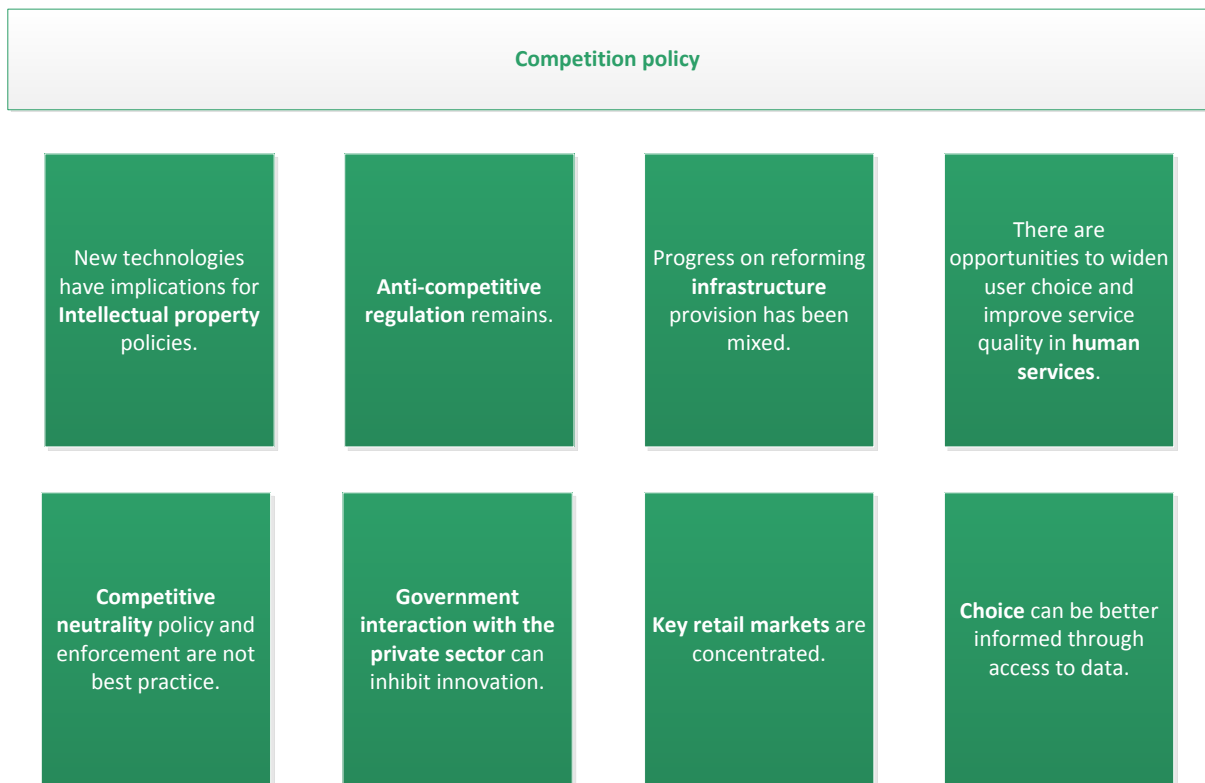


PART 3 — COMPETITION POLICY

In this Part we examine the current state of Australia’s competition policy and test its fitness for purpose against the criteria identified in [Part 1](#).

We identify areas where existing competition policy may not serve the long-term interests of consumers, especially in light of the forces for change bearing on the Australian economy.

The discussion is structured to reflect eight themes as outlined in the diagram below.



8 COMPETITION PRINCIPLES

The environment that led to the Hilmer Review, and then to all Australian governments agreeing to the National Competition Policy (NCP), is reflected in a Prime Ministerial statement from 1991:

The Trade Practices Act is our principal legislative weapon to ensure consumers get the best deal from competition.

But there are many areas of the Australian economy today that are **immune from that Act**: some Commonwealth enterprises, State public sector businesses, and significant areas of the private sector, including the professions.

This patchwork coverage reflects historical and constitutional factors, not economic efficiencies; it is another important instance of the way **we operate as six economies**, rather than one.

The benefits for the consumer of expanding the scope of the Trade Practices Act could be immense: potentially lower professional fees, cheaper road and rail fares, cheaper electricity.³⁴ (emphasis added)

The NCP reflected the challenges Australia faced at that time — more than 20 years ago now. The focus of the NCP reforms was exposing some previously sheltered activities to competition and applying a more national approach to competition issues.

The NCP was set out in three intergovernmental agreements, which are outlined in Box 8.1. They reflected the six elements of competition policy identified in the Hilmer Review:³⁵

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering 'competitive neutrality' between government and private businesses when they compete.

34 Hawke, B (Prime Minister) 1991, *Building a Competitive Australia*, Parliamentary statement, Canberra, 12 March.

35 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page xvii.

Box 8.1: National Competition Policy — intergovernmental agreements

In 1995, Australian governments committed to three intergovernmental agreements: the Competition Principles Agreement (CPA); the Conduct Code Agreement; and the Agreement to Implement the National Competition Policy and Related Reforms.³⁶ The elements of these agreements were:

- extending the *Trade Practices Act 1974* (TPA) to previously excluded businesses (unincorporated businesses and state, territory and local government businesses);
- establishing independent price oversight of state and territory government businesses;
- corporatising and applying competitive neutrality principles so that government businesses do not enjoy a net competitive advantage as a result of public sector ownership;
- structurally reforming public monopolies to separate out industry regulation and, where possible, further disaggregating potentially competitive parts of the monopoly;
- establishing a third-party access regime for significant bottleneck infrastructure;
- reviewing all legislation restricting competition;
- applying the agreements to local government;
- establishing the National Competition Council (NCC), including funding, appointments and work program;
- imposing conditions on governments seeking to exempt conduct from the competition law; and
- providing financial assistance to the States and Territories, conditional on progress in implementing the NCP.

Although the NCP agreements provided a framework for agreed policies, the States and Territories had flexibility in implementing what was agreed. The Panel considers that flexibility continues to be important, particularly in the context of a federation where responsibility for reform lies with various levels of government. Given the importance of local government in implementing aspects of competition policy is sometimes overlooked, this should be explicitly addressed in the future.

In reviewing the NCP, the Productivity Commission (PC) noted that flexibility provides the opportunity for governments to learn from different approaches to reform:

... flexibility has in turn harnessed the benefits of ‘competitive federalism’ to advance the reform process. That is, the NCP framework has provided opportunities for governments to learn from the outcomes of different approaches to reform in other jurisdictions.³⁷

That said, flexibility should not compromise the agreed outcomes of particular reforms. Moreover, where different approaches have been adopted by various jurisdictions, best practice approaches to implementing competition reforms should be identified.

Recognising that restrictions on competition can sometimes be desirable, the NCP included a ‘public interest’ test as a central component.

36 National Competition Council 1998, *Compendium of National Competition Policy Agreements, Second Edition*, Australian Government Publishing Service, Canberra.

37 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report no. 33, Canberra, page 130.

As discussed in [Part 1](#), digital technology and increasing globalisation are changing markets and consumers' ability to access markets. Australia also confronts long-term economic challenges, such as an ageing population.

In light of these developments, the Panel believes that the original elements of competition policy should be revisited.

The Crown (whether in right of the Commonwealth, state and territory, or local governments) has the potential to harm competition through its commercial arrangements entered into with market participants. The Panel, therefore, concludes that the anti-competitive conduct provisions of the *Competition and Consumer Act (2010)* (CCA) should reach beyond government businesses to cover all government activities that have a trading or commercial character. This is discussed in more detail in [Section 14.2](#).

Moreover, the Crown's capacity to enhance or harm competition also includes a range of policies and regulations that reach beyond the scope of the CCA. Procurement, which ranges from buying goods and services through to public-private partnerships (PPPs) and privatisations, should be designed with competition principles in mind. This is discussed in more detail in [Section 14.1](#).

The Panel also believes that the focus of competition policy should be widened beyond infrastructure sectors and government businesses to encompass government services more generally.

Competition policy plays an important role in improving government performance in sectors such as human services by promoting user choice and encouraging a diversity of providers. Choice and diversity have the potential to improve outcomes for users, especially but not only by stimulating innovation.

Independent regulation can encourage entry into markets (since it provides a level of certainty about the regulatory environment), while separating the interests of providers from those of funders and regulators encourages accountability, innovation and a level playing field between public and other providers.

The Panel also believes that declaration and third-party access to infrastructure should be mandated only where it promotes the public interest to do so. The onus of proof should lie with those seeking access to demonstrate that it would promote the public interest rather than on infrastructure owners to demonstrate that access would be contrary to the public interest. This is discussed in more detail in [Chapter 24](#).

Competition principles should be based around the central idea that competition policy, laws and institutions should promote the long-term interests of consumers. Responses to the principles, outlined in the Panel's Draft Report, are largely positive. CHOICE notes that a set of principles will 'help sustain momentum in reform processes that may take several years ... [and] can play an important role in ensuring there is a consistent approach to reform across multiple sectors' (DR sub, page 8).

CHOICE considers 'competition and consumer choice are means of improving consumer welfare rather than objectives in and of themselves' (DR sub, page 9), while National Seniors Australia 'strongly endorses the Review Panel's call for competition policy to focus on making markets work in the long-term interests of consumers' (DR sub, page 6).

In addition, some submissions comment on the importance of the overriding public interest test.³⁸ Submissions also highlight the risks in applying the principles to human services.³⁹

The Panel agrees that competition and choice need to be seen as a means to improving wellbeing and that caution must be exercised in applying competition principles in the human services sectors. This is discussed in more detail in [Chapter 12](#). In applying competition principles, the Panel endorses a **public interest test** as a central tenet of competition policy. The Panel recommends continuing with the NCP public interest test, namely 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.

Submissions from Marsden Jacob Associates (DR sub, page 1) and the Pharmacy Guild of Australia (DR sub, page 11) take issue with the public interest test set out in the Draft Report, which reflects that negotiated as part of the 1995 Council of Australian Governments (COAG) Competition Principles Agreement under the NCP.

Marsden Jacob Associates submits that the second limb of the test should not be applied literally, and did not appear in the NCC's 2005 report *Identifying a framework for regulation in packaged liquor*.⁴⁰ Instead, the submission suggests the test should be re-worded to substitute the word 'best' for the word 'only' in the second limb. The Pharmacy Guild of Australia similarly proposes that the second limb should be changed so that the words 'most efficient' replace the word 'only'.

The existing public interest test does not put competition above all other considerations, and nor should it. However, it does require that the effect on competition always be carefully considered as part of the overall assessment of the net public interest, and that the costs of anti-competitive regulation should be properly assessed in any cost-benefit analysis.

In its *Identifying a framework for regulation in packaged liquor* report, the NCC notes 'regulation that successfully addresses the public interest but also restricts competition can be justified, so long as the impact on competition is minimised'⁴¹ — illustrating that the test is flexible. The 1995 formulation of the public interest test was also subsequently re-endorsed by COAG in 2007.⁴²

The Panel sees no reason for change and recommends that the test continue to be expressed in the same way to ensure that regulatory reviews continue to focus on avoiding any restrictions on competition. The long-standing COAG test enshrines the correct principle — that competition should not be impeded unless it must be, in order to secure the public interest. It also acknowledges the fact that competition is not an end in itself — the test should continue to be applied by assessing the

38 See, for example: Australian Local Government Association, DR sub, pages 3-4; and South Australian Government, DR sub, page 5.

39 See, for example: Australian Education Union, DR sub, page 2; CHOICE, DR sub, page 8; and National Seniors Australia, DR sub, page 7.

