • annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Recommendation 43) on the number of complaints received and investigations undertaken.	Support
17	**Competitive neutrality reporting** To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports. The proposed Australian Council for Competition Policy (see Recommendation 43) should report on the experiences and lessons learned from the different jurisdictions when applying competitive neutrality policy to human services markets.	Support
18	**Government procurement and other commercial arrangements** 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. Procurement and privatisation policies and practices should not restrict competition unless: • the benefits of the restrictions to the community as a whole outweigh the costs; and • the objectives of the policy can only be achieved by restricting competition. An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with reporting on progress in reviewing government commercial policies and ensuring privatisation and other commercial processes incorporate competition principles.	Support and prioritise: • repeal of the Australian Jobs Act due to anti-competitive requirements to produce industry participation plans. • ACCP examining how to obtain effective competition outcomes following privatisation, without losing the efficiency benefits.

No		Business Council of Australia position
19	**Electricity and gas** State and territory governments should finalise the energy reform agenda, including through: • application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions; • deregulation of both electricity and gas retail prices; and • the transfer of responsibility for reliability standards to a national framework administered by the proposed Access and Pricing Regulator (see Recommendation 50) and the Australian Energy Market Commission (AEMC). The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical connection. The Australian Government should undertake a detailed review of competition in the gas sector.	Support finalisation of the energy reform agenda.
20	**Water** All governments should progress implementation of the principles of the National Water Initiative, with a view to national consistency. Governments should focus on strengthening economic regulation in urban water and creating incentives for increased private participation in the sector through improved pricing practices. State and territory regulators should collectively develop best-practice pricing guidelines for urban water, with the capacity to reflect necessary jurisdictional differences. To ensure consistency, the Australian Council for Competition Policy (see Recommendation 43) should oversee this work. State and territory governments should develop clear timelines for fully implementing the National Water Initiative, once pricing guidelines are developed. The Australian Council for Competition Policy should assist States and Territories to do so. Where water regulation is made national, the responsible body should be the proposed national Access and Pricing Regulator (see Recommendation 50) or a suitably accredited state body.	Support

No		Business Council of Australia position
21	**Informed choice** 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. The proposed Australian Council for Competition Policy (see Recommendation 43) should establish a working group to develop a partnership agreement that both allows people to access and use their own data for their own purposes and enables new markets for personal information services. This partnership should draw on the lessons learned from similar initiatives in the US and UK. Further, governments, both in their own dealings with consumers and in any regulation of the information that businesses must provide to consumers, should draw on lessons from behavioural economics to present information and choices in ways that allow consumers to access, assess and act on them.	Support and prioritise flexible approaches to data collection and use that minimise business costs. Non-legislative measures are to be preferred.
	Competition law	
22	**Competition law concepts** 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.	Support
23	**Competition law simplification** The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions. The process of simplifying the CCA should involve public consultation. Provisions that should be removed include: • subsection 45(1) concerning contracts made before 1977; and • sections 45B and 45C concerning covenants.	Support
24	**Application of the law to government activities** Sections 2A, 2B and 2BA of the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce. This recommendation is reflected in the model legislative provisions in Appendix A.	Support

No		Business Council of Australia position
25	**Definition of market and competition** 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. This recommendation is reflected in the model legislative provisions in Appendix A.	Support
26	**Extra-territorial reach of the law** 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 in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law. This recommendation is reflected in the model legislative provisions in Appendix A.	Support in principle

No		Business Council of Australia position
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. This recommendation is reflected in the model legislative provisions in Appendix A.	Support
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. This recommendation is reflected in the model legislative provisions in Appendix A.	Support
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. This recommendation is reflected in the model legislative provisions in Appendix A.	Support the repeal of price signalling Do not support proceeding with the extension of s45 to 'concerted practices'.

No		Business Council of Australia position
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.	Not supported
31	**Price discrimination** A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the Panel's recommended revisions to section 46 (see Recommendation 30)). Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports (see Recommendation 13) and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.	Support

No		Business Council of Australia position
32	**Third-line forcing test** 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
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).	Not supported. The Business Council recommends that vertical restrictions should be excluded from section 45 and assessed exclusively under section 47.
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, but notification should be available for RPM conduct. This recommendation is reflected in the model legislative provisions in Appendix A. The prohibition should also be amended to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.	RPM should cease to be a *per se* prohibition and be subject to a substantial lessening of competition test. Support extension of notification process to RPM.

No		Business Council of Australia position
35	**Mergers** 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. 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 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. Merger review processes and analysis would also be improved by implementing a program of post-merger evaluations, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the Australian Council for Competition Policy (see Recommendation 44).	Support the streamlining of the formal clearance process. However: • Existing formal processes should be kept separate, with formal clearance with the ACCC and authorisation with the tribunal at first instance. • Review by the tribunal of ACCC formal clearance decisions should be a full merits review.
36	**Secondary boycotts** The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced. The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.	Support

No		Business Council of Australia position
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.	Support
38	**Authorisation and notification** 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. This recommendation is reflected in the model legislative provisions in Appendix A.	Support
39	**Block exemption power** 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. This power would enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns, on the same basis as the test proposed by the Panel for authorisations and notifications (see Recommendation 38). The ACCC should also maintain a public register of all block exemptions, including those no longer in force. The decision to issue a block exemption would be reviewable by the Australian Competition Tribunal. The Panel's recommended form of block exemption power is reflected in the model legislative provisions in Appendix A.	Support

No		Business Council of Australia position
40	**Section 155 notices** 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 review of ACCC guidelines. Recommend that the obligation for the ACCC to frame notices in the narrowest form possible should be enshrined in section 155 itself. A Ministerial Direction should also require the ACCC to review and update its guidelines to ensure that they are consistent with this principle. Support amending section 155 to include the proposed defence.
41	**Private actions** Section 83 of the CCA 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. This recommendation is reflected in the model legislative provisions in Appendix A.	Not supported
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.	Support the changes to the declaration criteria. Recommend the regime be confined to 1) airports and 2) any other former publicly owned multi-user facilities that do not have an access regime. Recommend that the merits review should be unfettered in relation to criterion (f).

No		Business Council of Australia position
	Institutions and governance	
43	**Australian Council for Competition Policy — Establishment** 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 ACCP should be established under legislation by one State and then by application in all other States and Territories and at the Commonwealth level. It should be funded jointly by the Australian Government and the States and Territories. The ACCP should have a five-member board, consisting of two members nominated by state and territory Treasurers and two members selected by the Australian Government Treasurer, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories combined. The Chair should be appointed on a full-time basis and other members on a part-time basis. Funding should be shared by all jurisdictions, with half of the funding provided by the Australian Government and half by the States and Territories in proportion to their population size.	Support
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.	Support.
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.	Support market studies where: 1) there is clear evidence of systemic problems or significant public concerns; and 2) the study is in the public interest rather than market participants' interest.

No		Business Council of Australia position
46	**Market studies requests** 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. The work program of the ACCP should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.	Support, subject to the market study thresholds in our response to 45 above.
47	**Annual competition analysis** The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.	Support
48	**Competition payments** 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. Reform effort should be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.	Support
49	**ACCC functions** Competition and consumer functions should be retained within the single agency of the ACCC.	Support

No		Business Council of Australia position
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.	Support and ensure institutional separation of declaration (and similar functions), arbitration and policy functions. The NCC and ACCC declaration functions under the national access regime should not be placed with the new Access and Pricing Regulator.

No		Business Council of Australia position
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.	The BCA is concerned that part-time commissioners would have limited influence with a full-time Chair and commissioners. The BCA supported an independent board option (as proposed above for the Access and Pricing Regulator) in our submission on the draft report. This was in response to the review itself suggesting a board should be considered to improve ACCC governance. The government should test alternative governance models that will best achieve the review's recommendation to inject wider views into ACCC decision making.
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*.	Support

No		Business Council of Australia position
53	**Small business access to remedies** The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement. Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation. Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour. Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services. The Panel endorses the following recommendations from the Productivity Commission's Access to Justice Arrangements report: • Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services; • Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner; • Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code; • Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and • Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.	Support, in principle, with an exception that the ACCC should not be resourced to 'test the law on a regular basis' but to test the law when there is a clear public interest in doing so.

