



COMPETITION POLICY REVIEW

Final Report

March 2015

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CONTENTS

Message from the Panel	1
Acknowledgements	2
Competition Policy Review Panel	2
Abbreviations	4
Executive Summary	7
Guide to the Report	12
PART 1 — OVERVIEW	15
1 Context for the Review	15
PART 2 — FINDINGS AND RECOMMENDATIONS	29
2 Competition Policy	31
2.1 A set of competition principles	31
2.2 Determining priority areas for reform	34
2.3 Human services	34
2.4 Transport	38
2.5 Intellectual property	40
2.6 Regulatory restrictions	42
2.7 Competitive neutrality	49
2.8 Government procurement and other commercial arrangements	51
2.9 Electricity and gas	52
2.10 Water	52
2.11 Informed choice	53
3 Competition Law	55
3.1 Simplification	55
3.2 Application to government activities in trade or commerce	56
3.3 Market definition	56
3.4 Extra-territorial reach of the law	57
3.5 Cartels	58
3.6 Anti-competitive disclosure of information	59
3.7 Misuse of market power	60
3.8 Unconscionable conduct	62
3.9 Price discrimination	63
3.10 Vertical restrictions (other than resale price maintenance)	63
3.11 Resale price maintenance	64
3.12 Mergers	65
3.13 Secondary boycotts and employment-related matters	67
3.14 Exemption processes	69
3.15 Enforcement and remedies	71
3.16 National Access Regime	72
4 Institutions and Governance	75
4.1 A national competition body	75
4.2 Functions of the national body	76

4.3	Competition payments.....	79
4.4	Competition and consumer regulator	79
4.5	Access and Pricing Regulator	80
4.6	ACCC governance	81
5	Small Business	84
5.1	Access to remedies	84
5.2	Collective bargaining.....	86
5.3	Industry codes.....	87
5.4	Competitive neutrality	87
5.5	Regulatory restrictions.....	87
6	Retail Markets	88
6.1	Supermarkets	88
6.2	Fuel retailing.....	89
7	Implementation.....	91
	PART 3 — COMPETITION POLICY.....	93
8	Competition Principles.....	94
9	Intellectual Property	100
9.1	Is the ‘balance’ right?.....	102
9.2	The interaction between IP rights and competition law	105
9.3	IP and international trade agreements.....	111
10	Regulatory Restrictions	114
	A new round of regulatory reviews	119
	Priority areas for review	122
10.1	Planning and zoning	122
10.2	Taxis and ride-sharing	131
10.3	Goods — standards.....	135
10.4	Other potential areas for review	140
	Areas for immediate reform	156
10.5	Retail trading hours.....	156
10.6	Parallel imports	165
10.7	Pharmacy.....	178
11	Infrastructure Markets.....	191
11.1	Electricity and gas	196
11.2	Water	202
11.3	Transport.....	205
12	Human Services	218
12.1	Evolving approaches to human services	219
12.2	Governments as stewards.....	223
12.3	Expanding user choice.....	230
12.4	Commissioning service delivery	239
12.5	Diversity of service providers.....	244
12.6	Implementation issues	250
13	Competitive Neutrality.....	255
13.1	What is competitive neutrality?.....	255
13.2	Concerns raised about competitive neutrality policy	258
14	Government Procurement and Other Commercial Arrangements.....	269
14.1	Government procurement.....	269

14.2	The CCA and government activity.....	278
15	Key Retail Markets.....	283
15.1	Supermarkets.....	283
15.2	Fuel retailing.....	288
16	Informed Choice.....	293
16.1	The ‘right’ information is vital.....	293
16.2	Acting on information.....	297
16.3	Calls for access to more information.....	301
PART 4 — COMPETITION LAWS.....		307
17	Introduction to Competition Law Issues.....	307
17.1	Simplification.....	308
17.2	Specific reforms.....	308
17.3	Model legislative provisions.....	309
17.4	Implementation.....	310
18	Mergers.....	312
18.1	Market definition and global competition.....	314
18.2	Creeping acquisitions.....	321
18.3	Should merger review under the CCA be aligned with other approval processes?.....	324
18.4	Enforcement of the merger law.....	324
18.5	Merger approval processes.....	325
19	Unilateral Conduct.....	334
19.1	Misuse of market power.....	335
19.2	Misuse of market power in a trans-Tasman context.....	348
19.3	Price discrimination.....	349
19.4	Unfair and unconscionable conduct in business transactions.....	355
19.5	Codes of conduct.....	357
20	Anti-competitive Agreements, Arrangements and Understandings.....	359
20.1	Cartel conduct.....	359
20.2	Anti-competitive disclosure of information.....	367
20.3	Vertical restrictions (other than resale price maintenance).....	372
20.4	Resale price maintenance.....	376
20.5	Liner shipping exemption under Part X of the CCA.....	380
21	Secondary Boycotts and Employment-Related Matters.....	386
21.1	Secondary boycotts.....	387
21.2	Trading restrictions in industrial agreements.....	392
22	Exemption Processes.....	397
22.1	Simplification of the authorisation and notification processes.....	398
22.2	Collective bargaining notification.....	399
22.3	Block exemptions.....	403
23	Enforcement and Remedies.....	406
23.1	Public enforcement.....	406
23.2	Private enforcement.....	407
23.3	ACCC’s investigative powers.....	418
24	National Access Regime.....	422
24.1	Costs and benefits of the National Access Regime.....	424
24.2	The declaration criteria.....	431
24.3	Review of access decisions by the Australian Competition Tribunal.....	438