40 Marsden Jacob Associates 2005, *Identifying a framework for regulation in packaged liquor retailing*, National Competition Council, Melbourne.

41 Ibid. at Foreword.

42 Council of Australian Governments 2007, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, Canberra.

costs and benefits of the regulation overall (including any impact on competition) in order to meet the policy objective.

Further, in the rare circumstances where the benefit to the public would be maximised by a regulation that restricted competition, then the test is flexible enough to allow that option to be chosen.

The Panel's view

The Panel considers that an overarching set of competition principles will provide direction for governments in committing to further competition reform. High-level principles will allow jurisdictions the flexibility to implement policies that reflect local conditions.

These principles should be based around the central idea that competition policy, laws and institutions should promote the long-term interests of consumers.

The Panel reaffirms the principles which underpinned the NCP. However, a new set of competition principles should widen the focus of competition policy, laws and institutions to encompass the many different ways in which the government can affect competition in markets. The Panel's recommendation contains a set of new principles to which governments should commit.

In applying these principles, the Panel endorses the 'public interest test' as a central tenant of competition policy so 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.

Implementation

Formal agreement by governments to the revised set of competition principles should be pursued as the initial implementation step. Agreeing a set of principles would guide the Australian Government, state and territory and local governments in implementing those aspects of competition policy for which they are responsible.

The principles can be agreed to by each jurisdiction individually and applied through their own processes. Ideally, however, the Australian Government and state and territory governments would jointly agree to the principles. The Australian Government should seek the agreement of the States and Territories within six months of accepting this recommendation.

As with the implementation of the NCP, the agreements should clearly allow each jurisdiction to tailor reforms to meet its own local conditions.

The mechanisms for reaching agreement between the Australian Government and the States and Territories are being considered as part of the Reform of Federation White Paper process. The Panel does not therefore recommend any particular mechanism to reach agreement among the jurisdictions. However, we believe that agreement should be at the level of the Prime Minister, Premiers and Chief Ministers, since the principles apply across the whole of government.

Recommendation 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.

9 INTELLECTUAL PROPERTY

As discussed in [Part 1](#), disruptive technologies are changing, and will continue to change, Australia's competitive landscape. Technology is expanding the geographic boundaries of markets, digital delivery of content is becoming more common and connected technologies are increasingly integrated as global communication networks mature.

Disruptive technologies have put intellectual property (IP) rights in the spotlight. Although IP rights can create incentives for innovation and disseminating ideas, they also have the potential to restrict market entry by preventing access to technologies.

In light of technological changes and more general changes to the regulatory environment in which investment in creative effort takes place,⁴³ Australia's IP arrangements should be re-examined. As the Chairman of the Productivity Commission (PC), Peter Harris, recently argued:

... the nature of internet-driven change and related global dependence on software-based systems suggests each nation should consider closely how well it is served by current IP systems, as these trends take hold.⁴⁴

IP rights are a form of intangible property right granted to a creator for something new or original. Like other legal property rights, IP rights exclude others from freely using IP, but the exclusive rights can be traded or licensed to others.

IP rights exist in many forms including:

- patents (inventions and new processes);
- copyright (over literary, musical and artistic works) and registered designs (designs applied to articles such as clothing);
- trademarks (which distinguish the origin of goods and services); and
- plant-breeder rights.

There is no single IP Act. Instead, IP rights are secured by separate, specific statutory regimes; for example, the *Patents Act 1990* for inventions and the *Copyright Act 1968* for literary and artistic creations.⁴⁵

The underlying rationale for IP rights is to promote new ideas and creations. Competitive markets can fail to support an efficient level of innovation because creations and ideas, once known, can be copied at little cost.

Knowledge has 'public good' characteristics. It is difficult to exclude others from using new ideas, and use by one person has little or no effect on the extent to which it is available to others. These public good characteristics of knowledge typically lead to under-investment in research and development — the returns to creators will be insufficient to provide incentives for efficient investment in IP material.

43 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, pages 8 -9.

44 Harris, P 2014, *Competition Policy and Deregulation — Challenges and Choices*, Crawford School of Public Policy, ANU, Canberra, page 8.

45 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, page 66.

IP regulations attempt to address this ‘free rider’ problem by legally granting exclusive use of the protected right to the creator for a specified period.

IP rights are important for competition and follow-on inventions. They allow firms to derive financial benefit from commercially exploiting their inventions and creations (which provides an incentive to innovate) and allowing other firms and individuals to use disclosed information about new inventions (rather than it remaining secret).

The community benefits from reducing wasteful duplication of research effort and allowing others to build on existing ideas. As the PC notes:

The issuing of patents may improve efficiency and community welfare by increasing the incentives for firms to innovate, which can in turn lead to new, improved or less expensive products. (sub, page 7)

However, IP rights can be used in a way that deters competition and limits consumer choice. For example, this could manifest in owners of IP rights extracting excessive royalties from IP licences or placing anti-competitive restrictions on knowledge dissemination. This would have adverse knock-on effects for innovation.

As The Australia Institute says:

While strong IP rights may increase the incentive to put into the [knowledge] pool (thereby generating positive externalities) they hamper the ability to take previously generated knowledge out of the pool (giving rise to negative externalities). The design of the rules is therefore important. (sub, page 20)

The Australian Competition and Consumer Commission (ACCC) claims that, in the vast majority of cases, granting an IP right will not raise significant competition concerns:

... rights holders are entitled to legitimately acquire market power by developing a superior product to their rivals, and pursuant to the policy purpose of IP regulation, the temporary market power from an IP right provides the very incentive to invest in the production of new IP. Such innovation is also a key goal of competition law. In this respect, IP and the competition law are for the most part complementary, both being directed towards improving economic welfare. (ACCC sub 1, page 59)

However, conflicts between the two policies can occur ‘where IP owners are in a position to exert substantial market power or engage in anti-competitive conduct to seek to extend the scope of the right beyond that intended by the IP statute’ (ACCC sub 1, page 59).

The PC submits that the patent system (where not warranted to encourage innovation) can impose costs on the community by impeding competition, including through:

- the accrual of ‘patent portfolios’ — in some cases, firms that accrue patents conduct no business other than asserting their patents against other firms — effectively ‘taxing’ other firms’ innovations via court cases; and
- ‘cumulative innovation’, where innovation requires access to multiple patents, there are higher costs to innovate because of the need to purchase those patents. The need to access multiple patents can lead to ‘hold out’, whereby the owner of a patent holds out for a better deal from a potential innovator, which can also serve to discourage innovation. (sub, page 29)

Therefore, it is a balancing act. As the ACCC says:

The *extent* of any IP rights should balance: (i) on the one hand, the incentives for innovation in the creation of IP; and (ii) on the other, the incentives that access to IP material provides for efficient use of that IP and for innovation from such use. (sub 1, page 58)

Keeping the balance right in light of technology and market changes is also challenging. For example, the widespread dissemination of material through the internet raises issues around copyright and related rights in the global context. 3D printing — the ability to translate a digital file into a physical object — will also pose challenges.

As noted by the Big Innovation Centre, 3D printing has dramatically lowered the cost and ease of reproducing physical objects. A single 3D printer will be able to copy different products from existing designs that are easily and quickly shared over the internet. This means IP is likely to become the main method through which some manufacturing businesses can fund the research, development and design of physical products. The Big Innovation Centre remarked:

The disruption caused by 3D printing will put significant strains on government policy. By removing barriers between the internet and the physical world, 3D printing will throw up significant questions for intellectual property laws, for regulators and for competition authorities.⁴⁶

9.1 IS THE 'BALANCE' RIGHT?

CHOICE, like some other submitters, suggests that Australia has not got the 'balance' right between granting IP rights and promoting competition. CHOICE suggests that the balance currently favours rights holders rather than consumers:

... monopolies give rise [to] obvious and well-known problems that ultimately end up impacting consumers. For this reason, limitations and exceptions apply to the monopoly of intellectual property. CHOICE believes that currently, Australia has not achieved the right balance in this regard.

Many companies operating in the entertainment industry (which obviously depends very heavily on copyright) have leveraged the considerable advantage of monopoly rights to insulate themselves against the disruptive effects of technological change, in particular from the internet. The persistence [of] territorial licensing arrangements (limiting the distribution of content based on geographical regions) is testament to the ability of industry to resist change. (sub, page 20)

The Panel considers IP arrangements should be technology-neutral, given the importance of innovation for economic growth. A number of submissions argue that IP arrangements do not support innovation because they are too technology-specific.⁴⁷

Mark Summerfield says:

The current provisions in the Patents Act and the CCA [Competition and Consumer Act], intended to ensure that patents do not unduly deter competition, or limit consumer

46 The Big Innovation Centre 2012, *Three Dimensional Policy, Why Britain needs a policy framework for 3D printing*, London, page 3.

47 See, for example: Australian Digital Alliance and Australian Libraries Copyright Committee, sub, page 7; and Google Australia, sub, page 18.

choice, were not drafted with arrangements such as patent pools, or the evolution of global technology standards, in mind. (sub, page 8)

The Australia Institute recommends a critical examination of patents on items such as software and business methods (sub, page 20). The ACCC also notes ‘IP regulation can become quickly obsolete as the manner in which IP material is used changes’, citing the abandonment of the Optus TV Now service as a casualty of Australia’s current copyright laws (sub 1, page 65).

However, determining the appropriate ‘extent’ of IP protection is complex — and potentially ever changing. If IP rights provide higher rewards than needed to induce an invention, this will reduce the invention’s net benefit to the community as a whole and result in a higher share of the benefit going to the IP rights’ holder. If there are no substitutes for the idea or invention, the rights’ owner could also engage in monopolistic behaviour.

At issue is how closely tests for allocating IP rights are linked to ‘public benefits’. Innovation could occur without IP protection. How long is it appropriate to reward the original creators of innovations?

A recent review of the literature undertaken by the PC found limited incentives for innovation from the IP system.⁴⁸ For example, Hall and Harhoff’s survey of 210 studies found that patents provide clear incentives for innovation in only a few sectors: pharmaceuticals, biotechnology, medical instruments and specialty chemicals.⁴⁹

Hazel Moir argues ‘it is neither efficient nor effective if patents are granted for inventions that would be undertaken absent the patent incentive’ (DR sub, page 2), with the evidence showing that patents are most needed where copying is fast and relatively cheap and where initial research and development costs are high. Hazel Moir also observes:

Interestingly, during the period when empirical evidence has mounted showing that patents are generally not needed to support industrial innovation, patents have been made available over a wider subject matter range and for increasingly less inventive ‘inventions’. (DR sub, page 2)

It is important that the extent of IP rights provided by IP regulations be reviewed regularly. As the PC said ‘because of the pervasiveness of IP law, it is important that the design, operation and review of IP systems be carefully governed’.⁵⁰

The extent of IP protection should be based on what is in the best interest of Australians.

A number of submitters support the Panel’s draft recommendation for a review of the extent of intellectual property protection.⁵¹ Electronic Frontiers Australia, for example, says:

While we also recognise that the underlying rationale for IP rights is the promotion of new ideas and creations, empirically there is little evidence to demonstrate that IP rights actually do this in practice. Furthermore, certain assumptions which underlie the

48 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, pages 90-91.

49 Hall, B and Harhoff, D 2012, *Recent Research on the Economics of Patents*, NBER Working Paper No 17773, National Bureau of Economic Research, Cambridge.

50 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, page 2.