No		Business Council of Australia position
54	**Collective bargaining** The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business. Reform should include allowing: • the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members; • the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and • different timeframes for different collective bargaining notifications, based on the circumstances of each application. Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public. The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions. The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.	Support
55	**Implementation** The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.	Support
56	**Economic modelling** 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.	Support

Sources: Australian Government Competition Policy Review 2015 and Business Council of Australia

Attachment 2: Detailed analysis of the Competition Law recommendations in the Final Report

Detailed analysis of the Competition Law recommendations in the Final Report

As set out in its submissions to the Competition Policy Review, the Business Council supports the review's efforts to ensure that Australia's competition law remains fit for purpose and supports the review's following criteria in assessing this question:

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

However, there are conflicts both within and between these criteria. A law that is clear may not be simple, and a law that is simple may not be predictable. A law that is not clear or predictable can interfere with efficiency, innovation and entrepreneurship, protect individual competitors and risk reducing consumer wellbeing over the long term.

The Business Council agrees that Australia's competition law is in many aspects complex and overly prescriptive rather than principles-based. It supports many of the review's recommendations and commends them to the government, in particular:

- the simplification of the cartel provisions and the expansion of exceptions for joint ventures and vertical arrangements
- the removal of the price signalling laws
- the simplification of section 47 and the removal of the *per se* prohibition of third line forcing
- the removal of the predatory pricing and "Birdsville" amendments to section 46
- the extension of the notification process to resale price maintenance
- the simplification of the authorisation and notification processes.

However, a number of the review's other recommendations may go too far in an effort to simplify and align the various sections of the competition law, ignoring significant differences in the conduct addressed and reducing the certainty and guidance to business that is provided by clearly defined categories of conduct.

In particular, the Business Council is concerned at the review's apparent view that the 'purpose, effect or likely effect of substantially lessening competition' test is or should be the 'standard test' of the competition law.

While the substantial lessening of competition test is ideal in some circumstances, it is not the 'standard test' of Australian competition law and should not be. No single test is

capable of addressing the wide range of competitive and anti-competitive conduct that the CCA must distinguish. The overzealous extension of any single test into areas of law where its use is inappropriate will result in uncertainty and will risk interfering with efficiency and innovation to the detriment of consumer wellbeing in the long term.

Before introducing a new test or extending an existing test to another provision of the competition law, it is always necessary to ask whether that test is fit for purpose – taking into account the specific purpose of the provision in question.

For these and related reasons, the Business Council does not support the following recommendations:

- proposed changes to the section 46 'misuse of market power' provision (Recommendation 30)
- introduction of a new law covering 'concerted practices' (Recommendation 29)
- removal of section 47 on exclusive dealing (Recommendation 33)
- retention of the *per se* prohibition on resale price maintenance (Recommendation 34)
- extension of section 83 of the CCA to agreed admissions of fact. (Recommendation 41)

These and other parts of the competition law section in the Final Report that are of concern to the Business Council are explored below.

Misuse of market power

Misuse of market power under section 46 of the CCA has been a central issue of the review since it was first announced by the Coalition in opposition.[3] While the scope of the review has expanded considerably to cover many important areas of microeconomic reform, the issue of misuse of market power remains important and should not be seen simply as a distraction from these broader reforms.

As competition is introduced into new areas such as health and human services, it is critical that businesses – including large and efficient businesses – are able to compete vigorously in these areas in order to lower prices and increase consumer choice. If competition is discouraged or muted due to uncertain or overly intrusive legislation, the efficiencies intended by these reforms will not be fully achieved.

The present section 46 provides the clarity and certainty necessary to allow businesses to compete vigorously while avoiding any conduct that is likely to damage the competitive process. To achieve the important reforms contemplated by the Final Report, the fundamental character of section 46 should not be changed as has been proposed. The review has not established a case for change, but has made two attempts to redraft the section – presenting different but equally concerning problems and no solutions.

[3] See for example Bruce Billson MP, Hansard, House of Representatives, 7 July 2011: "I think that section 46 needs to be revisited… I would think there is a very strong argument for adding purpose and effect."

This section summarises and updates the key arguments of the Business Council's submissions to the review, with particular regard to changes in the panel's reasoning or recommendations since the Draft Report, and issues that have been raised publicly by the panel, the Australian Competition and Consumer Commission (ACCC) and other commentators since the Final Report was released.

The case for change has not been made

In 1993, the Hilmer Review set out a standard for evaluating proposed changes to section 46 that remains appropriate today:

> [T]he challenge is to provide a system which can distinguish between desirable and undesirable activity while providing an acceptable level of business certainty. **In this respect it is important to stress that uncertainty over the bounds of legally acceptable behaviour may deter efficient and socially useful competitive behaviour.**
>
> In addressing this challenge, the Committee starts from the position that there is already in place a regime which provides a basis for making the appropriate distinctions, that the regime is broadly consistent with approaches in comparable overseas jurisdictions, and that it has been sufficiently interpreted by the High Court to provide a reasonable degree of business certainty as to the limits of acceptable conduct. Moreover, none of the submissions presented to the Inquiry gave practical examples of any particular behaviour that was not proscribed by the current law and yet was clearly unacceptable. **The Committee thus considers that proposals for alternative mechanisms for dealing with misuse of market power should offer a demonstrable improvement over the current regime to justify introducing further uncertainty in this difficult area.**

The Business Council sees no reason to depart from the Hilmer Review's approach. As set out in its submissions to the review, the Business Council does not consider that any case has been made that the existing section 46 is inadequate or that an alternative test would better achieve the objects of the CCA.

In recommending fundamental change to section 46, the Final Report appears to rely on an over-simplification of the 'take advantage' element and a superficial objection to competitors in the current section. Even if these arguments were convincing, they would need to be weighed against the practical need for change and the practical impact of any proposed change.

That is, under the Hilmer Review standard, section 46 should be amended only if it can be demonstrated that, in practice, another test would result in an increase in competition overall – taking into account the anti-competitive conduct that may be captured, the pro-competitive conduct that may be chilled or prevented – including by increased uncertainty – and the costs of applying or predicting the application of the new test.

The ACCC acknowledges that it has never lost a case on the basis of purpose. It has won almost two-thirds of the section 46 cases it has run; and where it has failed on section 46 it has often prevailed on other sections of the CCA. In the past 25 years it has brought twice as many section 46 cases as the United States Department of Justice has instituted monopolisation cases; and it has still provided no examples of cases that it has failed to investigate or litigate due to concerns with section 46.

The onus is on the proponents of change to demonstrate that the current law is deficient or that alternatives from overseas or elsewhere would be likely to provide superior results

in Australia. They have failed to do so. They must further show – rather than assert – that the proposed solution would not capture or deter legitimate conduct and would not introduce uncertainty so as to outweigh any increased capture of anti-competitive conduct. They have not attempted to do so.

The 'take advantage' element

The 'take advantage' element of section 46 currently requires a connection between a corporation's market power and its actions. Without this nexus, a corporation with market power could be prevented from engaging in conduct that has a perfectly legitimate business justification, would be expected in a perfectly competitive market, and would remain available to its competitors.

Since even businesses with relatively low market shares may be found to have market power, and markets can be defined very narrowly, the removal of this element is likely to affect a significant number of businesses engaging in legitimate competitive behaviour that may, as the Dawson Review recognised, have the unintended effect of lessening competition in a market. That would further discourage competition to the detriment of consumers.

The Final Report argues that the 'take advantage' element is inappropriate because:

> Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

This is not a fair characterisation of the operation of section 46. The 'take advantage' element does not operate to immunise categories of conduct on the basis that they are also undertaken by firms without market power. It examines particular conduct in particular circumstances – with reference to the objective purposes of the conduct – and asks whether, in all those circumstances, a firm without market power could profitably have engaged in that conduct in order to achieve those purposes.

The importance of examining the conduct in question with the appropriate level of specificity was emphasised in the *Cement Australia* case:[4]

> Because that question involves a hypothetical construct it must be answered by applying an objective test but one which takes into account the legitimate business reasons identified by the firm for engaging in the conduct.
>
> However, that question is not to be *disengaged* from the conduct to the extent of asking a slightly *abstracted* and less relevant question... rather than a more focused question of whether such a profit maximising firm functioning in a workably competitive market would bid and ultimately contract for the acquisition of such an input *on the terms* upon which it actually contracted. Would it have been profitable for such a firm, so constrained, to engage in the *very particular conduct* under challenge?...
>
> If it can be demonstrated that … a profit maximising firm operating in a workably competitive market *could* in a commercial sense *profitably* engage in the conduct in question having regard to the ordinary business rationale identified, it follows that the corporation has not

[4] *ACCC v Cement Australia* [2013] Federal Court of Australia (FCA) 909 at para. 1902–1903.

> used its market power in a manner made possible only by the absence of competitive conditions.