PART 5 — COMPETITION INSTITUTIONS	441
25 Institutional Structures for Future Competition Policy.....	442
25.1 Strong institutions to sustain reform	442
25.2 Lessons from NCP.....	442
25.3 A national approach to competition policy	443
25.4 Independent competition policy advice	444
25.5 Competition payments.....	444
25.6 Market studies	447
25.7 Ex-post evaluation of some merger decisions	451
25.8 A new competition policy institution.....	452
25.9 Functions of the ACCP	452
25.10 Governance of the ACCP	455
25.11 Australian Government policy on the creation of new bodies	459
26 Enforcement of Competition Law	461
26.1 Competition and consumer protection functions	461
26.2 ACCC accountability and governance	463
26.3 ACCC and the media.....	467
27 Access and Pricing Regulation	470
27.1 A separate Access and Pricing Regulator	470
27.2 Governance	473
27.3 State and territory access and pricing regulation	474
27.4 Australian Government policy on the creation of new bodies	477
28 Review of Competition and Regulatory Decisions	478
28.1 Federal Court of Australia	478
28.2 The Australian Competition Tribunal.....	479
PART 6 — IMPLEMENTATION	481
29 Implementing the Review	481
29.1 Implementing National Competition Policy following the Hilmer Review	481
29.2 Implementing national competition policy today.....	483
29.3 A road map.....	489
30 Benefits of Reform.....	492
Appendix A — <i>Competition and Consumer Act 2010</i> — Model Legislative Provisions.....	499
Appendix B — International Comparisons of Competition Law	522
Appendix C — Terms of Reference	526
Appendix D — List of Non-Confidential Submissions.....	530

COMPETITION POLICY REVIEW

6 March 2015

The Hon. Bruce Billson MP
Minister for Small Business
Parliament House
Canberra ACT 2600

Dear Minister

Competition Policy Review Final Report

In accordance with the Terms of Reference, we are pleased to present the Final Report of the Competition Policy Review.

The Report presents a forward-looking package of reforms to Australia's competition policies, competition laws and competition institutions.

Reinvigorating competition will help to raise Australia's productivity levels and living standards and meet the economic challenges and opportunities we face now and into the future.

The Final Report's 56 recommendations are intended to complement each other. Implementing them will involve all levels of government working together to achieve common national objectives.

In making these recommendations, the Panel has drawn heavily on the expertise and experience of stakeholders garnered through submissions and in consultation meetings.

Nevertheless, the views expressed in this Final Report are our own, and we commend its recommendations to you.

Yours sincerely



Ian Harper
Chair



Peter Anderson
Member



Su McCluskey
Member



Michael O'Bryan QC
Member

MESSAGE FROM THE PANEL

This is our Final Report reviewing Australia's competition policy, laws and institutions.

The Panel undertook a stocktake of the competition policy framework across the Australian economy. Although reforms introduced following the Hilmer Review led to significant improvements in economic growth and wellbeing, the Panel believes that renewed policy effort is required to support growth and wellbeing now and into the future. To this end, we have reviewed Australia's competition policy, laws and institutions to assess their fitness for purpose.

Taken together, our recommendations comprise an agenda of reinvigorated microeconomic reform that will require sustained effort from all jurisdictions. We believe this commitment is necessary if Australia is to boost productivity, secure fiscal sustainability and position our economy to meet the challenges and opportunities of a rapidly changing world.

Given the forces for change already bearing on the Australian economy, delaying policy action will make reform more difficult and more sharply felt. An early response will make the reform effort more manageable over time, allowing Australians to enjoy higher living standards sooner rather than later.

The recommendations and views expressed in this Final Report draw upon the expertise and experience of each member of the Panel. Importantly, we have also had the benefit of hearing from a wide cross-section of the Australian community and from participants in all sectors of the economy.

To support this consultation, the Panel released an Issues Paper on 14 April 2014 and a Draft Report on 22 September 2014.

We met with groups representing consumers and those representing business, both large and small. We also met with a variety of individual business people, academics, current and former regulators, and governments, including a number of state and territory Treasurers. During May and June 2014, Panel members attended business forums around the country organised by representative business groups and, during October and November 2014, the Panel hosted public forums to discuss the Draft Report.

The Panel also held a series of workshops during the preparation of the Draft Report and the Final Report to discuss particular issues with subject matter experts. Further, on 23 and 24 October 2014, we convened a conference featuring international and Australian speakers, and including a series of workshops. This conference enabled Panel members to hear a wide range of views on our draft recommendations.

We received almost 350 submissions in response to the Issues Paper and around 600 submissions to the Draft Report. All non-confidential submissions are published on our website www.competitionpolicyreview.gov.au.¹ Around 40 per cent of submissions came from peak and advocacy bodies, around 30 per cent from individuals, around 25 per cent from business, and the remainder from governments. A wide variety of topics was identified, with the top five issues raised most often in submissions to our Draft Report being misuse of market power, retail trading hours, road transport, planning and zoning, and supermarkets.

1 In this Report, references to Issues Paper submissions are in the form (sub, page xx) while references to Draft Report submissions are in the form (DR sub, page xx).

We are aware of other reviews currently in train that are likely to cover sector-specific aspects of competition policy, such as the Energy White Paper, the Review of Coastal Trading and the Agricultural Competitiveness White Paper. We also note the Final Report of the Financial System Inquiry released in December 2014, which included a number of recommendations and findings regarding competition in the financial system, and the Review of the National Broadband Network released in several tranches throughout 2014, which made recommendations and findings regarding telecommunications infrastructure and markets.

The Australian Government has also commenced a Federation White Paper, asked the Productivity Commission to examine the performance of the workplace relations framework and foreshadowed a Tax White Paper. Although the Panel has not made detailed recommendations in these areas, in some cases we have encouraged these reviews to take account of competition issues.

Importantly, the recommendations in this Final Report form a significant contribution to the overall reform agenda offered by this set of reviews.