51 See, for example: ACM Parts, DR sub, page 2; Australian Information Industry Association, DR sub, page 4; Australian Digital Alliance and Australian Libraries Copyright Committee, DR sub, page 2; Business Council of Australia, DR sub, page 41; CHOICE, DR sub, page 15; and National Seniors Australia, DR sub, page 10.

neoclassical economics basis of much contemporary IP law and policy have been disproved by real-life events, particularly in the context of free and open source software projects. EFA would thus welcome a consideration of the fundamental principles underpinning Australian IP law and policy, and the extent to which IP law and policy do what they are supposed to, namely stimulate creation and innovation in society. (DR sub, page 2)

Google Australia strongly supports an overarching review of intellectual property and submits:

... a modern and flexible copyright regime will become an increasingly crucial element of economic policy as Australia transitions to an economy that relies heavily on knowledge, innovation, and creativity. (DR sub, page 2)

However, others question the need for a further review in light of the number of recent inquiries, particularly in the area of copyright law reform (including the Australian Law Reform Commission (ALRC) copyright review and the House of Representatives Standing Committee on Infrastructure and Communications' Inquiry into IT Pricing).⁵²

The Australian Copyright Council argues:

... the rapid rate at which the digital marketplace is evolving suggests that a further review at this time is likely to be premature. ... the dynamic state of the market makes it difficult to anticipate the long-term interests of consumers. (DR sub, page 3)

Hazel Moir points to the patent systems as the area most in need of review (DR sub, page 1).

Some submitters also argue that, if there is to be an IP review, it should have a multi-disciplinary approach.⁵³ For example, the Australian Publishers Association says:

Intellectual property is a complex and contested area of policy, about which there are many divergent perspectives, all of which should be comprehended within any wholesale review. To provide comprehensive advice to government, any further review would benefit from having from the outset a multi-disciplinary approach, encompassing legal understanding of this complex corpus juris and a broad economic perspective that covers the complex intersection between innovation, entrepreneurship and competition in a digital world. (DR sub, page 5)

The Australian Digital Alliance and the Australian Libraries Copyright Committee, while supporting an overarching review of IP, argue that it would be a perverse result if the ALRC recommendation for introducing a flexible 'fair use' exception to Australian copyright law was delayed by a further review of the IP system (DR sub, page 3).⁵⁴

The Panel acknowledges the recent number of IP reviews but notes that they are partial examinations. We remain concerned that there is no overarching IP policy framework or objective guiding changes to IP protection and therefore see a need for an overarching review of IP.

52 See, for example: Australasian Performing Rights Association Ltd and Australasian Mechanical Copyright Owners' Society, sub, page 3; Communications Law Centre UTS, DR sub, pages 1-2; and Copyright Agency, DR sub, page 3. Foxtel strongly disagrees that an IP review is warranted, DR sub, page 8.

53 See, for example: Australian Copyright Council, DR sub, page 4; and Australian Motor Industry Federation, DR sub, page 6.

54 Australian Law Reform Commission 2013, *Copyright and the Digital Economy*, Report 122, Sydney.

9.2 THE INTERACTION BETWEEN IP RIGHTS AND COMPETITION LAW

Currently, subsection 51(3) of the *Competition and Consumer Act 2010* (CCA) provides a limited exception from most of the competition law prohibitions for certain types of transactions involving IP. The exception covers certain conditions in licences or assignments of IP rights in patents, registered designs, copyright, trademarks and circuit layouts. The exception does not extend to the prohibitions relating to misuse of market power and resale price maintenance.

A number of submitters, including the PC (sub, page 28) and the ACCC, argue that there is no reason why trading arrangements involving IP rights (licensing and assignments) should be exempt from the competition law prohibitions in the CCA.⁵⁵ The ACCC says:

On the *use* of intellectual property rights, the CCA should apply in the ordinary way. The ACCC recommends that section 51(3) of the CCA should be repealed and that, in general, there is no reason to treat intellectual property any differently to other services in relation to access. (sub 1, page 58)

Similarly, iiNet says:

Many intellectual property licences and other agreements covered by section 51(3) have significant impacts on competition in a variety of markets and it is iiNet's view that it is therefore appropriate that the use of intellectual property rights be subject to Part IV of the CCA.

iiNet notes that if the exemption is repealed, authorisation will still be available for intellectual property transactions that are caught by the prohibitions in the Part IV but provide a public benefit. (DR sub, page 3)

Australian Industry Group submits that the exemption should be repealed because the ACCC should be allowed to regulate anti-competitive conduct in areas where copyright or patents may be used to engage in such behaviour. Also, the exemption is not needed to ensure that beneficial IP licensing arrangements are lawful (DR sub, page 9).

In a recent submission to the ALRC Inquiry into Copyright and Digital Economy, the ACCC also argued 'it is important that the rights created through IP laws should be subject to competition laws to ensure they are pro-competitive rather than anti-competitive in effect or purpose'.⁵⁶

The ACCC pointed to the digital environment providing new ways of creating, using and distributing copyright materials with commensurate opportunities to improve efficiency and welfare. However, copyright materials are increasingly used as intermediate inputs, which increases the potential for copyright to have anti-competitive effects. Solutions that are capable of addressing new market failures in digital environments (including potentially new forms of collective licensing or copyright exchanges) may also raise competition concerns.⁵⁷

The ACCC also noted 'that in other jurisdictions, such as the United States, IP rights are subject to the same competition laws as all other property rights. [And] ... in these jurisdictions, there has been

55 See, for example: Australian Communications Consumer Action Network, DR sub, page 5; Communications Law Centre, UTS, DR sub, pages 3 and 4; and Australian Digital Alliance and Australian Libraries Copyright Committee, DR sub, page 4.

56 Australian Competition and Consumer Commission 2012, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, Canberra, page 12.

57 *Ibid.*, page 6.

neither an erosion of IP rights for creators, nor any apparent impact on the incentives for the production of copyright material'.⁵⁸

Associations that represent IP owners, and IP owners themselves, put a contrary view (AIPPI Australia, DR sub, page 1). For example, the Australian Recording Industry Association Ltd says:

The idea that there is no need for the s 51(3) exemption because IP should be treated like any other form of property is simplistic and misleading. The exemptions under s 51(3) serve partly as a safety net where broadly defined prohibitions under the Competition and Consumer Act would otherwise be too far-reaching. The cartel prohibitions, the prohibition against anticompetitive agreements under s 45 and the prohibition against exclusive dealing under s 47 are all broadly defined and can easily catch conduct that is efficiency enhancing (there is no rule of reason defence in Australia). The exemptions under s 51(3) are important because they avoid liability where IP licensing conditions are efficiency enhancing. (sub, page 4)

AIPPI Australia, the Australian national group of the International Association for the Protection of Intellectual Property, argues that:

To repeal section 51(3) and expose dealings by intellectual property holders that are within the scope of their monopoly to the full scope of the competition law is inconsistent with the rationale for the existence of intellectual property rights. (DR sub, page 7)

CSIRO points to the value of subsection 51(3):

... in the context of competition law in Australia, subsection 51(3) is a valuable provision in relation to patent licence transactions and that its repeal (without putting in place some compensating mechanisms) would be potentially counterproductive to technology commercialisation in Australia. (DR sub, page 1)

Others argue that repealing subsection 51(3) will create uncertainty, add a cost burden on businesses and has the potential to give rise to unintended consequences. For example, AIPPI Australia states that, although the ACCC acknowledges the majority of cases do not give rise to competition concerns:

... without the protection afforded by section 51(3), it would still be necessary to conduct a detailed review of these agreements from a competition perspective to ensure they comply with the relevant laws. It is therefore inefficient to subject dealings to competition laws where the risk of infringement is negligible.

Additional uncertainty and complexity would increase transaction costs and reduce post innovation returns. (DR sub, page 7)

The Australian Copyright Council states:

While such an amendment may 'tidy up' the CCA ... this amendment could create further obstacles and uncertainty for rights holders investing in new business models. In particular, we query whether such an amendment would encourage innovation and establish competition laws and regulations that are clear, predictable and reliable. (DR sub, page 5)

58 Ibid., page 5.

The interaction between IP rights and competition law has been reviewed numerous times, including by the Hilmer Review, the National Competition Council (NCC) and by the Intellectual Property and Competition Review Committee (known as the Ergas Committee). Each of these reviews recommended amendments to the exception for IP licences and assignments (Box 9.1).

The NCC concluded that the original objectives of subsection 51(3) were unclear, although it was most likely included to avoid a perceived conflict between IP laws and competition laws. But ‘this objective is no longer relevant because it is clear that these two fields of law are compatible and consistent with each other’.⁵⁹ However, the NCC noted that subsection 51(3) may have some continuing objectives in the context of:

- clarifying whether licensing conditions that have the effect of subdividing IP rights may be anti-competitive; and
- providing greater certainty and reduced compliance costs in relation to the licensing and assignment of IP.⁶⁰

The Ergas Committee considered that IP rights were sufficiently different from other property rights and assets to warrant special treatment under the (then) *Trade Practices Act 1974* (TPA). However, the existing IP exceptions under subsection 51(3) were ‘seriously flawed, as the extent and breadth of the exemptions are unclear, and may well be over-broad’.⁶¹ The Ergas Committee was of the view that the:

... exemptions do not provide an appropriate balance between the needs of the intellectual property system and the wider goals of competition policy.⁶²

The then Government accepted the Ergas Committee’s recommendation to rewrite subsection 51(3) to allow the competition provisions of the TPA to be applied to IP arrangements that result in a substantial lessening of competition. However, no change has been made to the legislation.⁶³

A recent House of Representatives Standing Committee on Infrastructure and Communications report into pricing of information technology recommended repealing subsection 51(3) of the CCA.⁶⁴ The ALRC’s Copyright and Digital Economy Final Report also stated this repeal should be considered.⁶⁵

59 National Competition Council 1999, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974, Final Report*, Melbourne, page 166.

60 *Ibid.*, page 167.

61 Intellectual Property and Competition Review Committee 2000, *Review of intellectual property legislation under the Competition Principles Agreement*, Canberra, page 11.

62 *Ibid.*, page 11.

63 Attorney-General’s Department, *Government Response to the Advisory Council on Intellectual Property and Competition Review Recommendations, part 1*, viewed 20 February 2015, <http://arts.gov.au/resources-publications/publications/government-response-advisory-council-intellectual-property-ec-0>. and Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 284.

64 House of Representatives Standing Committee on Infrastructure and Communications 2013, *At What Cost? IT pricing and the Australia Tax*, Canberra, page xiii.

65 Australian Law Reform Commission 2014, *Copyright and the Digital Economy Final Report*, Sydney, pages 74 and 196.

Box 9.1: Reviews of IP and competition law

The Hilmer Review examined the exceptions for IP rights under the then *Trade Practices Act 1974* (TPA). The Hilmer Review stated that it was not apparent that the exception met the relevant policy goal, nor had the Committee been presented with any persuasive arguments as to why IP licensing and assignments should receive protection beyond the authorisation process. The report concluded that it:

... saw force in arguments to reform the current arrangements, including the possible removal of the current exemption and allowing all such matters to be scrutinised through the authorisation process. Nevertheless, it was not in a position to make expert recommendations on the matter and recommends that the current exemption be examined by relevant officials, in consultation with interested groups.⁶⁶

In 1999, the NCC reviewed subsection 51(3) of the TPA as part of the Australian Government's review of legislation that restricts competition under the Competition Principles Agreement.⁶⁷ The NCC concluded that only in rare cases do IP owners have sufficient market power to enable them to substantially lessen competition in the markets in which they compete. It recommended that:

- the exemption in subsection 51(3) be retained, but amended so that it no longer exempted horizontal arrangements or price and quantity restrictions; and
- the ACCC formulate guidelines on the scope of the exemption, and the application of Part IV to dealings in intellectual property rights.