In the *Pfizer* case, the court recognised that loyalty rebate schemes were common in the industry, but found that Pfizer's particular rebate scheme – where rebates were accrued during the period of Pfizer's patent monopoly to be redeemed after that period – could only be implemented due to Pfizer's market power.[5]

The 'take advantage' element has been subject to recent law reform suggested by the ACCC and adopted using the ACCC's language to address concerns with the test. This expanded test was applied in the *Pfizer* case without apparent difficulty. The 'take advantage' test should not cause any concerns as long as it is applied with adequate precision, and there is no evidence of widespread misapplication of the test.

Competitors or competition?

The Final Report appears to consider that the next significant issue is the question of whether section 46 does or should protect competitors or competition:

> Presently, the purpose test in section 46 focuses on harm to individual competitors − conduct will be prohibited if it has the purpose of eliminating or substantially damaging a **competitor**, preventing the entry of a **person** into a market, or deterring or preventing a **person** from engaging in competitive conduct.
>
> Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself − that is, the competitive process.

It is axiomatic that competition law is concerned with the protection of the competitive process rather than harm to individual competitors − which is an expected outcome of vigorous competition. These principles have been consistently applied in the Australian case law on the current section 46. The courts have had no difficulty reconciling the ultimate goal of protecting competition and consumer welfare with the proximate mechanism of prohibiting conduct that has the purpose of eliminating, damaging or excluding competitors. As Lockhart and Gummow JJ said in Eastern Express:[6]

> Part IV of the Act is designed to promote competition, and the role of Section 46 is to maintain competitive markets by restraining misuses of market power that will produce a non-competitive market.

The current section 46 identifies certain categories of exclusionary conduct – eliminating or substantially damaging a competitor, preventing a person from entering a market, or deterring or preventing a person from engaging in competitive conduct in a market – as particularly likely to produce a non-competitive market. To suggest that the current section 46 is concerned with harm to individual competitors is to misconstrue the section and ignore its judicial interpretation.

ACCC Chairman Rod Sims has explained that the 'substantial lessening of competition' test proposed by the ACCC and adopted by the Draft Report is designed to catch

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[5] *ACCC v Pfizer* [2015] Federal Court of Australia *(*FCA*)* 113

[6] *Eastern Express Pty Limited v General Newspapers Pty Limited* (1992) ATPR 41-167.

'exclusionary conduct', that is, 'behaviour that excludes others from the market'[7] or 'when a business takes steps to prevent competitors from entering a market.'[8]

Such a test is no less concerned with competitors than the current section 46. Both tests are intended to prohibit conduct that damages the competitive process by excluding competitors. However, the current section 46 makes this mechanism explicit and provides guidance to business as to conduct they should avoid, while the proposed test relies on an interpretation of the 'substantial lessening of competition' test that has never been tested and is at odds with the ACCC's enforcement of other parts of the CCA.

The proposed 'effects test'

It may be useful here to confirm that the Business Council is here and in public statements responding to the test first proposed in the Draft Report and adopted in the Final Report. Fundamentally that test replaces the current section 46 with a new provision that:

> A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

The Draft Report attempted to qualify this test with a defence, and the Final Report attempts to explain it with legislative guidance, but the Business Council considers that neither of these attempts would have sufficient practical effect to alter the primary test.

ACCC Chairman Rod Sims has criticised opposition to an 'effects test' as reflecting an assumption that the changes will simply add an effects alternative to the current section 46. Professor Harper has similarly expressed concern that opponents of the proposed changes have failed to consider the specific details of the proposal, and have placed undue reliance on past reviews that only rejected certain forms of 'effects test' but did not consider proposals similar to that of the Final Report.

Many participants in the debate have used the description 'effects test' to summarise the changes that have been proposed to section 46 since the review was first announced. The Business Council considers that the widening of the section to include effects as well as purposes remains the most significant change to the section, because it requires a business to look beyond its own intentions and strategies – which are certain – and predict the effects of its conduct – which are not.

However, the Business Council has always acknowledged and addressed the other changes to section 46 proposed by the review. These changes – removing the 'taking advantage' element and replacing the three specific exclusionary purposes with a 'substantial lessening of competition' test – have been debated extensively in submissions to the review by the Business Council and many others. The defence proposed in the Draft Report was subject to particular scrutiny and the legislative guidance of the Final Report also appears to have attracted a great deal of commentary.

Previous reviews of the competition law have also considered – and rejected – proposals that were practically identical to the Final Report's recommendation for section 46 over the

[7] ABC, 'The World Today', 2 September 2014.

[8] ACCC media release, *Our economy needs more competition on the merits*, 13 September 2014. https://www.accc.gov.au/media-release/our-economy-needs-more-competition-on-its-merits

past three decades. Most of these reviews have not limited their discussion to particular forms of section 46 but have concluded that, as a matter of principle, a predatory or exclusionary purpose should be an essential element of the section.

For example, the 1989 Griffiths Review considered the Trade Practices Commission's (TPC) proposal that section 46 might be replaced with:[9]

> ... a provision which prohibits a corporation with a substantial degree of power in a market from engaging in conduct which has the purpose or has or is likely to have the effect of lessening competition in any market.

This is substantially identical to the review's recommendation, but the Griffiths Review found that there was no need for any change to the section.

In 1991, the Cooney Committee considered proposals to prohibit conduct that had the purpose or effect of substantially lessening competition in the Trade Practices Act. It concluded that:[10]

> ... in a provision directed explicitly at misuse of market power it is appropriate that a distinction between purpose and consequence be retained. The Committee accepts that purpose is an essential element of the contravention.

In 1993, the Hilmer Review *only* considered an effects test based on a substantial lessening of competition, noting that[11]:

> The TPC proposed that unilateral conduct should be prohibited if it has the effect of substantially lessening competition. Such a test would not, in the Committee's view, constitute an improvement on the current test. It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct …
>
> Firms should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation... The Committee takes the view that an effects test is too broad in this regard.
>
> **The courts might develop a gloss upon an effects test to ensure that it did not prohibit economically efficient conduct, but it is not clear that the final result would differ from the existing interpretation of s.46, or that any such difference would constitute an improvement.**

The review panel does not appear to have considered or heeded the Hilmer Report's warning on a 'substantial lessening of competition' test for section 46 or the likely result of any gloss on such a test. Certainly it is not clear that either of the review panel's attempted 'glosses' – the defence or the legislative guidance – constitute an improvement over the current law.

Most recently, in 2003 the Dawson Review first considered adding an 'effects test' to the current section 46 (as then proposed by the ACCC), and then considered a 'substantial lessening of competition' alternative:[12]

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9 The TPC recommended retaining s46 in its current form but presented this alternative for debate and consideration. Griffiths Report, *Mergers, Takeovers and Monopolies: Profiting from Competition?*, May 1989, p. 29.

10 Cooney Report, *Mergers, Monopolies and Acquisitions*, May1991, p. 96.

11. Hilmer Report, *National Competition Policy*, August1993, pp. 70-71.

12 Dawson Report, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, pp 84-85.

> An alternative to the effects test proposed by the ACCC is to be found in some of the submissions. It is the amendment of section 46 to prohibit a corporation that has a substantial degree of market power from taking advantage of that power with the effect or likely effect of substantially lessening competition in a market.
>
> However, such an amendment would only serve to exacerbate the difficulties identified above in relation to the ACCC's proposed amendment. It would change the focus of section 46 from that of conduct with a proscribed purpose to that of conduct with a proscribed effect, the effect being the substantial lessening of competition in a market. Since the effect of legitimate competitive activities may result in the lessening of competition in a market, the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct. Competitive behaviour would be discouraged by the prospect of proceedings under section 46.

The test rejected by the Dawson Review differs from the review's proposal. The Dawson test retained the 'take advantage' element, and required an effect or likely effect, and not alternatively a purpose, of substantially lessening competition. The review's proposal could only raise more issues than the narrower proposal considered by the Dawson Review.

In these circumstances, any claim that past reviews have only dealt with irrelevant formulations of an 'effects test' are not only misleading but also concerning. Previous reviews have considered proposals which are very close or identical to the review's proposal, and have interrogated the principles behind them in depth. The review panel appears to have dismissed this analysis on a clearly erroneous basis, and to have ignored crucial argument and evidence. The Business Council urges the government to revisit these previous assessments, as their reasoning remains directly relevant.

Cost and uncertainty for business

The Business Council and other stakeholders remain concerned that the proposed changes to section 46 may discourage innovation, investment and low pricing made possible by efficiencies and economies, with the result that consumers may pay more for less. The need to address this concern has been recognised by most assessments of similar laws throughout the world and in previous reviews.

For example, the US Department of Justice and the Federal Trade Commission have acknowledged that:[13]

> [I]t is often difficult to distinguish illicit conduct from legitimate competition, and that a mistake can result in costs that extend far beyond the particular case by chilling the legitimate conduct of other firms.