ACKNOWLEDGEMENTS

The Panel would like to thank everyone who put so much time and effort into providing written submissions and participating in public forums. These contributions provided us with crucial insights into the issues we were asked to consider.

The Panel would also like to thank all those who participated in our targeted policy workshops and particularly the speakers who generously gave their time to present at our international conference:

Professor Gary Banks AO, Professor Caron Beaton-Wells, Professor Bruce Chapman, John Fingleton, Professor Quentin Grafton, Professor George Hay, Associate Professor Deborah Healey, Professor Julian Le Grand, Mary Ann O'Loughlin AM, Michael O'Neill, Professor Graeme Samuel AC, Paul Schoff, Professor Gary Sturgess AM, Kerrin Vautier CMG and Luke Woodward.

We would also particularly like to thank Chris Jose for expert legal advice.

Finally, the Panel wishes to acknowledge outstanding professional support provided by all members of the Secretariat:

Christine Barron (Secretary), Julie Abramson, Janine Bialecki, Melissa Bray, Russ Campbell, Kevin Cosgriff, Richard Fleming, Geoff Francis, Carol Gisz, Andrew Hunt, David Jones, Rosalie McLachlan, Chris McLennan, Scott Rogers, George Steel and Geoff Whelan.

COMPETITION POLICY REVIEW PANEL

Professor Ian Harper (Chair)

Professor Ian Harper is a Partner at Deloitte Touche Tohmatsu and Professor Emeritus of the University of Melbourne. Professor Harper is an economist whose experience spans academia, government and advising business. He was a member of the 1996-97 Financial System Inquiry (the Wallis Inquiry) and between 2005 and 2009 was inaugural Chairman of the Australian Fair Pay Commission.

Mr Peter Anderson

Mr Peter Anderson is a national business leader and public policy specialist in national and international affairs. He is also a former legal practitioner and educator to small businesses, as well as a senior advisor to governments, including on trade practices. He has experience as a delegate to the International Chamber of Commerce, the Organisation for Economic Co-operation and Development, the International Organisation of Employers and in regional business forums. Mr Anderson recently stepped down from the position of Chief Executive of the Australian Chamber of Commerce and Industry.

Ms Su McCluskey

Ms Su McCluskey is the Chief Executive Officer of the Regional Australia Institute. Ms McCluskey's experience spans senior public sector roles, including Executive Director of the Office of Best Practice Regulation, Consultant Specialist Advisor to the Office of Small Business at the (then) Department of Industry, Tourism and Resources and Assistant Commissioner for Tax Reform — Business Education and Communication at the Australian Taxation Office. Ms McCluskey has significant private sector experience and was Director of Tax and Trade Policy at the Business Council of Australia and General Manager of Policy for the National Farmers' Federation. She is also a beef cattle farmer.

Mr Michael O'Bryan QC

Mr Michael O'Bryan is a Queen's Counsel at the Victorian Bar. Mr O'Bryan has practised extensively in the area of competition law, previously as a partner of the law firm Minter Ellison and currently as a barrister. Mr O'Bryan is a member and past chairman of the Competition and Consumer Committee of the Law Council of Australia.



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

ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACCP	Australian Council for Competition Policy (proposed body)
ACL	Australian Consumer Law
ACTU	Australian Council of Trade Unions
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
AIPPI	International Association for the Protection of Intellectual Property
ALRC	Australian Law Reform Commission
APR	Access and Pricing Regulator (proposed body)
ARTC	Australian Rail Track Corporation
BCA	Business Council of Australia
BITRE	Bureau of Infrastructure, Transport and Regional Economics
CCA	<i>Competition and Consumer Act 2010</i>
CDPP	Commonwealth Director of Public Prosecutions
CFMEU	Construction, Forestry, Mining and Energy Union
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
CSO	community service obligation
EU	European Union
FSI	Financial System Inquiry
GDP	gross domestic product
IP	intellectual property
IPART	Independent Pricing and Regulatory Tribunal (NSW)
NAPLAN	National Assessment Program — Literacy and Numeracy
NBN	National Broadband Network
NCC	National Competition Council
NCP	National Competition Policy
NDIS	National Disability Insurance Scheme
NDIA	National Disability Insurance Agency
NECF	National Energy Customer Framework
NEM	National Electricity Market
NGO	non-government organisation

NHS	National Health Service (UK)
OECD	Organisation for Economic Co-operation and Development
PBS	Pharmaceutical Benefits Scheme
PC	Productivity Commission
PPP	public-private partnership
RPM	resale price maintenance
SME	small and medium enterprises
TPA	<i>Trade Practices Act 1974</i>
TFEU	Treaty on the Functioning of the European Union
Tribunal	Australian Competition Tribunal
UK	United Kingdom
US	United States

EXECUTIVE SUMMARY

Australia has enjoyed continuous economic growth since the early 1990s and weathered the global financial crisis of the late 2000s without a recession. This performance has led some to question whether there is a 'burning platform' for a new round of microeconomic reform.

Evidence presented to the Panel throughout the Review suggests that reform is not only overdue, given stalled reform effort in the 2000s, but critical to improving Australia's productivity performance and to sustaining our living standards into the future.

With Australia's terms of trade receding from their peak and the boom in mining investment past, we must look to productivity-enhancing reforms to underpin rising living standards and to strengthen Australia's fiscal outlook.

Reinvigorating Australia's competition landscape is a central element of a new round of microeconomic reform. To this end, the Panel examines whether Australia's existing competition policy, laws and institutions remain 'fit for purpose', especially in light of the persistent forces for change that will shape the Australian economy now and into the future.

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

Our **ageing population** will give rise to a wider array of needs and preferences among older Australians and their families. Extending choice and contestability in government provision of human services will help people to meet their individual health and aged care needs.