In 2000, the Ergas Committee also reviewed the interaction between IP rights and competition policy.⁶⁸ On subsection 51(3) of the TPA, the Ergas Committee recommended that IP rights continue to be accorded distinctive treatment under the TPA and this should be achieved by:

- amending subparagraph 51(1)(a)(i) of the TPA to *list* all relevant intellectual property statutes, that is any 'Act relating to patents, trademarks, designs, copyright, circuit layouts and plant breeder's rights';
- repealing subsection 51(3) and related provisions of the TPA;
- inserting an amended subsection 51(3) and related provisions into the TPA to ensure that conditions in a contract, arrangement or understanding related to the subject matter of that intellectual property statute did not contravene Part IV or section 4D of the TPA — unless those conditions were likely to result in a substantial lessening of competition; and
- the ACCC issuing guidelines to provide sufficient direction to IP right owners to clarify the types of behaviour likely to result in a breach of the competition law, and mechanisms for parties to seek a written clearance from the ACCC.

The Panel considers it appropriate that commercial transactions involving IP rights, including the assignment and licensing of such rights, be subject to the CCA, in the same manner as transactions involving other property and assets.

66 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 151.

67 National Competition Council 1999, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974, Final Report*. Melbourne, pages 11 and 12.

68 Intellectual Property and Competition Review Committee 2000, *Review of intellectual property legislation under the Competition Principles Agreement, Final Report*, Canberra, page 19.

As many submissions observe, the exemption afforded by subsection 51(3) is confined in two ways:

- In general terms, the exemption is limited to conditions imposed in licences and assignments of IP rights that relate to products created through the application of the IP rights.
- The exemption does not extend to section 46, which remains applicable.

Under the current law, subsection 51(3) does not exempt an IP licence and assignment from competition law; it only exempts certain **conditions** in a licence or assignment.

In most instances, assigning or licensing an IP right to another person will be neutral from a competition perspective. The assignment or licence will involve a bare transfer of the exclusive right from one person to another. However, on occasions, the transfer may result in the other party acquiring substantial control over an area of commerce by reason of the accumulation of IP rights. The transfer of IP rights, whether by licence or assignment, is subject to the potential application of sections 45 and 50 of the CCA and is not protected by subsection 51(3).

Likewise, subsection 51(3) does not exempt the decision by an IP owner to refuse to license IP rights to another person. Refusals to deal may, on occasions, contravene section 46 of the CCA.

In contrast, subsection 51(3) does exempt **conditions** of an IP licence or assignment that relate to products created through application of the IP right from all sections of the CCA apart from section 46.

The Panel acknowledges the original rationale for the exemption in subsection 51(3). The subsection applies where an owner of an IP right licences another person to commercialise that right, but imposes restrictions on the manner in which the commercialisation occurs; for example, quality specifications, quantity restrictions or territorial restrictions. If the IP owner were to commercialise the right, the owner would itself make decisions about quality, quantity and selling territory. The rationale for subsection 51(3) is that the grant of a licence to another person, subject to conditions or restrictions that the owner could have imposed upon itself, should not be regarded as anti-competitive and should be exempted from the competition law.

However, the Panel considers that the rationale for subsection 51(3) is flawed. In the relatively benign example given, the conditional licence would not substantially lessen competition and would not contravene the CCA. Without the licence, the licensee would have been unable to commercialise the IP right; therefore, a conditional licence does not restrict the level of competition that would have existed but for the licence. Accordingly, on the benign example, the exemption is not required.

Conversely, there are other circumstances in which a conditional licence can substantially lessen competition. In fields in which there are multiple and competing IP rights, such as the pharmaceutical or communications industries, cross-licensing arrangements can be entered into to resolve disputes but which impose anti-competitive restrictions on each licensee. Subsection 51(3) can operate to exempt those arrangements from the competition law. The Panel considers that arrangements of this type should be examinable under the competition law.

Most comparable jurisdictions have no equivalent to subsection 51(3). None of the US, Canada or Europe provide an exemption from competition laws for conditions of IP transactions. In those jurisdictions, IP assignments and licences and their conditions are assessed under competition laws in the same manner as all other commercial transactions. The courts in those jurisdictions distinguish between competitively benign and harmful IP transactions, taking account of all relevant circumstances of the transaction and the conditions imposed. There is no evidence that this has diminished the value of IP rights in those countries.

[Appendix B](#) summarises the approach to this issue in comparable jurisdictions.

Accordingly, the Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed.

This position is supported by a range of submitters, including: the Australian Digital Alliance and Australian Libraries Copyright Committee (DR sub, page 4); Australian Industry Group (DR sub, page 9); CHOICE (DR sub, page 16); National Seniors Australia (DR sub, page 10); Australian Communications Consumer Action Network (DR sub, page 5); and Electronic Frontiers Australia Inc (DR sub, page 2).

However, as is the case with other vertical supply arrangements, IP licences should be exempt from the per se cartel provisions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP. Such IP licences should only contravene the competition law if they have the purpose, effect or likely effect of substantially lessening competition.

IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA (which covers anti-competitive practices), but which are likely to produce offsetting public benefits, can be granted an exemption from the CCA through the notification or authorisation processes.⁶⁹

Concerns expressed in submissions about business uncertainty and increased compliance cost likely to arise from repeal of subsection 51(3) do not weigh heavily with the Panel. The competition law, and competition policy generally, are of fundamental importance to the welfare of Australians. All sectors of the economy should be exposed to and disciplined by the competition law, despite the necessary compliance cost that entails. The economic benefits of increased competition almost always outweigh the compliance costs.

Additionally, the block exemption power recommended by the Panel (see Recommendation 39) could be used to specify ‘safe harbour’ licensing restrictions for IP owners. As the ACCC notes:

Should a block exemption provision be introduced, it could be used to clarify the scope of permissible conduct relating to the exercise of intellectual property rights, thereby providing additional certainty for businesses. (DR sub, page 22)

The European Commission established a block exemption for categories of technology transfer agreements in 2014.⁷⁰

A number of submitters argue that it is ‘premature’ to repeal subsection 51(3) given the Panel’s proposal to review IP provisions.⁷¹ However, the repeal of subsection 51(3) concerns the use of IP rights; whereas, the proposed overarching review of IP would examine the extent of IP provisions.

Hence, the Panel does not consider that the repeal of subsection 51(3) should be delayed. Regardless of what the proposed review of the scope of IP provisions recommends, IP rights can still be used in an anti-competitive way.

69 Australian Competition and Consumer Commission 2012, [ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper](#), Canberra, page 5.

70 European Commission, Licensing agreements for the transfer of technology, [Commission Regulation \(EU\) No 316/2014 of 21 March 2014 on the application of Article 101\(3\) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements](#).

71 See, for example: Australian Publishers Association, DR sub, page 6; and Richard Hoad, DR sub, page 2.

9.3 IP AND INTERNATIONAL TRADE AGREEMENTS

For individual countries, the optimal design and level of IP rights depends on the extent to which they are net importers or exporters of different forms of IP. Australia is a net importer of IP.⁷² With trade and commerce-related aspects of IP crossing national borders, IP has been the subject of international treaties. Frameworks influencing Australian IP law, and trade and commerce in IP both within Australia and internationally, include:

- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- treaties administered by the World Intellectual Property Organization;
- other dedicated IP agreements falling outside the World Intellectual Property Organization's framework; and
- IP provisions included as part of bilateral and regional trade agreements.⁷³

As a net importer of IP, and likely to remain so, Australia's ability to access IP protected by rights granted in other countries will be important to ensure that we reap the benefits of the digital economy. That said, commitments regarding the extent of IP protection in Australia must also serve the best interests of Australians — an issue that should be tested through an independent cost-benefit analysis.

The ACCC (sub 1, page 65), the PC (sub, page 28) and The Australia Institute (sub, page 20) argue that caution should be exercised when entering international treaties or agreements that include IP provisions. As the PC notes, the proposed Trans-Pacific Partnership Agreement between Australia and various other countries, including the US, as well as other proposed international agreements, such as the Transatlantic Trade and Investment Partnership, are specifically considering intellectual property issues (sub, page 28).

AIPPI Australia notes:

... intellectual property concerns have on several occasions been given much less prominence in negotiations for trade agreements than matters such as agricultural access. This is an issue of increasing concern, as the knowledge economy is growing to form a larger part of the Australian economy. (DR sub, pages 2-3)

The PC suggests that Australia has likely incurred net costs from including some IP provisions in trade agreements. It points to analysis of extensions in the duration of copyright protection required by the Australia-United States Free Trade Agreement, which imposed net costs on Australia through increased royalty payments.⁷⁴ As Australia is, and will continue to be, a net importer of IP, these costs are potentially significant.

However, others suggest that the costs and benefits of IP provisions are adequately considered. For example, the Communications Law Centre UTS said:

... we consider that Australian representatives negotiating trade agreements do so with a guiding policy (but the necessary flexibility) of achieving what is in the overall best interests of Australians. ... each agreement represents a negotiated outcome in the

72 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Canberra, page 77.

73 Ibid., page 78.

74 Productivity Commission 2010, *Bilateral and Regional Trade Agreements*, Canberra.

particular circumstances of the bilateral or multilateral relationship. Intellectual property is one matter of concern in each complex and particular negotiation. (DR sub, page 3)⁷⁵

Although the Panel acknowledges that trade agreements are necessarily the outcome of a negotiation, trade negotiations must be based on an understanding of the costs and benefits to Australia of proposed IP provisions. This should be undertaken in an independent and transparent way and prior to negotiations being concluded.

A number of submitters support trade negotiations being informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions, including: Australian Digital Alliance and Australian Libraries Copyright Committee (DR sub, page 4); CHOICE (DR sub, page 15); Australian Industry Group (DR sub, page 8); Electronic Frontiers Australia (DR sub, page 4); AIPPI Australia (DR sub, page 2); iiNet (DR sub, page 3); and Spier Consulting Legal (DR sub, page 4).

Further to this, the Panel considers that a separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

The Panel's view

Given the influence that Australia's IP rights can have on facilitating (or inhibiting) innovation, competition and trade, the Panel considers that the IP system should be designed to operate in the best interests of Australians.

Determining the appropriate *extent* of IP protection is complex. Given the complexity of the issues, there is a case for conducting an independent framework-style IP review. The review should have regard to recent reviews of specific aspects of IP, look at competition policy issues, new developments in technology and markets and international trade agreements.

In the majority of cases, granting an IP right is unlikely to raise significant competition concerns. That said, IP rights, like all property rights can be *used* in a manner that harms competition. The use of IP rights should therefore be subject to the CCA.

Independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions in trade negotiations should be undertaken to inform international trade negotiations.

Implementation

The Government should task the PC with undertaking a 12-month, framework-style review of IP in Australia. Because this recommendation does not require consultation with, or agreement by, the state and territory governments, it can be implemented by the Australian Government. The increasing pace of change and importance of technological developments to the Australian economy suggest that the Review be undertaken as soon as possible. The Panel suggests it should commence with 6 months of the Government accepting this recommendation.

Repealing subsection 51(3) of the CCA should not be delayed pending the outcome of the Panel's proposed PC review of IP provisions. Subsection 51(3) concerns the use of IP rights, not the extent of IP provisions, which is the focus of the proposed PC review. It can therefore be repealed at the same time as the other recommended changes to the CCA in this Review.

75 See also Australian Copyright Council, DR sub, page 4.

Recommendation 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.

Recommendation 7 — Intellectual property exception

Subsection 51(3) of the CCA should be repealed.

10 REGULATORY RESTRICTIONS

Following the introduction of the National Competition Policy (NCP) in 1995, governments made a concerted effort to examine and reform regulation that restricted competition where those restrictions were not in the public interest.