Even supporters of 'effects tests' point out the costs that these tests can impose on businesses, agencies and the competitive process:[14]

> [B]ecause this approach generates fact-driven outcomes, it tends to lead to greater delays and costs for the agency and those under investigation. The approach also makes it more difficult for business planners and counsel to predict whether specific conduct is likely to

[13] International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007.

[14] International Competition Network, *Unilateral Conduct Workbook,* April 2012.

> result in an infringement decision. This uncertainty may result in a chilling effect, as firms avoid conduct that may in fact be pro-competitive and lawful …
>
> The cost of over-enforcement is a lessening of pro-competitive behaviour on the part of dominant firms. This may result in static efficiency losses from the dominant firm's reduced incentives to cut prices or compete hard, as well as from competitors having to compete less vigorously in response. It can also result in the loss of dynamic efficiency due to the dominant firm's lessened incentives to innovate and make initial investments.

The US Supreme Court has also warned of these costs:[15]

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs … Mistaken inferences and the resulting false condemnations 'are especially costly because they chill the very conduct the antitrust laws are designed to protect.' The cost of false positives counsels against an undue expansion of [Sherman Act] § 2 liability.

These risks have also been identified by previous reviews of Australia's competition law evaluating section 46. The Hilmer Review noted:[16]

> As the High Court has observed, the very essence of the competitive process is conduct which is aimed at injuring competitors … Firms should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation. There is a serious risk of deterring such conduct by too broad a prohibition of unilateral conduct. The Committee takes the view that an effects test is too broad in this regard...
>
> The current provision has the advantage over an effects test of an appropriate interpretation and a greater level of certainty for businesses.

The Dawson Review similarly concluded:[17]

> Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour...
>
> The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency...
>
> The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.

Importantly, the risks and costs of an inappropriate test do not only arise if competitive conduct is – or would clearly be – found by a court to breach the law. They will also arise if the law is not sufficiently certain to assure businesses that they can engage in vigorous competition without the risk of regulatory or third-party intervention.

An insufficient recognition or understanding of business concerns about the extent and certainty of the proposed test has, in the Business Council's view, prevented the review from developing an effective clarification of the test.

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[15] *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

[16] Hilmer Report, *National Competition Policy*, August1993, p. 70.

[17] Dawson Report, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, pp 80-81.

The legislative guidance

The Business Council agrees that the defence proposed in the Draft Report would not have assisted in distinguishing between legitimate and illegitimate conduct, though it is possible that an alternatively drafted defence might have been useful.

In this regard, the legislative guidance proposed in the Final Report appears to be a step backwards. The Business Council welcomes the intention to recognise efficiency and other pro-competitive justifications, but it does not consider that this intention is realised by the proposed guidance.

In particular, the Final Report appears to endorse Professor Stephen Corones's view that:

> [U]nder both EU competition law and US antitrust law, firms with substantial market power are provided with the opportunity of demonstrating pro-competitive efficiency justifications for their conduct.

Similarly, the Final Report notes the American Bar Association position that:

> In the U.S., a monopolist may rebut evidence of anticompetitive conduct by establishing that it had a valid justification for the conduct – that is, one related directly or indirectly to enhancing consumer welfare.

A justification is, of course, a purpose. European and US competition law excuses conduct that has a legitimate business purpose – unless it is not a genuine purpose, judged objectively, or the applicant can show that it causes disproportionate harm.

By contrast, the proposed guidance simply requires a 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.

Critically, a court is not directed to consider whether conduct has the purpose or effect of enhancing efficiency, innovation, product quality or price competitiveness. It is only directed to consider whether the conduct has the purpose or effect of *increasing competition by* enhancing efficiency, innovation, product quality or price competitiveness.

It is not easy for a business to judge whether its conduct is likely to *increase* competition, and whether it will also *lessen* competition, in order to assess whether it will *substantially lessen competition.* It is particularly unclear to a business whether *engaging in* competitive commercial activity – for example, by lowering prices or developing innovative products – will necessarily *increase* the level of competition in a market. And while competition can be expected to increase efficiency, it remains unclear to what extent, and in what circumstances, efficiencies would be considered in turn to increase competition.

In Australia, efficiencies will certainly be taken into account as a public benefit for the purposes of an authorisation determination – particularly if they are passed through to

consumers – but in a competition test it appears that they may only be taken into account to a limited extent or in limited circumstances.

In the merger context, for example, it is clear that efficiencies may increase competition if they allow the merged firm to compete more effectively against a larger competitor, but it is less clear that efficiencies in themselves will be considered to increase competition.

As noted by the Dawson Review:

> Efficiency is already taken into account by the ACCC in applying the competition test laid down by section 50, but only to the extent that increases in efficiency contribute to the competitiveness of the market.

And as the ACCC's Merger Guidelines confirm:

> The ACCC generally only considers merger-related efficiencies to be relevant to s. 50 merger analyses when it involves a significant reduction in the marginal production cost of the merged firm and there is clear and compelling evidence that the resulting efficiencies directly affect the level of competition in a market and these efficiencies will not be dissipated post-merger.
>
> In cases where a merger is likely to achieve significant efficiencies, but the efficiencies do not prevent a substantial lessening of competition, the merger may only proceed if authorised by the Tribunal. The Tribunal may consider whether gains in efficiency constitute a public benefit that outweighs the public detriment from the substantial lessening of competition.

The ACCC here appears to take the view that conduct that enhances efficiency will not necessarily increase competition, but will only do so in limited circumstances.

The position of conduct that enhances innovation, product quality or price competitiveness appears to be similarly unclear – particularly where the conduct is engaged in by a business with a substantial degree of market power who may not be competing against a substantially larger or more efficient competitor.

By contrast, the factors listed in the second limb of the guidance are more clearly connected to the level of competition in a market: conduct that prevents, restricts or deters the potential for competitive conduct in the market or new entry is all but certain to lessen competition to some extent.

As a result, a purpose or effect of enhancing efficiency or innovation may be taken into account only in limited circumstances, while a purpose or effect of restricting or deterring competitive conduct or preventing new entry – including by prices that drive out less efficient competitors – will almost always be taken into account.

In these circumstances, the proposed guidance provides very little protection for conduct with a legitimate business purpose or justification – certainly nothing like the protection offered in the United States or Europe, and nothing like the protection offered by the current section 46.

Requiring courts to 'have regard to' these potentially conflicting purposes and effects does not provide sufficient guidance to the courts or certainty to businesses. As a result, the proposed guidance is not likely to be any more effective than the abandoned defence.

Overseas comparisons

The Final Report also argues that section 46 is inconsistent with similar provisions in other countries, and this theme has been repeated by Professor Allan Fels.

While noting that international comparisons are difficult, the Dawson Review concluded that international practice did not support the introduction of an effects test:[18]

> The ACCC also submits that the incorporation of an effects test in section 46 would bring the Act into line with overseas competition laws. However, save for New Zealand, there is no real counterpart to section 46 in other countries and comparison is difficult and unhelpful.
>
> Where effect is the test, as in the European Union, there is the higher threshold of market dominance.
>
> It is clear that in the United States an attempt to monopolise under the Sherman Act 1890 requires a specific intent and monopolisation itself requires an element of wilfulness.
>
> Section 79(1) of the Canadian Competition Act 1985 adopts an effects-based test for proscribed 'anti-competitive acts', but the Canadian Competition Tribunal has held that purpose is a necessary component of an 'anti-competitive act' …
>
> The Committee is of the view that international practice, so far as it is of assistance, does not indicate that the introduction of an effects test to section 46 would be appropriate.

However, the Final Report relies on the same examples – the European Union, the United States and Canada – to reach the opposite conclusion. The divergence between the Dawson Review and the Harper Review should be examined further. The Business Council finds the Dawson Review's analysis more considered and more convincing.

(a) United States

In relation to the United States, the Final Report relies on the submission of the American Bar Association, quoting the first paragraph of the extract below:

> Modern U.S. decisions hold that it is not subjective intent but objective intent that is relevant, and that intent can be inferred from conduct and effect. The focus of the U.S. courts is on evidence of monopoly power and proof of exclusionary conduct.
>
> Similarly, in Australia it appears that "purpose" is considered broadly under an objective − not a subjective − standard … it seems clear that Australian courts can and do consider the totality of the circumstances in determining whether a corporation possesses the requisite anticompetitive purpose, including analyzing the nature of the conduct and its likely effect.

In the Business Council's view, the ABA's submission in context suggests that the current section 46 is closely aligned with the position in the United States – both require proof of intent or purpose in an objective sense, considering the totality of the circumstances.