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

COMPETITION POLICY

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

In the Panel's view, competition policy should:

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

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

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

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

- 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; and
- innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.

In the area of **infrastructure**, the Panel recommends reforming road transport by introducing cost-reflective road pricing in a revenue-neutral way and linked to road construction, maintenance and safety so that road investment decisions are more responsive to the needs and preferences of road users.

Reforms begun in electricity and gas need to be finalised and water reform needs to be reinvigorated.

Anti-competitive regulations remain in place despite significant progress made under NCP. The Panel recommends removing regulations governing retail trading hours and parallel imports, and removing pharmacy location and ownership rules. The Panel also recommends repealing Part X of the *Competition and Consumer Act 2010* (CCA), which exempts liner shipping from the competition laws, and reducing restrictions on sea and air cabotage. The Panel recommends that other regulations restricting competition be reviewed by each jurisdiction, with particular priority given to regulations covering planning and zoning, taxis and ride-sharing, and product standards.

Australia's **intellectual property** regime is a priority for review. The Panel also recommends that the current exception to competition law for conditions of intellectual property licences in the CCA be repealed.

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

Government procurement guidelines and decisions can significantly affect the range of goods and services available to consumers. Procurement can also shape the structure and functioning of competition in markets. The Panel recommends that promoting competition should be a central feature of government procurement and privatisation frameworks and processes.

The Panel believes that markets work best when consumers are informed and engaged, empowering them to make good decisions. The Panel sees scope for enhancing Australian consumers' access to data to better inform their decisions.

COMPETITION LAWS

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

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than 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?

Although the Panel considers that our competition laws have served Australia well, the Final Report recommends specific reforms to enhance their effectiveness.

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.

Section 46 should instead prohibit conduct by firms with substantial market power that has the purpose, effect or likely effect of substantially lessening competition, consistent with other prohibitions in the competition law. It should direct the court to weigh the pro-competitive and anti-competitive impact of the conduct.

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

Further, the prohibition on exclusive dealing in **section 47** should be repealed. Secondary boycott provisions should be retained and effectively enforced. Trading restrictions in awards and enterprise agreements (except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees) should be prohibited by the CCA. Merger approval processes should be streamlined.

The Panel also recommends changes to other approval processes, both authorisation and notification, and introducing a block exemption power for the Australian Competition and Consumer Commission (ACCC), to reduce costs for business, especially small business.

Collective bargaining and collective boycott arrangements should be made more flexible and easier for small business to use. The ACCC should be proactive in assisting small businesses to seek other forms of redress when it decides not to pursue a case on their behalf.

Appendix A to this Report contains model legislative provisions reflecting many of the Panel's recommendations for reforms to the CCA.

COMPETITION INSTITUTIONS

In assessing Australia's competition institutions — their current performance and preparedness for the future — the Panel has identified a gap in Australia's competition framework. To fill this gap, Australia needs an institution whose remit encompasses advocating for competition policy reform and overseeing its implementation. This includes reforms agreed following this Review as well as future reforms.

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

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

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

The Panel recommends that, while the ACCC retain both competition and consumer functions, a separate access and pricing regulator be established with responsibility for existing regulatory functions undertaken by the NCC and the ACCC. These regulatory functions would include all those currently performed by the Australian Energy Regulator (AER) but exclude relevant consumer protection and competition functions, which would remain with the ACCC.

The Panel considers that, although the ACCC is a well-regarded and effective body, its performance would be strengthened by including a more diverse range of views and experience at the Commission level. This can be achieved by introducing part-time Commissioners whose commitments beyond the ACCC would broaden the Commission's perspective, and whose part-time status would make them more independent from the day-to-day management of ACCC business.

The Panel also recommends that Commissioners no longer be designated with specific responsibilities, for example, for small business or consumer protection, but that the Commission as a whole be required to have regard to all sectors and interests.

SMALL BUSINESS

The Panel has been especially mindful of the concerns and interests of small business in the context of the Review. Accordingly, this Report contains a number of recommendations relevant for small business.

Recommended changes to strengthen the misuse of market power provision are intended to improve its clarity, force and effectiveness so that it can be used to prevent unilateral conduct that substantially harms competition.

The Panel believes that small business needs greater assurance that competition complaints can be dealt with. The ACCC can play an important role in connecting small business to alternative dispute

resolution services. Developing industry codes with practical and effective dispute resolution processes can also help to ensure that small business has access to justice.

The Panel recommends that the CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business. Improved understanding of the collective bargaining and collective boycott provisions can also promote their use and potentially strengthen the bargaining position of small business in dealing with large business.

Other recommendations to reform competitive neutrality policy and review regulatory restrictions, including standards, occupational licensing, and planning and zoning rules can enable small business to compete more effectively.

RETAIL MARKETS

Competition in retail markets has been an important focus for the Review, including competition in grocery and fuel retailing, regulations on planning, zoning and trading hours, and specific regulations such as those affecting pharmacy and liquor retailing.

The Panel recommends a number of changes that will apply to retail markets to promote competition and benefit consumers.

IMPLEMENTATION

The reform agenda laid out in this Final Report is ambitious, with recommendations to all levels of government. Accordingly, the Report provides a 'road map' for implementation (see Section 29.3). The Panel recognises that individual jurisdictions are already progressing competition policy matters and considers that this Review will add momentum.

A number of the Panel's recommendations can be implemented by jurisdictions independently of each other and may even benefit from a diversity of approaches. To this end, the road map identifies recommendations that can be adopted by governments individually. Nonetheless, the Panel considers that co-operation and collaboration across jurisdictions generally leads to better outcomes.

GUIDE TO THE REPORT

In [Part 1](#) of this Report, the Panel makes the case for reform and spells out the **context** for the Review, including the main challenges and opportunities facing Australia.