Australian laws at the Commonwealth and state and territory level were subject to review for anti-competitive impact as part of the NCP reforms, as set out in Box 10.1 below.

Box 10.1: NCP Legislative Review Program

In 1995, all Australian governments agreed that legislation (including Acts, enactments, ordinances and regulations) should not restrict competition unless it could be demonstrated that the benefits of the restriction to the community as a whole outweighed the costs, and that the objectives of the legislation could only be achieved by restricting competition.⁷⁶

Governments committed to review and, where appropriate, reform all legislation that restricted competition by 2000.

Around 1,800 individual pieces of potentially anti-competitive legislation were identified as part of this process, which was later extended to 2005.

Governments reviewed, and where appropriate reformed, around 85 per cent of their nominated legislation and around 78 per cent of 'priority' legislation.⁷⁷

These assessments were linked to the NCP payments from the Australian Government to the States and Territories.

Regulatory restrictions can limit consumers' ability to exercise choice and businesses' ability to respond to consumers. They can determine who participates in the market, what they can produce and even the standard of the product or service they can provide.

Regulatory restrictions can affect: who can supply; what can be supplied; and when and where supply can occur. While it is not practical for the Panel to examine all existing regulatory restrictions on competition, some of the broad categories are detailed below. These are raised in submissions and provide examples of areas requiring a reinvigorated program of regulatory review.

76 See clause 5 of the 1995 Council of Australian Governments inter-governmental [Competition Principles Agreement](#). See also the discussion on the public interest test in [Chapter 8](#).

77 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne, page xi.

Restricting who can supply	Restricting what can be supplied	Restricting where and when supply can occur
Professional licensing and standards	Product standards and labelling	Air service agreements
Liquor and gambling	Agricultural marketing	Retail trading hours
Pharmacy	Parallel imports	Planning and zoning
Taxis	Intellectual property	
Media and broadcasting services	Private health insurance	

The Panel heard that, although much was achieved through regulatory reform, more remains to be done.

Some restrictions applying to particular industries appear to support only a small number of market participants and may have perverse effects — such as mandated ethanol usage in New South Wales, which may have pushed motorists towards higher-priced premium fuels.⁷⁸ Similarly, liquor licensing rules in Queensland that restrict packaged alcohol sales to holders of hotel licences appear to have induced major supermarkets to buy hotel licences, which may have made it harder for smaller independent stores to compete.⁷⁹

Such regulations are generally not contained in competition law,⁸⁰ but rather in a multitude of Commonwealth, state and territory and local government laws and legislative instruments. Although generally intended to serve other public policy purposes (for example, health, safety, standards of conduct, consumer protection), regulatory restrictions can nonetheless adversely influence competition. For example, they may create barriers to entry, advantaging some businesses over others, or reducing incentives to compete.⁸¹

These restrictions can take many forms, including the examples submitted by the Business Council of Australia (BCA) in Box 10.2 below.

78 ACCC sub 1, page 40 and [section 15.2](#).

79 See Deborah Smith, DR sub, page 4 and [section 10.4](#).

80 Subsection 51(1) of the *Competition and Consumer Act 2010* provides that all jurisdictions can exempt specific conduct from competition laws by way of regulations or legislation. The Acts and Regulations that contain these exemptions are listed on the [ACCC's website](#). ACCC 2015, *Exceptions under commonwealth, state & territory legislation*, viewed 5 February 2015, www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation/exceptions-under-commonwealth-state-territory-legislation.

81 OECD 2014, *How Can Competition Contribute to the G-20 Commitment to Raise GDP by at Least 2%?*, page 2.

Box 10.2: Examples of regulatory restrictions on competition provided by the BCA⁸²

'Regulation requiring imported cars to be modified to meet Australian-specific car design standards, as these differ from those of the US and the EU, restricting the scope for parallel imports and importation of second-hand cars.

Restrictions on the parallel importation of commercial quantities of books by booksellers.

Concessional excise treatment of domestically produced ethanol while imported ethanol pays full excise.

The displaying of discounted fuel prices on fuel retailers' price boards is specifically regulated in New South Wales and South Australia.

A restricted number of taxi licences are issued in all states and territories, and competition from hire cars is mostly restricted.

Packaged liquor can be sold by hotels in regional Western Australia on Sunday, but not by specialist packaged liquor stores.

Retail pharmacies can only be owned by pharmacists (whereas no such restrictions exist on medical practices in Australia, nor on pharmacies in the UK, the Netherlands, Norway, Canada and the US).

Restrictions on pharmacists administering vaccinations and re-issuing prescriptions for long-term conditions.

Genetically modified crops cannot be grown in South Australia and Tasmania (but can be grown in all the other mainland States).

The sale of fresh potatoes is restricted in Western Australia (but nowhere else in Australia).

Owner driver and independent contractors are subject to industry-specific regulation in Western Australia, Victoria and New South Wales (but not other states).

Compulsory workers' compensation insurance and third party personal injury transport insurance are only available from government monopoly providers in some States.'

This does not necessarily argue for complete deregulation. The Panel considers the focus should be on *better* regulation. Already, regulation serves the public interest in a range of areas, for example, to protect public safety. The goal is to ensure that regulation does not restrict competition, except to the extent required to meet other overriding policy objectives. Pro-competitive regulation, combined with governments' general deregulation agendas, will provide a more efficient and effective marketplace that offers consumers better value and choice.

The National Competition Council (NCC), which was tasked with assessing the progress of the review process, considers that the NCP legislation review program resulted in a 'material reduction in unwarranted competition restrictions', but that government self-assessment as the basis of reform had been 'limiting'.⁸³

82 Business Council of Australia, sub, Main Report, Exhibit 6, page 21.

83 National Competition Council 2005, *National Competition Council Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, Melbourne, page xii.

An independent and transparent process of assessment is more likely to hold all governments to account. Importantly, this assessment must examine the outcomes, not just the processes undertaken, and this requires a more thorough assessment.

The NCP regulatory review process relied upon a generic, but limited, set of factors to assess public interest. The elements to consider in the public interest will necessarily differ on a case-by-case basis and a generic approach is understandable. However, providing governments with industry or regulation-specific guidance can also lead to a narrow approach being taken to assess public interest.

Instead, an independent and transparent process of review can result in a level of public scrutiny that ensures that a thorough examination of the public interest takes place.

The onus of proof in the NCP process was on those wishing to maintain the restriction to demonstrate that it continues to serve the public interest. There is no evidence that this produced poor outcomes.

In addition to national reform agendas such as the NCP, and jurisdiction-specific reviews of pieces of regulation, governments can introduce processes to manage the stock and flow of regulation over time.⁸⁴

Clause 6 of the Competition Principles Agreement (CPA) requires jurisdictions to review legislation that restricts competition, actually or potentially, once every ten years.⁸⁵ However, as the Australian Competition and Consumers Commission (ACCC) submission notes, the impetus for review ‘slowed considerably’ once the competition payments ceased in 2006 (sub 1, page 21).

Although the Australian Government and state and territory governments were signatories to the CPA, local governments also have power to make rules that can affect competition (see Box 10.3).

Box 10.3: Local government and regulatory restrictions

The 2012 Productivity Commission (PC) report on *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*⁸⁶ discussed local government regulation in some detail.

Local governments often have significant delegated power, which extends beyond formally making local laws. In many instances, local governments develop quasi-regulations — including rules, local government policies, codes, guidelines, conditions on permits, licences, leases or registrations — that can have a similar effect to local laws.

In that report, the PC found ‘no state government had provided comprehensive training or guidance on how to administer and enforce regulation.’

84 In its report on National Competition Policy, the Productivity Commission recommended that all Australian governments should ensure that they have in place effective and independent arrangements for monitoring new and amended legislation. (Productivity Commission 2005, *Review of National Competition Policy Arrangements*, Canberra, page XLVII (Recommendation 9.2)).

85 Council of Australian Governments 1995, *Competition Principles Agreement*, (as amended to 13 April 2007), Council of Australian Governments, viewed 27 February 2015, www.coag.gov.au/node/52.

86 Productivity Commission 2012, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*, Canberra, pages 13, 15 and 16.

Box 10.3: Local government and regulatory restrictions (*continued*)

While exercising its duties, local government may face conflicting roles, which may raise competitive neutrality concerns. The PC notes specific examples, including ‘local governments can be the providers of certain facilities, such as waste depots and caravan parks, and regulate similar facilities provided by the private sector.’

The PC notes:

...for practical reasons it is frequently difficult to remove such conflicts without significantly affecting the quality of services ... Transparency, conflict resolution and probity requirements are needed to address the potential for these conflicting roles to result in compromised decision-making.

And concludes:

Since conditions that are applied through approvals and registrations are given less scrutiny than conditions contained in local laws, there is greater scope for these conditions to impose direct or indirect costs on business and for competition to be restricted without being subject to a public interest test.

Since local government rules can affect competition in much the same way as legislation or regulation, they should be made transparently and be subject to the same scrutiny and regulatory impact analysis as Commonwealth, state and territory laws and regulations.

Regulatory impact analysis

All Australian jurisdictions now have in place regulatory impact analysis procedures. Intra-jurisdictional approaches vary in their guidance and application, and there is a specific process for national reforms in the form of the Council of Australian Governments (COAG) best-practice regulation guide.⁸⁷ Principle 4 of the COAG Principles of Best Practice Regulation adopts the CPA legislation review principle that legislation should not restrict competition 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 regulation can only be achieved by restricting competition.

The Panel recognises that regulatory impact analysis is important for managing the flow of regulation. We consider that the impact on competition should be an important element for consideration in any regulation-making process.

87 Council of Australian Governments 2007, *COAG best practice regulation guide*, Canberra.

The Panel's view

Regulatory impact analysis is an important part of policy development for new and amending regulations at the Commonwealth, state and territory and local government levels. The Competition Principles Agreement test for regulatory restrictions on competition (that legislation should not restrict competition 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 legislation can only be achieved by restricting competition) should be retained and promoted as an important part of the process, to ensure that all governments consider competition policy on an ongoing basis.

A NEW ROUND OF REGULATORY REVIEWS

Regulatory restrictions on competition can have a significant negative impact on the economy. This can occur directly, by limiting economic activity in the regulated sector, or indirectly, as many sectors facing regulatory restrictions supply significant inputs to other business activities. While competition principles are enshrined in regulatory impact analysis frameworks for new regulations, the stock of existing regulations is large and needs continual review.

A rigorous, transparent and independent assessment of whether regulations are in the public interest, with the onus on the party wishing to retain anti-competitive regulation, is important to ensure regulation serves the long-term interests of consumers. Although NCP reviews and reforms made substantial progress in eliminating anti-competitive regulations, not everything was considered, and the impact regulations have on competition can change over time.

Now, more than 20 years since the Hilmer Review, and 10 years after the end of the formal regulation review processes that followed, the reform agenda needs reinvigorating. Submissions in response to both the Issues Paper and Draft Report provide a range of examples where review and, where appropriate, reform are needed. Further, jurisdictions have exempted more than 80 pieces of regulation from the operation of the competition law under subsection 51(1) of the *Competition and Consumer Act 2010* (CCA). These should also be reviewed to assess whether they are still needed or can be made to be less anti-competitive.