To the extent that effects are considered separately from purpose in the US, it appears from the International Bar Association's submission that the test requires consideration of both purpose *and* effect:[19]

> [U]nlawful monopolization cannot be established under current United States law without an analysis of both the effect on competition and the proposed justification for the conduct.

[18] Dawson Report, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, pp. 79-80.

[19] International Bar Association Submission at p. 20.

(b) Canada

Similarly, the Final Report argues that the current section 46 is inconsistent with the position in Canada, where:

> [S]ection 79 of the Competition Act prohibits anti-competitive conduct by a dominant firm that has the effect or likely effect of substantially lessening competition.

However, as recognised by the Dawson Review, section 79 relies on the definition of 'anti-competitive act' contained in section 78, which lists nine specific acts engaged in for particular purposes and directed against particular competitors. Although this list is inclusive rather than exclusive, the Canadian courts have confirmed that such a purpose is essential to the definition of an anti-competitive act:[20]

> First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor.

Like section 46, the Canadian law requires proof of a specific exclusionary or predatory purpose. Unlike section 46, it *also* requires an effect or likely effect of substantially lessening competition. It is unequivocally a purpose *and* effect test.

(c) Europe

Finally, the review's reliance on the European example requires further analysis. The Final Report notes the International Bar Association's conclusion that the European approach:

> ... has moved towards an approach which focuses more on whether the conduct of dominant businesses has (or would have) adverse effects on competition (in particular focussing in principle, on exclusionary conduct which forecloses equally efficient competitors).

It should also be acknowledged that the courts remain some distance from the EU Commission's Guidance:[21]

> The European courts have, over time, also started to adopt a similar approach to that outlined in the Guidance, with a focus on the effect of the conduct in question and whether it produces any actual or likely exclusionary effect. We emphasise this movement of Court decisions over time.

Further, the European law applies only to dominant firms, a higher threshold than the Australian requirement of substantial market power; and both the Guidance and the case law provide more effective defences of efficiency and objective justification than the review's proposal – as discussed above.

In summary, and consistent with the conclusions of the Dawson Review, to the extent that international comparisons are meaningful, they tend to support the retention of the existing section 46 rather than the far broader proposal of the Final Report. Treasury should undertake its own assessment of the international situation – particularly in the US, Europe and Canada – before accepting the review's argument for changing section 46.

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[20] *Canada (Commissioner of Competition) v. Canada Pipe Co* (2006) FCA 233.

[21] International Bar Association Submission at p. 18.

Conclusions

In 1993, the Hilmer Review noted that the challenge of section 46 was to distinguish between desirable and undesirable activity while providing an acceptable level of business certainty – stressing that uncertainty may deter efficient competitive behaviour.

It recognised that the current section 46 provides a basis for making the appropriate distinctions; that the regime was broadly consistent with overseas jurisdictions; and that it has been sufficiently interpreted by the High Court to provide business certainty. It identified that submissions had failed to provide practical examples of unacceptable behaviour. Critically, it considered that:

> [P]roposals for alternative mechanisms for dealing with misuse of market power should offer a demonstrable improvement over the current regime to justify introducing further uncertainty in this difficult area.

In the Business Council's view, all of this could have been written yesterday – and should have been written in the Final Report. A review branded 'Hilmer Mark II' should at least acknowledge the approach of its predecessor. Instead, the Final Report ignores and manifestly fails to meet the standard set by the Hilmer Review.

Again, submissions presented to the review have failed to offer any practical examples of unacceptable behaviour that is not proscribed by the current law.

The review's proposal is presented as more consistent in principle with the aims and objectives of competition law than the current section 46, but this ignores both clear interpretation of the current section and the need for competition laws to be applied by businesses, regulators and courts.

The proposal is presented as more consistent with the other sections of the Australian competition law, but consistency for its own sake is not an appropriate reason for changing the law. There are clear and recognised differences between the regulation of multilateral and unilateral conduct and no reason why they should be subject to the same test.

Finally, the proposal is claimed to be better aligned with similar provisions internationally. This is not supported by analysis of the relevant provisions overseas, many of which treat purpose as an essential element and use effects as an additional test, not an alternative. The proposal is broader, more uncertain and more likely to capture conduct with a legitimate business justification than any test found overseas.

The legislative guidance proposed for section 46 will not solve these problems and will only introduce more uncertainty. The proposal does not offer any demonstrable improvement over the current law and the uncertainty it would introduce cannot be justified. The proposal cannot satisfy the Hilmer test or any other test for appropriate regulatory intervention.

Price signalling and 'concerted practices'

The Business Council remains concerned by the Final Report's treatment of price signalling and other information exchanges.

The Business Council supports the review's recommendation to repeal the current price signalling provisions, which are complex, arbitrarily limited to a single sector, and risk capturing information disclosures of the kind that are necessary for the efficient operation of the market.

However, the Business Council does not support the review's recommendation to extend the competition law with a prohibition against 'concerted practices' that have the purpose or effect of substantially lessening competition.

The case for the new law is weak

The principle that the law should strike the right balance between pro-competitive and anti-competitive conduct suggests that the law should interfere only with efficiency, innovation and entrepreneurship to the minimum extent necessary to address a clear problem.

As argued in the Business Council's submissions to the review, it has never been clear that any new law needs to be introduced in order to deal appropriately with anti-competitive information exchanges. The ACCC has won, and continues to pursue, cases involving information exchanges under the existing section 45. The fact that it has not won every legal action or pursued every borderline case does not by itself demonstrate a failing of the competition law. Since there can be a fine line between anti-competitive information exchanges and information disclosures that help consumers and competition, it is not surprising that courts and regulators may disagree over which side of the line certain conduct may fall.

The Final Report itself appears to acknowledge that the argument for change has not been made convincingly

> The concern originally raised by the ACCC was that a practice of exchanging price information between competitors may not constitute an "understanding" within the meaning of section 45 and thereby not be regulated by section 45. **Whether that concern is realistic might be debated** − it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis. [emphasis added] (p. 370)

A concern that is only debatably realistic is not a sound basis for the potentially far-reaching change to the law subsequently proposed by the review. Furthermore, as the review finds, most or all of these concerns can be dealt with under the current Act.

> Other provisions of the competition law are capable of addressing anti-competitive price signalling. For example, if the price signalling causes competitors to agree the level of their prices, the conduct will be prohibited as price fixing by the cartel provisions. If, on the other hand, the price signalling falls short of price fixing but has the effect of substantially lessening competition (by enabling competitors to co-ordinate their pricing decisions), the conduct will generally be prohibited by section 45. (p. 370)

The fact that a particular concern can be readily addressed by a particular measure does not suggest that it should be so addressed. The Business Council remains concerned that, in recommending this new law, the review panel has not met its obligation to evaluate the costs and benefits of all reasonable alternatives, including removing the dedicated price signalling provisions and leaving section 45 as it is.

As the Final Report recognises, the present price signalling provisions grew out of the ACCC's dissatisfaction with the court's interpretation of 'understanding' in section 45.[22] That concern prompted a Treasury Discussion Paper[23] in 2009 which elicited a number of submissions, including arguments that the existing section 45 was appropriate and sufficient,[24] that the meaning of 'understanding' should be clarified,[25] that a new prohibition against anti-competitive communications be added to section 45,[26] or that the concept of 'understanding' be explicitly replaced by 'concerted practice'.[27]

These arguments were not considered transparently, if at all, before or during the development of the price signalling provisions to address fresh ACCC concerns about price signalling in the banking sector. That process involved separate bills by the government and the opposition, both considered by separate House[28] and Senate[29] committees to which most submissions argued that no change was necessary or that an alternative solution was to be preferred. The government's bill was passed with only superficial amendments and no reference to alternatives.

As a result, the range of reasonable responses to the perceived gap in the law is yet to be properly evaluated. The Business Council recommends that the government take this opportunity to more carefully consider, or recommend a further inquiry to carefully consider, each of the alternatives proposed since the ACCC first raised the issue in 2007, including that:

- the current meaning of 'understanding' is in fact appropriate to capture anti-competitive conduct while protecting beneficial information disclosures; or
- if the meaning of 'understanding' is inadequate, simple changes to that definition may allow the law to operate more effectively without requiring the development of a new body of Australian jurisprudence; or
- if the Australian jurisprudence is be supplemented from overseas, the US concept of a 'facilitating practice' may be more precisely tailored to any gap in section 45. A facilitating practice is any practice – such as information exchange – that is likely to facilitate coordination or collusion, and may be applied in conjunction with parallel behaviour to infer an agreement to fix prices.[30]

22 *Petrol prices and Australian consumers: Report of the ACCC inquiry into the price of unleaded petrol*, December 2007.