[Part 2](#) brings together the Panel's analysis into a set of **recommendations** to reform competition policy, laws and institutions. Competition policy reforms are set out in order of priority so that those with the greatest potential benefit to Australians are identified first.

Recommended changes to competition laws are set out in the order that the provisions appear in the *Competition and Consumer Act 2010* (CCA).

Recommendations on institutions and governance, small business and retail markets are grouped together, and there is a summary of the Panel's views on implementing the recommendations.

Parts 3, 4 and 5 analyse competition policy, laws and institutions in greater depth. The recommendations have been reproduced in these parts but not always in the same order as they appear in Part 2.

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

[Part 4](#) explores Australia's **competition laws** in detail, beginning with general issues, before moving to unilateral conduct, anti-competitive agreements, secondary boycotts and employment-related matters, exemption processes, enforcement and finally the National Access Regime. Part 4 examines areas some observers claim are deficient and considers whether the laws remain fit for purpose in a changing business environment.

[Part 5](#) assesses Australia's **competition institutions**, including the competition regulators, examining their current capabilities and preparedness for the future.

Finally, [Part 6](#) provides a road map to guide **implementation** of the proposed reforms as well as identifying their potential benefits.

Part 1 Overview	Ch 1: Context for the Review	
Part 2 Findings and Recommendations	Ch 2: Competition policy Ch 3: Competition laws Ch 4: Institutions and governance Ch 5: Small business Ch 6: Retail markets Ch 7: Implementation	Recs 1 - 21 Recs 22 - 42 Recs 43 - 52 Recs 53 - 54 Recs 55 - 56
Part 3 Competition policy	Ch 8: Competition principles Ch 9: Intellectual property Ch 10: Regulatory restrictions Ch 11: Infrastructure markets Ch 12: Human services Ch 13: Competitive neutrality Ch 14: Government procurement and other commercial arrangements Ch 15: Key retail markets Ch 16: Informed choice	Rec 1 Recs 6, 7 Recs 8 - 14 Recs 3, 5, 19, 20 Rec 2 Recs 15 - 17 Recs 18, 24 Rec 21
Part 4 Competition laws	Ch 17: Introduction to competition law issues Ch 18: Mergers Ch 19: Unilateral conduct Ch 20: Anti-competitive agreements, arrangements and understandings Ch 21: Secondary boycotts and employment-related matters Ch 22: Exemption processes Ch 23: Enforcement and remedies Ch 24: National Access Regime	Recs 22, 23 Recs 25, 35 Recs 30, 31 Recs 4, 27 - 29, 32 - 34 Recs 36, 37 Recs 38, 39, 54 Recs 26, 40, 41, 53 Rec 42
Part 5 Competition institutions	Ch 25: Institutional structures for future competition policy Ch 26: Enforcement of competition law Ch 27: Access and pricing regulation Ch 28: Review of competition and regulatory decisions	Recs 43 - 48 Recs 49, 51, 52 Rec 50
Part 6 Implementation	Ch 29: Implementing the Review Ch 30: Benefits of reform	Rec 55 Rec 56

PART 1 — OVERVIEW

1 CONTEXT FOR THE REVIEW

Competition policy, like other arms of government policy, is aimed at securing the welfare of Australians. Broadly speaking, it covers government policies, laws and regulatory institutions whose purpose is to make the market economy better serve the long-term interests of Australian consumers. Properly applied, it can improve the quality and range of goods and services, including social services, available to Australians.

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

Policies that strengthen our competition landscape are crucial for Australia as a small, open economy, exposed to competitive forces that originate beyond our borders. Australia's economic development has been propelled by exposure to opportunities elsewhere in the world, with Australian living standards reflecting the beneficial impact of international trade in goods and services — both exports and imports.

Exposure to markets beyond Australia widens choice and opportunities, helping to ensure that Australia remains an attractive place to live, work, raise a family and run a business.

During the 1980s and 1990s successive governments opened the Australian economy to greater competition by lowering import tariffs, deregulating markets for foreign exchange, admitting foreign banks, deregulating domestic aviation and partially deregulating and reforming the waterfront, coastal shipping and telecommunications (see Box 1.1). These initiatives widened consumer choices, lowered prices and exposed local producers to more intense competition from abroad.

Box 1.1: Deepening Australia's integration with the world

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

Trade liberalisation — reductions in tariff assistance (begun in 1973) and the abolition of quantitative import controls — mainly in the automotive, whitegoods and textile, clothing and footwear industries — gathered pace from the mid-1980s. The effective rate of assistance to manufacturing fell from around 35 per cent in the early 1970s to 5 per cent by 2000.²

Capital markets — the Australian dollar was floated in December 1983, foreign exchange controls and capital rationing (through quantitative lending controls) were removed progressively from the early 1980s and foreign-owned banks were allowed to compete — initially for corporate customers and then, in the 1990s, to act as deposit-taking institutions.³

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

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

In 1995, Commonwealth, state and territory governments agreed to implement a wide-ranging National Competition Policy (NCP) built on the recommendations of the Hilmer Review (see Box 1.2). The NCP reflected a desire to build on the momentum of earlier reforms by extending the reach of choice and competition beyond tradeables to encompass non-tradeable goods and services.

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

These expectations were realised. In 2005 the Productivity Commission (PC) estimated that productivity improvements and price reductions flowing from the NCP and related reforms in the 1990s raised Australia's gross domestic product (GDP) by 2.5 per cent.⁴

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

3 Ibid.

4 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report No. 33, Canberra, page XVIII.