Submissions generally support the Draft Report's recommendation for a new round of regulation review. While a broad range of submitters (particularly business submitters) support a national regulation review program,⁸⁸ some submissions express the view that a national program is not needed and that more targeted reviews would suffice.⁸⁹

While acknowledging that there is likely to be less anti-competitive regulation than at the time of the NCP, the Panel believes it is still an issue requiring national attention. A national approach will provide momentum, impose discipline on all jurisdictions, and foster a nationally-consistent business regulatory environment. Further, reviews of the impact on competition are also distinct from, but complementary to, other 'red tape reduction' processes. The Panel is of the view that the factors to consider in assessing public benefits and costs should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

88 See, for example: Australian Industry Group, DR sub, page 11; Australian National Retailers Association, DR sub, page 6; Coles Group Limited, DR sub, page 3; National Seniors Australia, DR sub, page 11; Plastics and Chemicals Industries Association, DR sub, page 4; Standards Australia, DR sub, page 4; and Suncorp Group DR sub, page 5.

89 See, for example: CHOICE, DR sub, page 19; and South Australian Government, DR sub, page 14.

The Australian Local Government Association notes that state and territory governments will need to ‘guide and assist councils in reviewing their regulatory obligations under state and territory laws’ (DR sub, page 7).

The Panel also acknowledges submissions that express concern about excessive deregulation.⁹⁰ What the Panel believes is needed is *better* regulation, and regulation that does not impede competition, rather than deregulation for its own sake.

The Panel’s view

The NCP reforms substantially reduced the amount of anti-competitive regulation. However, the regulation review process begun under the NCP has flagged and should be reinvigorated on a national level.

Regulations should be assessed against the same COAG-agreed public interest test that was used under the NCP reforms from 1995 and later reaffirmed in the 2007 regulatory impact analysis framework *COAG Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (see discussion in [Chapter 8](#)). Factors to consider in assessing public benefits and costs should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

There will be many instances where some regulation is required, such as for health and safety reasons. The Panel is not suggesting there should be no regulation in those situations, but that regulation should be as pro-competitive as possible, when considered alongside other policy objectives. There is a need for better regulation rather than no regulation at all.

Maintaining a rigorous, transparent and independent assessment of whether regulations serve the public interest, with the onus on the party wishing to retain anti-competitive regulation, is important to ensure that changes in regulation improve the wellbeing of Australians.

The assessment should focus on outcomes achieved and not on processes undertaken.

Implementation

Within six months of accepting the recommendation, all jurisdictions should agree to a process for a renewed round of regulatory reviews to be undertaken by the Australian Government and state and territory governments. State and territory governments would also be responsible for reviewing, or assisting reviews of, local government regulations. Where regulatory reviews are already in place, such as the Australian Government’s deregulation agenda, competition principles should be included as part of those reviews.

These regulation reviews must be embraced by all jurisdictions either individually or, preferably, collectively. The national approach taken under NCP was an important reason why regulation review was such a successful reform mechanism. Nationally consistent reforms should be preferred, where practical, to minimise regulatory compliance costs for businesses that operate across state and national borders.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction and results published along with timetables for reform. Priority reviews should be nominated within six months of jurisdictions agreeing to the new round of regulatory reviews.

⁹⁰ For example, the clear concerns raised in many submissions about any relaxation of restrictions on the sale of alcohol. See [Section 10.4](#).

The Panel acknowledges that, since the legislation review under the NCP, jurisdictions have progressed reform or made pro-competitive changes. This should not dampen the enthusiasm for improvement. The priority areas for review will differ between jurisdictions, with each government responsible for selecting which regulations to review. However, jurisdictions should work collaboratively to learn from the experiences of past reforms.

The review process should be overseen by the proposed Australian Council for Competition Policy (ACCP) (see Recommendation 43) with a focus on the outcomes achieved rather than the process undertaken. The ACCP should publish an annual report on progress of the reviews.

The ACCP will provide the forum for all governments to collaborate and share their experiences. It should report annually on governments' progress on undertaking regulatory reviews and implementing subsequent reform.

Recommendation 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.

PRIORITY AREAS FOR REVIEW

While the regulation reviews should be broad, the Panel considers that planning and zoning rules, the regulation of taxis and mandatory product standards (in particular greater acceptance of international product standards) are priority areas for review and should be commenced immediately.

Governments should subsequently identify other priority areas as part of the national reform and review agenda (see [Section 10.4](#)).

10.1 PLANNING AND ZONING

Land can be used for a variety of purposes, including residential, industrial, commercial and conservation, which can include national parks. However, the unfettered market may not deliver an outcome across these various uses that is considered optimal for society as a whole. Hence, governments allocate land to particular uses through planning, zoning and development assessment.

Although submissions note that planning processes are necessary to give the community an opportunity to have input into relevant developments (for example, the Queensland Law Society, sub, page 3), planning systems can create excessive barriers to entry, diversification or expansion, including by limiting the number, size, operating model and mix of businesses. This has the effect of making suppliers less responsive to the needs of consumers.

Planning has been reviewed a number of times, as set out in [Box 10.4](#), with reviews highlighting the need to reform planning and zoning rules across jurisdictions to increase competition and improve productivity.

Box 10.4: Planning reviews

NCP assessments

The NCC's 2003 assessment of governments' progress in implementing the NCP noted that, under NCP, governments are broadly responsible for balancing objectives in developing planning schemes that are in the public interest.⁹¹

Where legislative restrictions reflect the following principles, the NCC assessed the jurisdiction as having met its CPA obligations:

- Planning processes minimise opportunities for existing businesses to prevent or delay participation by new competitors.
- Jurisdictions considered and, where appropriate, provided for competition between government and private providers in planning approval processes.

91 National Competition Council 2003, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume two — Legislation review and reform*, AusInfo, Canberra, page 10.2.

Box 10.4: Planning reviews (continued)

All States and Territories except New South Wales and Western Australia were assessed as having met their obligations in 2003.

By 2005 Western Australia was the only State that had not completed the reform activity.⁹²

ACCC grocery inquiry

The 2008 ACCC inquiry into the competitiveness of retail prices for standard groceries found that planning and zoning laws act as a barrier to establishing new supermarkets and that 'little regard is had to competition issues in considering zoning or planning proposals.'⁹³

The report noted that independent supermarkets were particularly affected by impediments to new development, given the difficulties they have in obtaining access to existing sites. The ACCC received evidence of incumbent supermarkets using planning consultation and objection processes to 'game' the planning system to delay or prevent potential competitors entering local areas.⁹⁴

PC research report into planning, zoning and development assessments

The PC's 2011 research report into planning, zoning and development assessments⁹⁵ found competition restrictions in retail markets evident in all States and Territories, and identified the following changes to planning and zoning systems that could improve competition:

- reducing the prescriptiveness of zones and allowable uses, which would allow a wider range of businesses and developers to bid for the same land;
- facilitating more 'as-of-right' development processes, where no discretionary action is required by the assessment body;
- eliminating the impact on the viability of existing businesses as a consideration for development applications and re-zoning approval;
- considering impacts on the viability of centres only during the metropolitan and strategic planning stages;
- providing clear guidelines on alternative assessment paths to deal with larger scale and/or jurisdictionally significant or sensitive projects (for example, call-in powers of state ministers); and
- accompanying appeal rights with disincentives to discourage their use for anti-competitive purposes.

PC inquiry into the Australian retail industry

The PC's 2011 inquiry report, *Economic Structure and Performance of the Australian Retail Industry*, found that planning and zoning regulations were 'complex, excessively prescriptive and often anti-competitive'.⁹⁶

92 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, Canberra, page 14.39.

93 Australian Competition and Consumer Commission 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Canberra, page xix.

94 Ibid., pages xix and 194.

95 Productivity Commission 2011, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Research Report, Canberra, pages 277 and 352-355.

Box 10.4: Planning reviews (continued)

The PC's recommendations included:

- State, territory and local governments should (where responsible) broaden business zoning and significantly reduce prescriptive planning requirements to allow the location of all retail formats in existing business zones to ensure that competition is not needlessly restricted. In the longer term, most business types (retail or otherwise) should be able to locate in the one business zone (PC Recommendation 8.1).
- Governments should not consider the viability of existing businesses at any stage of planning, re-zoning or development assessment processes. Impacts of possible future retail locations on existing activity centre viability (but not specific businesses) should only be considered during strategic plan preparation or major review — not for site-specific re-zoning or individual development applications (PC Recommendation 8.2).
- State, territory and local governments should facilitate more as-of-right development processes to reduce business uncertainty and remove the scope for gaming by competitors (PC Recommendation 8.3).

PC study on relative costs of doing business in Australia

The PC's 2014 research report on *Relative Costs of Doing Business in Australia: Retail Trade* made two findings in this area:⁹⁷

- The Australian economy would benefit from further simplification of state and territory planning and zoning schemes that expand the supply of retail space by simplifying business zones and removing unnecessary restrictions on the allowable use of land within each zone. Victoria is leading the way in this space, and should serve as a model for other states and territories to follow (PC Finding 6.1).
- The expected net benefits to the economy from state and territory government planning and zoning reforms will only be realised in full if local governments have the resources to effectively implement state and territory government policies consistently and as intended (PC Finding 6.2).

Submissions raise a number of planning and zoning issues. The range of issues is broad and cast in different ways, but there is general dissatisfaction with the current arrangements. Some of this dissatisfaction may reflect individual decisions going against a proponent. However, in other cases, structural issues may be the root cause, as reviews like the PC's research report into planning, zoning and development assessments conclude.

Submissions suggest land use restrictions can pose considerable barriers to effective competition by constraining the supply of urban land, concentrating market power and creating barriers to entry for new businesses.⁹⁸

96 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra, page XIV and these findings were based on the Productivity Commission's assessment from its 2011 Research Report *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*.

97 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 28 and Chapter 6.

Inflexible restrictions placed on retailers in relation to land use restrictions and costly approval procedures are also cited as examples of unnecessary barriers to business entry and expansion (Australian Retailers Association, sub, page 9). This issue is particularly relevant for emerging providers in the sharing economy.

In relation to the retail sector, ALDI suggests its expansion has been considerably slower than planned on account of regulatory constraints. The retailer says that rigid and overly-prescriptive land-use planning and zoning rules have produced a chronic shortage of suitably zoned land for small-format supermarkets in many built-up areas. It goes on to state:

More so than any other country in which it does business, ALDI has found the challenge of securing appropriate property holdings in Australia the single most significant brake on its expansion. (sub, page 4)

Given that planning regulation can restrict the number and use of retail sites, it can confer significant negotiating power on established landlords and restrict commercial opportunities for others. The NSW Business Chamber suggests ‘removing unnecessary constraints on planning and zoning regulation would help new development and increase competition in the marketplace’ (sub, page 5).

The City of Sydney submits that the city’s planning policy framework, which includes planning for centres, acts to protect the broader public interest. It suggests that focusing primary retail development in mixed-use centres — where they are supported by residential populations, complementary businesses and services, and community and transport infrastructure — provides the flexibility for existing centres to grow, while allowing new centres to establish. It also suggests that clustering activity together allows consumers to shop around in one location, compare products and prices, and make more informed decisions, which ultimately drives competition (DR sub, pages 3-4, 10).

The PC, on the other hand, argues that land-use regulation that centralises retail activity can be either competition-enhancing or competition-reducing, depending on how it is designed and implemented by the relevant planning authorities.⁹⁹

To this point, National Seniors Australia suggests:

Not only can planning and zoning restrictions represent significant barriers to competition in retail markets, including supermarkets, they may also restrict new entrants to other markets of particular relevance to senior Australians, including markets for seniors housing eg retirement villages and aged care accommodation. (DR sub, page 11)

The National Farmers’ Federation notes that the planning permit application process can deter a farm from increasing its intensity or efficiency as operational changes may trigger the need to obtain a planning permit. It also notes that local planning zones often provide permit exemptions for a range of agricultural uses and structures (DR sub, page 6). The South Australian government suggests

98 For example, Urban Development Institute of Australia (sub, page 2) noted the new residential zones currently being introduced in Melbourne as part of the Victorian Government’s Metropolitan Planning Strategy will place a mandatory limit of two dwellings per lot for at least 50 per cent of residential areas in Melbourne. Also that this policy has the potential to lock large quantities of valuable urban land into an extremely limited range of uses, and is characteristic of planning systems throughout Australia.