23 Treasury, *Discussion paper – Meaning of 'Understanding' in the Trade Practices Act 1974*, 8 January 2009.

24 Law Council of Australia Trade Practices Committee submission, 31 March 2009; American Bar Association submission, 26 March 2009; Business Council of Australia submission, 2 April 2009.

25 Ian Wylie submission.

26 Ian Tonking SC submission.

27 Caron Beaton-Wells & Brent Fisse submission, 7 April 2009.

28 House of Representatives Standing Committee on Economics, *Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010 and Competition and Consumer Amendment Bill (No 1) 2011*, 22 June 2011.

29 Senate Economics References Committee, *Competition within the Australian banking sector*, May 2011.

30 See *Todd v Exxon Corp*, 275 F.3d 191 (Court of Appeals, 2nd Circuit 2001): 'Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement'.

A proper consideration of these options could avoid the need to import the concept of a 'concerted practice'. While this concept is familiar in European jurisprudence, it is not clear how it would be interpreted in the Australian context.

There is considerable uncertainty in the 'concerted practices' proposal

The Final Report proposes that the section 45 prohibition against contracts, arrangements and understandings that have the purpose or effect of substantially lessening competition be extended to include 'concerted practices' that have that purpose or effect.

The Final Report notes that Article 101 of the Treaty for the Functioning of the European Union (TFEU) includes the concept of 'concerted practice', but it does not explore the legal treatment or definition of that concept, or indicate whether the concept recommended by the review is intended to adopt any of the European jurisprudence.

Beyond its definition of a concerted practice as 'a regular and deliberate activity undertaken by two or more firms' that 'would include the regular disclosure or exchange of price information between two firms', the Final Report explains that:

> The word "concerted" means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants.

Further:

> The expression "concerted practice with one or more other persons" conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (for example, suppliers selling products at the same price).

Despite somewhat different definitions of the terms 'concerted', 'concerted practice' and 'concerted practice with one or more other persons':

> The Panel considers that the word "concerted" has a clear and practical meaning and no further definition is required for the purposes of a legal enactment.

Without further definition, the Business Council is concerned that the Australian courts are likely to rely on the European jurisprudence. This could have uncertain and potentially unfortunate consequences given the very different context in which the European concept has been developed and continues to be applied.

For example, Article 101 contains no separate concept of 'arrangement or understanding' as included in section 45 of the CCA. As a result, the concept of a 'concerted practice' extends to all relevant arrangements that fall short of an agreement between the parties. In Australia, it is not clear how a 'concerted practice' concept would affect or be affected by the adjacent definitions of arrangement and understanding in our law.

Further, Article 101(3) provides a defence to an otherwise anti-competitive agreement or concerted practice on the basis that it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'. This is essentially an efficiency defence and is critical in helping to ensure that Article 101 does not prevent information disclosures that provide overriding consumer benefits.

It is not at all clear that the 'substantial lessening of competition' test would replicate this efficiency defence in the Australian law.

The uncertainty and potential breadth of the concerted practices concept makes an additional test or defence such as the Article 103(1) efficiency defence critical. Authorisation and notification would not provide a meaningful exemption in the context of information exchanges. Indeed, to ensure that information exchanges that promote competition, inform consumers or are otherwise essential to business are not prevented or chilled, the ACCC should bear the onus of proving that there is no legitimate business justification for the disclosure or that it was not in the ordinary course of business.

In these circumstances there is a serious risk that spontaneous and pro-competitive conduct would be penalised if the changes proposed by the Final Report were made without significant additional thought and consultation.

If a careful evaluative process were to conclude that a concerted practices element should be added to section 45, the Business Council considers that, at a minimum:

- a more considered legislative definition of 'concerted practice' should be developed through public consultation;
- the ACCC should develop guidelines setting out its approach to what is to be considered a 'concerted practice', capturing the appropriate nuance of the European jurisprudence, and also through public consultation; and
- it should be an essential element of proving a contravention that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

Vertical restrictions

The Business Council supports the review's recommendation to prohibit third line forcing only where it substantially lessens competition. It also supports the simplification of section 47, which in its current form is difficult for businesses to understand and apply.

However, the Business Council does not support the removal of section 47. Leaving the regulation of vertical arrangements to a general prohibition of contracts, arrangements and understandings that have the purpose or effect of substantially lessening competition would not provide business with sufficient certainty over which conduct is likely to breach the law.

Further, the proposed redrafting of section 47 does not result in a section that is as clear and comprehensible as it could be. For example, prohibiting a corporation from supplying goods or services 'subject to a condition relating to the supply of those or other goods or services by the supplier to the acquirer' does not make it clear what kind of conduct is being targeted and should be avoided.

Presumably this is intended to cover bundling or full-line forcing (though it does not appear to cover third line forcing), but its language is so broad as to be almost limitless. Greater clarity around the form or forms of vertical restriction that these provisions are designed to address would strengthen the proposed section 47 and assist in compliance.

The proposed cartel provisions provide a useful model for a revised section 47. They refer to four identified categories of conduct – price fixing, restricting output, market allocation and bid rigging – described using their common names and further supplemented with clear legal language.

Section 47 could benefit from a similar approach, identifying the recognised categories of potentially harmful vertical restrictions in a way that is broad enough to capture the conduct of concern but not so broad that it provides no guide to behaviour. The section could specifically identify and define:

- tying
- bundling
- third-line forcing
- restrictions on resupply.

As discussed below, the Business Council considers that resale price maintenance should be considered along with other restrictions on resupply and prohibited only where it has the purpose or effect of substantially lessening competition.

The Business Council does not consider that section 45 should be used as a catch-all to capture vertical arrangements that do not fall into the categories identified by section 47. Vertical arrangements are generally not anti-competitive and it has long been argued by some commentators that they should be *per se* legal. Robert Bork argues that:[31]

> Analysis shows that every vertical restraint should be completely lawful.

While the Business Council does not propose all vertical restrictions should be *per se* legal in Australia, it considers that the prohibition should be limited to specific forms of vertical restraint that have the purpose or effect of substantially lessening competition. Accordingly, it recommends that vertical restrictions should be excluded from section 45 – just as they are excluded from the cartel provisions – and assessed exclusively under section 47.

Resale price maintenance

The Business Council remains concerned that the *per se* prohibition of resale price maintenance is out of step with competition policy principles.

The Final Report recognises that the objectives of the competition law can be met if 'only conduct that is anti-competitive in most circumstances is prohibited *per se* — other conduct is only prohibited if it can be shown that the conduct has the purpose, effect or likely effect, of substantially lessening competition' (p. 307).

There are many circumstances in which resale price maintenance arrangements are efficiency-enhancing and not anti-competitive. This is particularly the case in industries where inter-brand competition is more important than intra-brand competition – a situation

[31] Robert H Bork, The Antitrust Paradox (1978) at p. 288.

that has long existed in many industries and is becoming more common as manufacturers increasingly vertically integrate at a global level. In the US it has been recognised that:[32]

> [E]conomics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance … A single manufacturer's use of vertical price restraints tends to eliminate intra-brand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between … Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands.
>
> Manufacturers are increasingly selling directly to the public either online or through vertically integrated retail outlets. Resale price maintenance is a legitimate business strategy to align the interests of the non-vertically integrated manufacturers with their distributors and retailers, enabling them to implement a competitive distribution channel in competition with vertically integrated brands. Further, the *per se* prohibition on resale price maintenance can force businesses into distribution models that they would not otherwise efficiently engage in, such as agency distribution models. The fact that the prohibition can be avoided, through a change in distribution model from one based on sale to a distributor and resale to one based on supply to an agent for sale on behalf of the supplier, points to the absence of a strong rationale for the prohibition and the unnecessary costs that it can impose on business.

As the Final Report notes, the ACCC recognised the potential benefits of resale price maintenance in its first authorisation of resale price maintenance. On 21 October 2014 the ACCC granted conditional authorisation for importer and wholesaler Tooltechnic to set minimum resale prices on Festool products, on the basis of strong inter−brand competition and the potential for resale price maintenance to prevent free-riding by discounters and improve service for highly differentiated, complex products.[33] In particular:

> The ACCC considers that Festool products are complex products which are highly differentiated in terms of their attributes and quality, and the provision of services to customers is important in the sale of Festool products. These services include pre-sale explanations, demonstrations and 'try-before-you-buy' of Festool products and post-sales services such as repairs, loan tools and training in use of a product. Full service retailers are well placed to effectively and efficiently explain and demonstrate these attributes to potential customers, and to provide after-sales service to existing customers. However, customers can access retail services from one retailer but then purchase the product from another retailer (which may not provide retail services) at a discount. That is, some retailers can gain the benefit of, or free ride on, the services offered by other retailers.
>
> In this case, the ACCC accepts that there is a market failure caused by free riding by some Festool retailers. That is, there is a material risk that full service retailers will not achieve a sufficient return on the sales of Festool products to continue to provide these pre- and post-sales services, or to provide a sufficient level of these services.