Box 1.2: National Competition Policy

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

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

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

- consumers had no choice of electricity or gas provider — they paid regulated tariffs and customer service was poor or non-existent;
- telecommunications services operated as a monopoly, which only ended in 1992 when Australia's second telecommunications provider, Optus, entered the market;
- there were price controls and supply restrictions on food products such as eggs, poultry, milk, rice, and sugar;
- retail trading hours were restricted for most stores, with limited trading on weekends; and
- only lawyers could offer land conveyancing services (conveyancing fees fell by 17 per cent in New South Wales when this regulation was repealed, leading to an annual saving to consumers of at least \$86 million).⁵

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

Retail trading hours have been substantially deregulated in most States and Territories. Online shopping allows consumers access, choice and convenience at any time of the day or night. Australia

⁵ National Competition Council 1999, *National Competition Policy: Some impacts on society and the economy*, Melbourne, page 9.

has more mobile phones than people,⁶ and consumers can choose among a vast array of phone plans from a variety of telecommunications providers.

These developments highlight how competition underpins so many aspects of Australia's economy. Its importance in Australia's financial system was recently recognised in the Final Report of the Financial System Inquiry (see Box 1.3).

Box 1.3: Competition in Australia's financial system

On 20 December 2013 the Treasurer, the Hon. Joe Hockey MP, released final terms of reference and appointed an independent committee to undertake a Financial System Inquiry (FSI), chaired by Mr David Murray AO. The FSI was charged with examining how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth. The Final Report of the FSI was released on 7 December 2014.

The FSI considered that competition and competitive markets 'are at the heart of the Inquiry's philosophy for the financial system ... [and] ... the primary means of supporting the system's efficiency'.⁷ The FSI found that:

- competition in Australia's financial system is generally adequate at present, but there is complacency about the level of competition that exists;
- high concentration and increasing vertical integration within some parts of the Australian financial system have the potential to limit the benefits of competition in future;
- a number of specific improvements could be made in particular areas, including the capital adequacy of authorised deposit-taking institutions, superannuation, regulation of the payments system and in relation to new technology; and
- all regulators involved in the financial system should more clearly explain how they have considered the effect of their decisions on competition, and the Australian Securities and Investments Commission's (ASIC's) mandate should explicitly include consideration of competition.

The Australian Government has announced that it will respond to the FSI's recommendations in 2015, after consulting with industry and consumers. This consultation process will end on 31 March 2015.⁸

REINVIGORATING MICROECONOMIC REFORM

Australia has enjoyed continuous economic growth since the early 1990s and weathered the global financial crisis of the late 2000s without a recession. During the Panel's consultations, this backdrop led some stakeholders to question whether there was a 'burning platform' for a new round of microeconomic reform.

Evidence presented to the Panel throughout the Review suggests that reform is not only overdue, given stalled reform effort in the 2000s, but critical to improving Australia's productivity performance and to sustaining our living standards into the future.

6 Australian Communications and Media Authority 2014, *Communications report 2013–14*, Melbourne, page 17.

7 Australian Government 2014, *Financial System Inquiry Final Report*, Canberra, page xvi.

8 Hockey, J (Treasurer) 2014, *Release of the Financial System Inquiry Report*, media release 7 December 2014, Canberra.

In the 1990s, Australia benefited from strong productivity growth, reflecting the competition-enhancing reforms undertaken in the 1980s and 1990s. As the Organisation for Economic Co-operation and Development (OECD) 2010 regulatory review of Australia noted:

Increased exposure to international trade during the 1980s and the product market liberalisation conducted in the 1990s under the National Competition Policy (NCP) framework reduced barriers to entry, and increased competition in the Australian economy. This contributed to an impressive surge in productivity in the 1990s ...⁹

In the 2000s, the driver of Australia's rising living standards changed, as a surge in our terms of trade and a boom in mining investment took over from productivity growth. In fact, multifactor productivity growth (a measure of output produced per unit of combined inputs of labour and capital) deteriorated markedly during this time.¹⁰ Much of this deterioration coincided with a stalling in Australia's microeconomic reform effort.

Now that Australia's terms of trade are receding from their peak and the boom in mining investment is past, as a matter of urgency we must look once again to productivity growth to underpin rising living standards.

The case for further microeconomic reform, and particularly competition policy reform is clear.

Looking ahead, structural change in the Australian economy will continue to subdue average rates of growth in productivity. Productivity growth is lower in service sectors, such as aged care and health, which are expected to expand, while sectors with higher productivity growth, such as financial services, are expected to decline as a share of the economy.¹¹

Without reform to improve the productivity of our large and growing services industries, Australia's economy will face increasing challenges, affecting not only the choices of our citizens in their everyday activities, but also the state of our public finances. Providing the services that users want, and delivering them in the way they want, are important elements of making government-funded services sustainable.

Australia must reform its economy, not only to deal with the productivity challenge at home but also to take advantage of global developments, to sustain Australia's capacity to secure rising levels of prosperity.

The industrialisation of developing nations and, in particular, the rise of Asia and the growing Asian middle class offer Australia important growth opportunities. Yet, as outlined below, Australia cannot assume that the rise of Asia will be an uncontested opportunity.

Notwithstanding the economic imperatives, it takes time to implement reforms and for their effects to materialise. The NCP reforms took many years to be agreed and implemented across jurisdictions before the real benefits were fully exploited and our standard of living was materially improved.

A new microeconomic reform agenda will inevitably take time to be formulated, agreed and then implemented. Given the forces for change that Australia already faces, any delay will only make

9 OECD 2010, *OECD Reviews of Regulatory Reform: Australia 2010*, Paris, page 14.

10 Parkinson, M 2014, Fiscal sustainability & living standards — the decade ahead, Speech to the Sydney Institute, Sydney, 2 April.

11 Parkinson, M 2014, *Challenges and opportunities for Australia over the next decade*, Speech to the Association of Mining and Exploration Companies, Perth, 2 July.

reform more difficult, and more sharply felt. Early action will make the reform effort more manageable, allowing Australians to enjoy higher living standards sooner rather than later.