99 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade, Research Report*, Canberra, page 121.

that consideration of ‘fit for purpose’ land-use planning regimes may better assist primary industries and regional development (DR sub, page 13).

Submissions also suggest that another issue is the lack of an economic objective in relation to planning. One submission states:

...planning is not an area of government activity with clear, simple goals (other than motherhood statements about ‘building better communities’ and the like), and this leaves it ripe for capture by special interests. (Nick Wills-Johnson, sub, page 1)

The Panel’s draft recommendation to include competition principles in the objectives of planning and zoning legislation is supported by a number of submitters.¹⁰⁰ For example, Australian Industry Group notes:

Planning and zoning restrictions can risk stifling competition when they fix existing land uses — and users over extended periods. Incorporating competition considerations is sensible and will potentially reduce the cost, complexity and time taken to challenge existing regulations. It is a worthy reform. (DR sub, page 10)

Other submissions note that economic objectives already exist in planning and zoning regulations. They raise concerns about the overload of objectives in planning legislation and whether the draft recommendation would just add to complexity.¹⁰¹

The Western Australian Local Government Association suggests that local governments would agree that any ‘excessive and complex zoning’ should be minimised to provide greater clarity for the community. However, it also submits that the planning system has been established to protect and enhance local communities and should not be seen purely as a market-driven consumer tool (DR sub, pages 11-13).

Other local government associations do not support the draft recommendation.¹⁰² They note that ‘councils have a legislated responsibility to take into account the broader interests of their municipal residents’ (Local Government Association of Tasmania, DR sub, page 6).

Small retailers¹⁰³ suggest planning and zoning controls are needed to protect competition and local communities. Others note that planning and zoning restrictions have been maintained in response to concerns that removing restrictions may devastate small business.¹⁰⁴

Master Grocers Australia/Liquor Retailers Australia (DR sub, page 28) and others¹⁰⁵ recommend that councils have more guidelines on how to take account of competition. They suggest councils should

100 See, for example: ACCC, DR sub, pages 23-24; ALDI, DR sub, page 2; Australian Industry Group, DR sub, pages 10-11; Australian National Retailers Association, DR sub, page 20; Australian Retailers Association, DR sub, page 4; Coles Group Limited, DR sub, page 5; Large Format Retail Association, DR sub, page 7; Shopping Centre Council of Australia, DR sub, pages 5-6; South Australian Government, DR sub, page 13; and Woolworths Limited, DR sub, page iv.

101 See, for example: Local Government Association of Queensland, DR sub, page 5; National Farmers’ Federation, DR sub, page 6; and Peter Phibbs, DR sub, page 3.

102 See, for example: Australian Local Government Association, DR sub, pages 6-7; and the Local Government Association of Queensland, DR sub, page 5.

103 See, for example: Kepnock Residents Action Group, DR sub, page 11; Santos Retail, DR sub, page 2; and a number of IGA supermarkets and individuals.

104 See, for example: Australian Newsagents’ Federation, DR sub, page 5; Law Council of Australia — SME Committee, DR sub, page 8; and Spier Consulting Legal, DR sub, page 5.

apply a ‘net community benefit test’, which would reflect the desire of the local population in determining whether a developer or retail tenant is desirable in a region. Many small retailers say they disagree with ‘the principle that more floor space and more entrants in a market equals more competition’.¹⁰⁶

Some submissions raise concerns about the Draft Report’s focus on ensuring arrangements do not explicitly or implicitly favour incumbent operators,¹⁰⁷ with some proposing a neutral formulation to ensure that neither new nor incumbent businesses receive a competitive advantage.¹⁰⁸

Local governments, police and community organisations express concern that changes to planning and zoning rules could increase the availability of alcohol and the incidence of alcohol-related harm. A significant number of submitters urge the Panel to ensure that competition policy does not interfere with the rights of state and territory governments to impose controls on the sale of alcohol or to limit the trading hours of outlets, the type of outlets (including supermarkets) and the number of outlets in the interests of community safety and wellbeing.¹⁰⁹

Liquor is addressed specifically in [Section 10.4](#). In addition, the Panel notes that although, as a general policy, competition should be taken into account as an important part of the planning and zoning process, this should not be interpreted as removing any ability for governments to take full account of harm minimisation as an objective.

A number of governments have recognised problems presented by planning rules, with reviews either underway, or recently completed in most jurisdictions. For a number of incoming governments, reform of planning laws has been a priority.

Yet, despite the numerous reviews of planning and zoning, implementing reform has been slow.

That said, while agreeing that progress in implementation has been slow and patchy, the PC notes that Victoria is ahead of other jurisdictions in implementing leading practices for planning and zoning (see [Box 10.5](#)).¹¹⁰

105 See, for example: Jean Cowley, DR sub, page 1; Walter Daly, DR sub, page 1; Kepnock Residents Action Group, DR sub, pages 10-11; and Ritchies Stores, DR sub, page 3.

106 See, for example: Santos Retail, DR sub, page 1-2; and a number of IGA supermarkets and individuals.

107 See, for example: Grain Producers of South Australia, DR sub, page 2; and the Shopping Centre Council of Australia, DR sub, page 5.

108 See, for example: Australian National Retailers Association, DR sub, page 20; and Shopping Centre Council of Australia, DR sub, page 5.

109 See, for example: ACT Policing, DR sub, page 9-10; Australasian Professional Society on Alcohol and other Drugs, DR sub, page 2; Australian Health Promotion Association, DR sub, page 1; Brimbank City Council, DR sub, pages 1-2; Cancer Council NSW, DR sub, page 2; City of Port Phillip, DR sub, pages 1-2; Foundation for Alcohol Research and Education, DR sub, pages 13-15; Hobsons Bay Council, DR sub, pages 1-2; Local Government Association of Tasmania, DR sub, pages 6-7; Maribyrnong City Council, DR sub, pages 1-2; McCusker Centre for Action on Alcohol and Youth, DR sub, pages 1-2; Municipal Association of Victoria, DR sub, pages 5-6; National Alliance for Action on Alcohol, DR sub, pages 6-7; National Drug and Alcohol Research Centre, DR sub, pages 2-3; Planning Institute of Australia, DR sub, page 5; and VicHealth, DR sub, page 3.

110 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade, Research Report*, Canberra, pages 124-126.

Box 10.5: Examples of planning reforms in Victoria¹¹¹**1. Broadening business zones**

In 2013, Victoria reformed business zones by simplifying requirements and allowing a broader range of activities to be considered. The previous five business zones have been condensed into two broader commercial zones, increasing permissible uses within the zones. The PC expects the benefits of the reform to include: more mixed uses and diversity within employment precincts; making the property sector more responsive to changes in demand for various business types/models; and removing planning barriers to investment.

2. Simpler permit process

In September 2014, Victoria introduced VicSmart, a new development permit process for low-impact development applications costing less than \$50,000. Under VicSmart, the waiting time on permit applications has been reduced from 40 to 10 days. Streamlined processes are also being introduced at the Victorian Civil and Administrative Tribunal to reduce the time taken and other cost burdens associated with decision appeals.

3. Metropolitan planning strategy

'Plan Melbourne', which is a strategy document for the future development of the city, was released for public comment in 2013 and adopted as government policy in 2014. Plan Melbourne proposes a less prescriptive approach to planning and zoning through greater use of higher density mixed-use zones and the removal of retail floor space and office caps in activity centres.

The PC notes the need for continuing reform in its 2014 research report, *Relative Costs of Doing Business in Australia: Retail Trade*, but its rationale could equally apply to planning and zoning more broadly:

Continued action by state, territory and local governments in implementing the leading practices previously identified by the Commission and others...is needed to ensure that the market for retail space is competitive and least-cost, while still achieving the desired outcomes of planners in relation to amenity and other community objectives.¹¹²

The Planning Institute of Australia advocates adopting a set of planning system principles across the country to provide a framework for the effective operation of planning systems (DR sub, page 4).

Given that reform is already underway around the country,¹¹³ an opportunity exists to make comparisons across jurisdictions to determine 'best practice' as a basis for updating and improving current requirements.

111 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade, Research Report*, Canberra Chapter 6, also Victorian Department of Transport, Planning and Local Infrastructure 2014, *Improving the System*, Department of Transport Planning and Local Infrastructure, Melbourne, viewed 28 January 2015, www.dtpli.vic.gov.au/planning/about-planning/improving-the-system and Victorian Metropolitan Planning Authority 2014, *Plan Melbourne, Plan Melbourne, Melbourne*, viewed 28 January 2015, www.planmelbourne.vic.gov.au/Plan-Melbourne.

112 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade, Research Report*, Canberra, page 133.

113 For example, the Western Australian Local Government Association (DR sub, page 12) notes a 2010 review of Western Australia's State Planning Policy relating to Activities Centres which led to the removal of the previous cap on metropolitan floor space.

Box 10.6 sets out an example of how competition can be considered as part of the planning process. The Panel endorses this as a good example of the principles that should be considered as part of reforming planning and zoning rules.

Box 10.6: Example of how competition issues can be considered in the planning context

In 2010, a New South Wales government report¹¹⁴ recommended ways to ensure the planning process does not unreasonably restrict competition by inadvertently creating barriers to entry, or by discouraging innovative forms of development to emerge.

The report recommended developing a State Environment Planning Policy covering competition policy in planning decisions, including three important clarifications:

- Competition between individual businesses is not in itself a relevant planning consideration (that is, the loss of trade for an existing business is not normally a relevant planning consideration and that a planning authority should not consider the commercial viability of a proposed development).
- Restricting the numbers of a particular type of retail store in any local environmental plan or development control plan is invalid.
- Proximity restrictions on particular types of retail stores contained in local environmental plans or development control plans are invalid.

Some comparison work has already been undertaken, for example:

- An independent advisory forum of government, industry and planning professions, the Development Assessment Forum, set out 10 leading practices for jurisdictions to adopt with a view to a simpler, more effective approach to development assessment in its 2005 'Leading Practice Model for Development Assessment'.¹¹⁵
- The Property Council of Australia's 2013 report *Property Interests: Benchmarks for Queensland Planning Schemes* contains details of existing planning scheme codes that it considers workable and effective examples.¹¹⁶

114 New South Wales Department of Planning and the New South Wales Better Regulation Office 2010, *Promoting Economic Growth and Competition through the Planning System: Review Report*, Sydney.

115 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 123.

116 PSA Consulting Australia 2013, *Property Interests: Benchmarks for Queensland Planning Schemes*, Property Council of Australia, Brisbane, page 23.

The Panel's view

Planning and zoning requirements can restrict competition by creating unnecessary barriers to entry. The regulations should encourage competition and not act to limit entry into a market.

Reform to, or reviews of, planning and zoning are already underway around the country. An opportunity exists to make comparisons across jurisdictions to determine 'best practice' as a basis for updating and improving current requirements. Implementing reform in this area should be advanced more quickly than has been the case to date.

Implementation

Planning and zoning laws and regulations are the responsibility of state and territory and local governments. Within two years, each of these governments should implement reforms to ensure the rules do not unnecessarily restrict competition. As part of this process, collaboration across jurisdictions can assist in developing 'best practice' guidelines that each government can adopt in line with its own local considerations.

The proposed ACCP can provide the forum in which this collaboration can occur — and independently assess progress across the jurisdictions.