The reasons for authorisation set out by the ACCC are hardly unique to the power tools industry but would apply equally to many products in many markets. The free riding issue identified by the ACCC is becoming more of a problem not only for retailers who offer a high degree of service.

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[32] *Leegin Creative Leather Products, Inc. v. PSKS, Inc*. 551 U.S. 877 (2007) at 886.

[33] ACCC Draft Determination, Application for authorisation A91433 lodged by Tooltechnic Systems (Aust) Pty Ltd in respect of resale price maintenance, 21 October 2014.

The Business Council considers that no case has been made that resale price maintenance should be prohibited *per se* or that a change to a substantial lessening of competition test would fail to capture any anti-competitive conduct. On the contrary, the evidence shows that in many cases, resale price maintenance can enhance efficiency with no overriding public detriment.

If the Final Report's other recommendations were implemented, resale price maintenance would be the only form of conduct prohibited *per se* in the CCA, apart from the recognised categories of hard-core cartel conduct: price fixing, bid rigging, market sharing and restricting output. This is surely an anomaly.

A comparison with the prohibition of third line forcing suggests a clear path from absolute prohibition of vertical conduct with no exemptions to the extension of first the authorisation process and then the notification process to that conduct, and ending with calls to assess that conduct under the substantial lessening of competition test.

However, the removal of the *per se* prohibition of third line forcing has been recommended since the Hilmer Review in 1993. Since then, more than 4,000 notifications have been lodged with the ACCC and only a handful revoked or challenged, representing a significant waste of time and money for both business and the ACCC. The Business Council hopes that the review's suggestion to remove the *per se* prohibition of third line forcing is finally implemented this time; but hopes it will not take another two decades for resale price maintenance to be judged according to its effect on competition.

Accordingly, the Business Council considers that the government should also remove the *per se* prohibition on resale price maintenance and include it along with the other vertical restraints subject to a substantial lessening of competition test in section 47.

In any case, the Business Council supports the review's recommendation to extend the notification process to resale price maintenance, and to exempt resale price maintenance arrangements between related bodies corporate.

Formal merger processes

The Business Council supports the streamlining of the formal exemption process. As the review has found, the current formal clearance application process is excessively complex and prescriptive, and its historical lack of use indicates that it does not provide a real alternative to the informal process. The Business Council is of the strong view that a robust and time-limited alternative to the informal review process plays an important role, first by providing an alternative to informal clearance, particularly for contentious mergers, and, second, in creating incentives for the efficient administration of the informal process.

Although there have been a limited number of tribunal applications for merger authorisation, the option of seeking authorisation directly from the tribunal has provided a valuable alternative in some cases. This is particularly so in cases where the merger proponents are aware that they will require the opportunity to directly challenge the information put forward by opponents or views already held by the ACCC.

Accordingly, the Business Council recommends keeping the formal clearance process with the ACCC and the formal authorisation process with the Australian Competition Tribunal in the first instance.

The Business Council supports the Final Report's Recommendation 35 insofar as it relates to the formal clearance process, in particular that:

- 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 (subject to the Business Council's comments on the ACCC's investigative powers below).
- 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.

In respect of the last point, the review of formal clearances should be a full merits review and not restricted to a 'review on the documents'. This will allow the tribunal to consider all aspects of a merger and both proponents and opponents of a merger to adduce all available relevant information. Should market conditions or commercial circumstances change, it will also allow the tribunal to make its decision using the best available information.

Leaving the formal clearance and authorisation processes with separate bodies at first instance will remove any incentive for parties to withhold evidence from the ACCC under the formal clearance process: if they prefer their application to be considered by the tribunal they may simply use the authorisation process. Review of formal clearance decisions should then be a full merits review.

The Business Council supports the panel's view that the specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC. It also supports the ex-post evaluation of merger decisions by the Australian Council for Competition Policy in order to increase confidence in ACCC decision making.

The ACCC's investigative powers

The Business Council appreciates the review's finding that the costs and resourcing involved in responding to section 155 notices can be significant.

It also agrees with the review that 'the ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated'. However, it is concerned that this view does not appear to be adequately reflected in the relevant recommendation, which only suggests that the ACCC 'should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age'.

The panel's view would be better reflected if the obligation to frame notices in the narrowest form possible, consistent with the scope of the matter being investigated, were enshrined in section 155 itself. A Ministerial Direction could also require the ACCC to review and update its guidelines to ensure that they are consistent with this principle, including with regard to the increasing burden imposed by notices in the digital age.

The Business Council welcomes the review's recommendation that failing to comply with a section 155 notice should be subject to a statutory defence that a reasonable search had been undertaken.

Private enforcement and admissions of fact

The review's recommendation to amend section 83 of the CCA to extend to agreed admissions of fact, in addition to findings of fact made by the court, raises significant concerns.

The distinction between agreed admissions and findings made by a court is an important one in both principle and practice, and this distinction should not be removed simply because doing so would reduce the costs of private actions.

The courts' reluctance to extend section 83 to agreed findings, even where such an order has been sought by the parties, recognises the principles that underlie this distinction. As Finkelstein J recognised in ACCC v ABB Transmission (No 2 – Distribution Transformers):[34]

> It is not clear whether a judge who acts on formal admissions is making findings of fact. I rather think he is not, because the purpose of an admission, such as may be made in a pleading, is to dispense with the need to prove the admitted fact. That is quite different from a case where the judge hears evidence and makes findings based on that evidence.

Goldberg J came more firmly to the same conclusion in ACCC v Leahy Petroleum (No 3):[35]

> [I]t would seem, as a matter of principle, that where evidence has not been tendered, but the parties rely upon statements of agreed facts which have not been the subject of critical analysis by the Court, it is inappropriate to make orders that would allow for an extended use of findings of fact, particularly use of those facts as prima facie evidence in related proceedings as envisaged by s 83.

These decisions recognise that there is a qualitative legal difference between the evidentiary findings of a court and facts agreed for the purpose of a settlement, and that findings that have not been forensically tested should not be binding on a party for the purposes of subsequent proceedings that may occur at any later time. This is a fundamental evidentiary principle and should not be dislodged.

In recent cases the ACCC has agreed with parties that facts agreed and admissions made in these statements are made for the purpose of the present proceedings only. As a result, in a significant number of cases concluded by the ACCC, the intention of both the ACCC and the parties, and the likely effect of the law, is that findings of fact are not available to be relied on by private litigants.

Agreed admissions or statements of fact are presented to the court by parties wishing to reduce the costs and uncertainties of litigation. They have been used in the majority of ACCC legal actions and have accounted for the majority of ACCC penalties awarded. However, agreed admissions will be substantially less appealing to respondents if they

[34] [2002] FCA 559
[35] [2005] FCA 265

are used to facilitate private litigation including class actions by constituting prima facie evidence in these subsequent actions.

Although only the ACCC can seek penalties, under section 82 private litigants may seek compensation for loss or damage resulting from a breach of Part IV and, particularly in the case of class actions, the compensation sought may approach or exceed the penalties imposed. For example, in the Visy–Amcor cardboard packaging price fixing case, the ACCC agreed a $36 million penalty against Visy (while exempting Amcor under its immunity policy), while a subsequent class action was settled for a $95 million, of which Amcor paid two-thirds, and $25 million in costs.

As a result, the ability for respondents to mitigate the scope of third-party damages risk is an important factor in encouraging them to settle proceedings with the ACCC – and has become a key element in the ACCC's enforcement and cooperation policies. The ACCC itself expresses concern that the extension of section 83 would discourage settlement and affect the ACCC's enforcement activities:[36]

> The ACCC believes that firms will be less likely to come forward to seek immunity if there is an increased potential for the admissions they make to be used against them in follow-on proceedings … Fewer applicants coming forward with information on the existence of cartels could affect the number of breaches that the ACCC detects and prosecutes each year.
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> The proposed amendment could also impact on the ACCC's ability to reach settlements in competition law matters. From the ACCC's experience in negotiating settlements, it is clear that defendants place considerable emphasis on the prospect of follow-on proceedings, particularly in relation to the content of agreed facts. The proposed amendment could result in defendants being less willing to settle, less willing to agree to facts, or being willing only to agree to limited facts, if they know the facts are able to be used in a follow-on proceeding. A reduction in the number of matters being resolved by consent would lead to more matters having to be fully litigated. There is a significant public benefit resulting from settling matters, including reduced spending on litigation, faster resolution of matters and freeing up of court resources.