A ROLE FOR COMPETITION POLICY REFORM

As previously noted, competition policy reform is vital to achieving the productivity improvements necessary for higher incomes and jobs growth, most especially by making goods and services markets more competitive. More competitive markets maximise our capacity to adjust rapidly to changing circumstances, arising from both global and domestic sources. Strong competition in goods and services markets encourages innovation, growth in productivity and average income levels, and ultimately the number and quality of Australian jobs.

More competitive markets also improve our quality of life by delivering greater variety and more freedom in our everyday choices. Having more choices open to us, along with greater capacity to exercise informed choice, improves our lives, individually as well as communally. Competition and choice also help to ensure that our economy is agile, flexible and robust to future challenges and opportunities.

Reform is vital as the Australian economy is beset by ongoing forces for change. Some of these forces are long-standing, but others were barely envisaged at the time of the Hilmer Review. For example, online digital technologies were in their infancy in the early 1990s, and were only widely adopted from the mid-1990s onwards.

The rise of China was anticipated, following the economic reforms of Deng Xiaoping, but not really established until well into the 1990s. The effect of Australia's ageing population was again anticipated but has only begun to bite economically as the 'Baby Boom' generation retires from the workforce.

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

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

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

DEVELOPING NATIONS AND THE RISE OF ASIA

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

However, the global shifts are not confined to the Asian region. Many emerging economies in Europe, Africa and Latin America also supply raw materials and energy in direct competition to

Australia. As the OECD notes, the global economic balance will continue to shift towards current non-OECD areas, including many emerging economies, whose economic structure and export profile will increasingly match those of the OECD countries.

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

Further reforms to inject dynamism in labour and product markets, combined with re-designed intellectual property right policies, will be needed to sustain innovation, productivity and employment.¹²

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

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

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

The benefits of these economic opportunities should reflect in the living standards of everyday Australians. A wider array of products and services to choose from, supplied from a variety of sources, at prices kept low by competition — domestically and from abroad — will be enjoyed widely within the Australian community.

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

AGEING

Australia's population is ageing. The number of Australians aged 75 years and over is projected to increase by around four million between 2012 and 2060 — an increase roughly equivalent to the current population of Sydney.¹³ Population ageing will lower expected income growth. As the Baby Boom generation retires, the number of working age people relative to those over the age of 65 will fall.

Population ageing will substantially increase demands on the health and aged care systems. Australian Government real health expenditure per person is expected to more than double over the

¹² OECD 2014, *Shifting Gear: Policy Challenges for the next 50 Years*, OECD Economics Department Policy Notes, No. 24, Paris, page 1.

¹³ Productivity Commission 2013, *An Ageing Australia: Preparing for the Future*, Commission Research paper, Canberra, page 6.

next 40 years, and aged care expenditure per person is expected to more than triple.¹⁴ Improving the efficiency and responsiveness of these sectors will be crucial to meeting the needs and preferences of older Australians with dignity.

Although the ageing of Australia's population is well documented, its impact on our competition framework has not received much attention. Ageing will see greater demands for choice and diversity from Australians over their aged care arrangements, with expectations for new competitive and innovative services to meet a widening array of needs and preferences.

More options, with greater flexibility, adaptability and responsiveness will become the norm, with users having an increasing say in the system — instead of providers dictating outcomes.

THE DIGITAL REVOLUTION

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

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

Technological innovation is lowering barriers to entry across a range of markets. For example, new ride-sharing services and providers of short-term accommodation are using digital technologies, primarily through smart phone applications, to connect customers and providers in innovative ways and in direct competition with incumbent providers. These examples highlight the potential for digital technologies to disrupt traditional markets.

Innovative, competitive new entrants in a market can lower prices to consumers and widen their choice of providers. However, they can also raise concerns about consumer safety. The community will expect new entrants to challenge existing providers by offering new and better products, while still adhering to expected safeguards against doubtful or dangerous market practices. New entrants should not be exempt from the need to operate in a safe and reliable way, consistent with community expectations.

Community expectations will demand that all providers (both new and incumbent) compete on the basis of the quality, value and responsiveness of the products and services they offer to consumers.

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

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

14 Australian Government 2015, *2015 Intergenerational Report, Australia in 2055*, Canberra, Page xvi-xvii. Real health expenditure per person is projected to more than double from around \$2,800 to around \$6,500, while real aged care expenditure per person is projected to more than triple from \$620 to \$2,000.

networks and the power of innovation to lift living standards require Australia's competition policy, laws and institutions to be fit for purpose for the digital age.

FIT FOR PURPOSE

The Competition Policy Review has been tasked with examining whether Australia's competition policy, laws and institutions remain fit for purpose, especially in light of changing circumstances likely to face the Australian economy over the next decade or so. Having a sustainable and durable policy framework is important, for current as well as future generations of Australians.

The Panel identifies six attributes of competition policy as defining its fitness for purpose (see Box 1.4). These attributes are the criteria against which we assess Australia's current competition policy, laws and institutions in this Report. In [Part 2](#) we summarise the Panel's findings and recommendations.

Box 1.4: Fit for purpose

A competition policy that is 'fit for purpose':

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

Making markets work in the long-term interests of consumers

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

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

In 1995, the then TPA incorporated an objects clause,¹⁵ stating:

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

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

In an environment where Australia's economic structure will continue to evolve in response to global forces, and markets become increasingly global, fostering competitive processes in the interests of

¹⁵ Section 2 of the former *Trade Practices Act 1974*. Now section 2 of the *Competition and Consumer Act 2010*.

consumers becomes an ever-changing and challenging task. Disruptive technologies increasingly challenge the way our markets work, and by extension, our existing regulatory architecture.