In these circumstances it does not, with respect, seem 'doubtful that a change to section 83 would materially alter the assessment by a respondent whether or not to settle an ACCC proceeding'.[37] The 'real possibility' that agreed facts may be otherwise admissible under the *Evidence Act* would not prevent the extension of section 83 from increasing the risk of exposure to follow-on actions.

Private litigants already derive considerable benefits from proceedings settled by the ACCC and will continue to do so even if section 83 is not extended to cover admissions or statements of agreed facts. Although private litigants will still have to prove the facts establishing a contravention, a statement of agreed facts will show them exactly what to look for. The additional advantage that might be provided by the recommendation is not worth overturning the principles identified by the courts or the clear benefits of effective settlement to the enforcement process.

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[36] ACCC submission on Draft Report, p 80.

[37] Final Report, p 408.

Access regulation

The Business Council supports many of the findings of the Harper Review in relation to the National Access Regime in Part IIIA, however there is a need to go further than the changes recommended by the review to respond to weaknesses with the current operation of Part IIIA.

Part IIIA has been reviewed twice in three years by the Productivity Commission and the Harper Review. Both reviews have highlighted the potential chilling effect on private investment from getting infrastructure regulation wrong and have endorsed the Hilmer view that the national access regime 'should be used sparingly'.

The Harper Review made the important finding that:

> ... imposing an access regime upon privately developed single-user infrastructure is more likely to be produce inefficiency than efficiency, impeding the competitiveness of Australian industry. (p. 431)

The Business Council welcomes a number of the recommendations including the changes to the declaration criteria and the expansion of the Tribunal's review powers in respect of declaration decisions (including reintroducing its ability to hear direct evidence). The Business Council also supports the establishment of a dedicated Access and Pricing Regulator.

However, the Business Council points to three concerns with the current application of Part IIIA that were not adequately addressed by the review's recommendation. These are:

- The panel acknowledged that Part IIIA needs to be targeted, but did not make a specific recommendation to implement this. To achieve this, the Business Council proposes that the regime be confined to 1) airports and 2) any other former publicly owned multi-user assets. If a more appropriate, sector-specific regulatory approach can be adopted for airports and multi-user assets, then the current declaration process in Part IIIA should be removed in those areas as well.

- If retained, the operation of the declaration criteria in section 44(G)(2) and 44H(4) has been fundamentally undermined by the broad discretion granted to the minister under criteria (f) as interpreted by the High Court in the recent Pilbara Infrastructure case – which is set largely beyond the scope of review by the Tribunal. The risk this poses of politicisation of access policy needs to be urgently addressed and does not appear to have been considered by the panel.

- The Business Council supports the proposed Access and Pricing Regulator, however it is neither necessary nor good regulatory practice to have the same regulator determine declaration decisions (if this process is retained) as well as to arbitrate disputes. It is not appropriate to give both of these functions to the new Access and Pricing Regulator.

Targeting

The review framed the right starting point in the Final Report in relation to Part IIIA:

> Given the economic costs that can be caused by this form of regulation, it is important to examine the benefits of the Regime carefully and to ask whether those benefits can be achieved by a less intrusive form of regulation.

The Business Council identified in its submission that the declaration process has proven costly and cumbersome in operation, in circumstances where the only sectors in which it is likely to still play any meaningful role are for airports and former publicly owned multi-user assets that do not currently have a dedicated access regime.

The review was only able to point to ports and airports as being sectors where sector-specific regulation was not already in place, and that it was not well suited to the monopoly pricing issue that arises in relation to these assets:

> The regulatory issue that arises in respect of airports is generally one of monopoly pricing rather than access. Although airports are bottleneck facilities, their operators are not vertically integrated into upstream and downstream markets. Hence, they have limited incentive to reduce competition in dependent markets, but they have power to impose monopoly charges on users of their facilities.
>
> To some extent, Part IIIA can be used as a means of addressing monopoly pricing at airports. However, that is not its original objective and its processes are cumbersome and not well suited to that function. (pp427−8)

The review considers that Part IIIA may play a 'back stop' role for other sectoral access regimes, and therefore concludes:

> Part IIIA should continue to provide a back stop to the current industry-specific access regimes. It may also be needed for future access regulation of airport and port infrastructure.

The Business Council is disappointed that, having recognised the cost and burden of the declaration process and the emergence of more suitable sector-specific arrangements, the review did not use the opportunity to press for a more substantive reform, by:

- introducing targeted regulation for multi-user ports and airports – better suited than the declaration process to addressing monopoly pricing – and then removing the declaration process from Part IIIA
- retaining the certification process and COAG competition framework as the tools to provide a 'back stop' for sectoral regimes and to support the consistent development of those regimes in the future
- retain the other existing paths to access regulation under Part IIIA, including the ability to lodge access undertakings, which can be used by State and Commonwealth governments where needed (e.g. as part of privatisation processes).

The Business Council submits that this approach to the structure of Part IIIA is more targeted, better achieves its economic objectives and reduces the cost and uncertainty imposed on business and investment by the operation of the current declaration process.

The 'public interest' criterion

The Business Council submitted in response to the original 2014 Issues Paper that the operation of Part IIIA had been undermined by the High Court judgment in Pilbara Infrastructure. In that decision, the High Court found that (at [42] and [112]):

- the operation of the 'public interest' test under criterion (f) of the declaration criteria should be understood as primarily a policy decision, and not as an economic one

- the minister's discretion is 'very wide' and will seldom require the Minister to undertake an overall balancing of costs and benefits
- because of the breadth of matters that can be considered, the determination of the public interest criterion is 'best suited to resolution by the holder of a political office', so that the tribunal should be slow to depart from a decision of the minister as to what is contrary to the public interest.

The Business Council is concerned that this interpretation of criterion (f) undermines the efficacy of all of the declaration criteria, and risks making declaration a highly politicised process.

While the Business Council acknowledges the amendments proposed to other criteria by the Harper Review, these may prove of limited value if the decision to declare is ultimately a political one, and is a decision placed outside the scope of review by the tribunal.

The review was correct to identify in its Final Report that access regulation is 'intrusive', overriding private property rights. It therefore needs to be subject to a regime that focuses on the achievement of clear economic objectives, where the benefits of intervention clearly outweigh the economic costs. It is not appropriate for declaration to be left to the vagaries of political judgment.

The Business Council therefore repeats its original submission that criterion (f) be amended to make clear that:

- criterion (f) is an economic criterion (and not principally a political one) that requires an overall balancing of economic costs and benefits associated with declaration
- that the balancing exercise undertaken under criterion (f) is a matter that can be reviewable by the tribunal on that basis.

Different decision makers for declaration and arbitration

The review did not accept the Business Council's submission that it was important that the roles of declaring services and arbitrating disputes under Part IIIA continued to be performed by different bodies. To the contrary, the review has recommended that the proposed Access and Pricing Regulatory subsume both the declaration and arbitration functions currently undertaken by the National Competition Council (NCC) and ACCC.

The review panel found:

> The Panel does not foresee any conflict in a single regulator performing both functions and anticipates that there may be benefits. The Panel notes that, under the current telecommunications access regime (in Part XIC of the CCA), the ACCC performs both the declaration and arbitration functions. (p. 81)

The Business Council does not share the review panel's confidence that integrating the two functions has any benefit and, to the contrary, sees the separation of these functions as an important and valuable feature of the existing process, if they are retained.

It is important that the decision maker that is setting terms of access brings a fresh perspective, and is able to clearly test whether the costs of access regulation can be

mitigated through the terms of access. In practice, this independent and fresh perspective will not be possible for the body that has just applied the declaration criteria.

The Business Council does not consider that it is an answer to this criticism merely to point to regulation of telecommunications under Part XIC of the CCA. The experience in telecommunications might perhaps more easily be said to illustrate the problems associated with integrating both functions. While the tasks of declaring a new service and setting regulated terms of access to that service are separated under the telecommunications access regime in Part XIC, the ACCC undertakes both and generally in quick succession. In practice, there has proven to be little, if any, fresh consideration given by the ACCC to the costs of access and how these can be mitigated through terms of access as part of the second stage process.

While the Business Council supports the establishment of a new Access and Pricing Regulator, the new body should take over only the roles currently performed by the ACCC under Part IIIA. The task of making recommendations in relation to declaration should be performed either by the ACCP (if created) or the NCC should retain its current functions, in that regard.

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