As it becomes more challenging and complex to ensure that markets operate efficiently in the interests of consumers, we must continue to adhere to fundamental principles but allow flexibility in their application. In particular, we must foster the smooth entry and exit of suppliers in response to changing consumer tastes, needs and preferences — which means removing or lowering barriers to entry (and exit) wherever possible.

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

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

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

Fostering diversity, choice and responsiveness in government services

Choice is a powerful dynamic force for improving our lives. Enabling our individual requirements and preferences to be expressed through choice encourages governments to adapt their services to better serve our needs.

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

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

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

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

If managed well, moving towards greater diversity, choice and responsiveness in government services can both empower consumers and improve productivity.

Encouraging innovation, entrepreneurship and the entry of new players

In the coming decades, the technological change we have witnessed in the recent past is likely to accelerate, most especially in the field of information and communications technology. The explosion in information available to all market participants has both better informed those on the buy-side of transactions and allowed those on the sell-side to target their goods and services more accurately.

The information revolution is just one facet of a rapidly evolving technology landscape. New techniques and applications utilising information are fostering new ideas and ways of doing business. Such innovations fundamentally challenge existing laws and policies, founded as they often are on the premise of a stable and predictable marketplace with known participants.

Australians eagerly embrace new ideas when they offer us something of value, including innovations from new players entering markets like never before. But our existing laws and institutions often struggle to keep pace. Sometimes this is the inevitable consequence of an unanticipated shock, but it can also be because existing laws and policies have rightly or wrongly instituted some form of preferment to incumbent market participants.

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

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

They also need to recognise that new technologies can provide alternative avenues to address the needs and concerns of the community rather than falling back on existing and, at times, out-dated regulatory frameworks (see Box 1.5).

A competition policy that is fit for purpose must strike a balance between the long-term benefits to consumers of allowing new entrants to establish themselves in a market and protecting the public against dishonest or dangerous practices. It requires flexible and adaptable regulatory interventions, enabling and requiring new providers to operate within appropriate legal frameworks.

Box 1.5: Technological versus regulatory solutions to market failure –ride-sharing apps

Markets may sometimes be inefficient due to information asymmetries. This occurs when one party to a transaction has more information about the goods or services on offer than the other.

This type of problem was first identified by economist George Akerlof, who concluded that the presence of information asymmetries could drive down the average quality of goods in a market, since sellers of high-quality goods would be unable to distinguish themselves from sellers of low-quality goods — and hence would not get a price premium.¹⁶ Without a higher price, sellers of high-quality goods would withdraw them from the market, driving the average quality down.

¹⁶ Akerlof, G A 1970, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism', *The Quarterly Journal of Economics*, Vol. 84, No. 3, The MIT Press, Cambridge.

**Box 1.5: Technological versus regulatory solutions to market failure –ride-sharing apps
(continued)**

Although markets can develop solutions to overcome information problems, governments have also resorted to regulation to help overcome information problems. Examples of such regulation include mandatory warranties, mandatory disclosure, and laws prohibiting misleading and deceptive conduct.

However, while regulation can assist in making markets work better, it is not necessarily a complete solution. It requires ongoing enforcement and gives sellers that have met a minimum standard little incentive to improve.

Recently, technology has emerged that offers an alternative to regulation in helping to solve information problems.

For example, in the context of personal transport services, Uber and Lyft¹⁷ coordinate users and providers of ride-sharing services using internet apps where mandatory feedback from both customers and operators is used to encourage good service standards and passenger behaviour. Such ride-sharing apps, which allow passengers and drivers to post feedback on each other, enable drivers and passengers to establish and trade on their reputations.

However, such innovative solutions to information problems in markets can pose challenges for regulators. Where regulation is inflexible, it may prevent markets from responding to innovative service offers that do not fit neatly within existing regulated categories. Regulation must be reviewed regularly to ensure that it is still required and not inhibiting the emergence of new service offerings.

Promoting efficient investment in and use of infrastructure and natural resources

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

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

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

Pricing or other signals that guide allocation of our natural resources towards their highest-value use will optimise their potential to support Australian living standards into the future. In this regard, we

17 Lyft ride-sharing services do not operate in Australia.

need to ensure that planning, zoning and environmental regulations governing the use of our land and other natural resources, including water, are applied sensibly.

Competition laws and regulations that are clear, predictable and reliable

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

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

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

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

A competition policy that is fit for purpose should enshrine competition law that is sufficiently general in its design to accommodate evolving ways of doing business or engaging with consumers, but sufficiently reliable and predictable in its application to avoid discouraging innovation and entrepreneurship.

Securing necessary standards of access and equity

Australians expect the benefits and opportunities afforded by a well-functioning market economy to be enjoyed widely, not reserved for the privileged few, or those with the necessary information and resources to exploit the benefits of choice or responsiveness. For choice to deliver real benefits, consumers not only need proper access to information, but it must also be in the right form for them to assess it, and they must have the capacity to act on it.

Access and equity dictate necessary standards and genuine opportunities that all consumers should be able to enjoy, making genuine choice, responsiveness and innovation available to all. Many government services have not previously been exposed to competition because of concerns about the impact on vulnerable consumers, especially in regard to access (usually around pricing but also quality) and outcomes that may accentuate inequality.

Well-functioning markets, governed by policies and laws that are fit for purpose, can help to deliver access and equity. When opportunities and choices are limited (through poor market regulation and/or government decisions) questions of distributive justice or fairness often arise. Markets that cater to a wide range of consumer tastes and incomes can help to promote fair outcomes. However, when lower-income or vulnerable consumers are denied basic opportunities and choice, especially in their dealings with government, concerns about access and equity become more pronounced.

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

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