Given the numerous reviews of planning and zoning rules in many States and Territories, implementation of reform should be able to proceed as a priority.

Recommendation 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.

10.2 TAXIS AND RIDE-SHARING

The taxi industry in most States and Territories remains heavily regulated, despite being a priority reform area identified under the NCP regulation review program and most subsequent reviews recommending substantial reform.¹¹⁷

Regulations cover minimum quality standards for taxi services, a range of other requirements that amount to community service obligations (CSOs), restrictions preventing other services from competing directly with taxis and restrictions limiting the number of taxis that can operate.

Regulations governing quality cover areas such as the age of vehicles, roadworthiness, driver presentation and knowledge, as well as access to radio dispatch facilities. These regulations are aimed at ensuring minimum standards to promote public confidence that taxis are safe and will provide a minimum standard of service. On the whole, they appear to impose little cost on the taxi industry and their customers because they do not significantly restrict competition between taxi services.

The taxi industry reports that many additional regulations imposed on it create CSOs that competing services do not comply with. For example, Taxi Council Queensland notes that the taxi industry in Queensland is required among other things to:

¹¹⁷ National Competition Council 2005, *Annual Report 2004-2005*, Melbourne, pages 35-36.

- provide a booking service for all communities with more than 10,000 residents;
- provide services on demand, 24 hours per day, for 365 days of the year;
- accept all reasonable requests, meaning that passengers must be served in sequential order, with the exception of wheelchair-accessible taxis, which must give priority to passengers in a wheelchair or on a mobility scooter;
- have taximeters, which are automated for certain tariff times and public holidays, able to apply tolls and access fees, with various restrictions to prevent tampering;
- operate to Minimum Service Levels stipulated in contracts; and
- operate a lost property service (DR sub, page 4).

In addition to regulations covering service standards and obligations, most States and Territories also restrict the quantity of taxis by requiring each taxi to have a licence and limiting the number and types of licences issued.¹¹⁸ This has the effect of limiting responsiveness to consumer demand. There is no restriction on the number of taxi drivers.

New taxi licences are typically issued on an infrequent and ad hoc basis with different sale methods in the States and Territories resulting in large variations in sale price. Most people wishing to obtain a taxi licence must purchase one from an existing licence holder.

Although laws that regulate safety and minimum service levels are commonplace in the Australian economy, the taxi industry is virtually unique among customer service industries in having absolute limits on the number of service providers.

The Australian Taxi Industry Association considers that:

... State and Territory Governments cap the supply of taxi licenses (or permits) at levels that aim to balance customer convenience and service (for example measurable in terms of waiting times) with the viability of taxi drivers' and operators' small businesses. This leads to supply caps well in excess of normal demand, although less than the number required to service peak demand without some acceptable diminution in service level. (sub, page 7)

However, the Panel notes that most service industries face variable demand, and that businesses are able to operate without regulation limiting the number of operators.

The scarcity of taxi licences has seen prices paid for licences at \$390,000 in New South Wales and \$290,000 in Victoria, which indicates that significant economic rents accrue to owners of taxi licences and is at odds with the claim that licence numbers are balanced given market conditions.¹¹⁹

IPART estimates that in New South Wales 15 to 20 per cent of the taxi fare arises as a result of restrictions on the number of licences and notes that the passengers who stand to benefit from reform include a significant number of lower-income earners, many of whom have limited transport options on account of their age or disabilities (sub, page 7).

118 Ibid., pages 35-36.

119 Australian Taxi Industry Association 2013, *Taxi Statistics, State and Territory Statistics as at December 2013*. Australian Taxi Industry Association, Brisbane, viewed 20 February 2015, www.atia.com.au/taxi%1estatistics/.

In each jurisdiction and nationally, the industry has been subject to a series of reviews dating back more than two decades.¹²⁰ However, apart from recent reforms in Victoria (see Box 10.7), there has been little reform. The Victorian case demonstrates that change for the benefit of consumers is possible.

Box 10.7: Victorian taxi reforms

In Victoria, dissatisfaction with taxi costs and service levels led the State Government to undertake fundamental reforms, mostly along the lines recommended by the Taxi Industry Inquiry 2012.¹²¹

These reforms include:

- increased pay and higher standards for drivers under a new mandatory Driver Agreement;
- improvements to the fare structure including peak and off-peak pricing;
- cutting the service fee for card payment from 10 per cent to five per cent;
- regulated fares moving from prescribed fares to maximum fares, providing the ability for customers to be offered discounted rates, such as lower fares to the airport;
- a zoning system — metro, urban (including large regional centres), regional, and country — with separate licence fees applying;
- opening the market, with the Taxi Services Commission issuing new licences as the market demands, with a set annual fee for licences—the fee will be lower in regional and country areas and for wheelchair-accessible vehicles;
- applying a new ‘consumer interest test’ to regional and country zones to gauge the benefits of new licences for customers;
- enabling taxis and hire cars to compete for contract work to fill the gaps in public transport services; and
- removing the requirement to offer taxi services on a continuous basis, allowing taxi operators to set their own hours.¹²²

Technological change is also disrupting the taxi industry, with ride-sharing apps, such as Uber, connecting passengers with private drivers. Traditional booking methods are also being challenged by the emergence of apps such as GoCatch and ingogo.

The advent of ride-sharing services both in Australia and overseas has been particularly controversial, with regulatory agencies questioning their legality and fining drivers,¹²³ notwithstanding public acceptance of and demand for ride-sharing services.

120 See, for example: Industry Commission 1994, *Urban Transport*, Melbourne.

121 Taxi Services Commission Victoria 2012, *Final Report — Customers First: Service, Safety, Choice, Victoria*.

122 Taxi Services Commission Victoria, *Taxi and Hire Car Reform*, Taxi Services Commission, viewed 30 January 2015 www.taxi.vic.gov.au/taxi-reform/about-taxi-and-hire-car-reforms.

123 Thomson, A, 8 May 2014, *About 50 Uber drivers have been fined \$1700 in crackdown by Taxi Services Commission*, Herald Sun, Melbourne viewed 10 February 2015, www.heraldsun.com.au/news/victoria/about-50-uber-drivers-have-been-fined-1700-in-crackdown-by-the-taxi-service-s-commission/story-fniOfit3-1226910856247; Jackson, E, 16 October 2014, *Uber drivers risk fines, Qld govt warns* Brisbane Times, Brisbane, viewed 10 February 2015, www.brisbanetimes.com.au/queensland/uber-drivers-risk-fines-qld-govt-warns-20141016-1177nf.html and Grubb, B, 8 May 2014, *Victoria government issues \$1700 fines to Uber ride-sharing drivers as media gaffe surfaces*, Sydney Morning Herald, 8 May 2014, Sydney, viewed 2 February 2015, www.smh.com.au/digital-life/smartphone-apps/victoria-government-issues-1700-fines-to-uber-ridesharing-drivers-as-media-gaffe-surfaces-20140508-zr6yp.html.

National Seniors Australia notes that new technologies are empowering consumers:

... the digital revolution — including the growing use of mobile telephone applications in combination with satellite navigation technologies — is giving rise to opportunities for new entrants to break down existing taxi network monopolies, enabling consumers to exercise greater choice and receive prompter service. It will be important to ensure that these innovations are not stifled by further anti-competitive regulation aimed at protecting incumbents. (sub, pages 14-15)

Taxi Council Queensland considers that taxis and ride-sharing are readily substitutable and should therefore be subject to the same rules and obligations. It considers that ride-sharing platforms are competing unfairly, since they do not comply with the universal service obligation requirements that taxis must comply with:

These services are illegal de facto taxi services masquerading as a collaborative consumption model. (DR sub, page 10)

and

... the Henry Tax Review panel believed [universal] service obligations essentially ‘tax’ low-cost users who subsidise high-cost users. (DR sub, page 5)

A regulatory double standard should not be allowed to persist. One option would be to review the USO [universal service obligation], in line with the Henry Tax Review panel’s recommendation. (DR sub, page 5)

Conversely, Uber considers that:

While ridesharing competes with the taxi industry, ridesharing is not a taxi service ... Notably, ridesharing trips (as with all services facilitated by platforms such as the Uber app) are not anonymous, cannot be hailed on the street, do not use taxi ranks and do not have taximeters. (DR sub, page 1)

A number of state and territory governments have determined that Uber is acting outside current industry regulations and issued fines to Uber drivers.¹²⁴ The Panel does not endorse illegal activity, nor encourage new players to ignore or defy relevant laws or regulations. The Panel’s primary concern is to ensure that the regulations respond to changes in technology in a way that allows new entrants to meet consumer demand, while continuing to ensure the health and safety of consumers.

Box 1.5 in [Part 1](#) of this Report discusses technological versus regulatory solutions to market failure.

Although taxi reform is not expected to make a major contribution to national productivity, the sector is an important component of metropolitan transport and can be particularly important for the mobility of the elderly and those with a disability. More affordable and convenient taxi services give consumers options. Significantly, reduced barriers to entry could see more services operate at peak times, without needing to operate at off-peak times.

The Panel considers that the longstanding failure to reform taxi regulation has undermined the credibility of governments’ commitment to competition policy more broadly, making it harder to argue the case for reform in other areas. The Victorian example demonstrates that change is possible and technological disruption suggests that consumer-driven change is inevitable.

124 Ibid.

The focus of reform in the taxi industry needs to be twofold: to reduce or eliminate restrictions on the supply of taxis that limit choice and increase prices for consumers; and to encourage technological change that can benefit consumers. There is also an opportunity for the taxi industry to consider a reduction in the current level of red tape that applies to their industry.

An important element of reforming regulation should be to separate out CSOs currently embedded in taxi regulation and fund those CSOs explicitly. This would allow the taxi industry and ride-sharing services to compete with each other more effectively.

The ACT Government recently announced a review of its taxi industry regulation to ensure that it adequately protects consumers but is also supportive of new technologies.¹²⁵

The Panel's view

Taxi industry reform in most States and Territories is long overdue. Many restrictions remain that limit competition by creating barriers to entry and preventing innovation.

The regulatory framework for taxi regulation could be enhanced considerably through independent regulators having the power to make determinations (rather than recommendations), including on the number and type of taxi licences to be issued.

Mobile technologies are emerging that compete with traditional taxi booking services and support the emergence of innovative passenger transport services. Any regulation of such services should be consumer-focused, flexible enough to accommodate technical solutions to the problem being regulated and not inhibit innovation or protect existing business models.

Further regulatory review of the industry is necessary to take account of the impact of new technologies.

10.3 GOODS — STANDARDS

Restrictions on the sale of goods can come in a range of forms, including through adopting standards, both Australian and international. Restrictions on the sale of goods reduce businesses' ability to respond to consumer demand.

Adherence to standards can be mandated in law (explicitly or through delegated decision making) or by voluntary adoption by certain industry participants. When compliance with a standard is mandatory, there is a greater likelihood of an anti-competitive effect.

Standards may be in the public interest for many policy reasons, including health, safety and consumer protection. Submissions note that standards can provide efficiencies, address information asymmetries and generate cost savings.¹²⁶

Standards can also promote competition by facilitating interoperability. For example, having no standards for car tyre sizes could limit competition since not all manufacturers would be able to produce tyres to fit all car wheels — reducing the scope for efficiencies of scale as well.

¹²⁵ Rattenbury, S 2015, [Taxi review to increase innovation, choice and value](#), media release, 28 January, Canberra.

¹²⁶ See, for example: Australian Industry Group, sub, page 15.

However, on occasion, the way standards are adopted or referenced in law provide unnecessarily high or differential requirements for goods or services, dampening competition or creating barriers to market entry and innovation.

Submissions provide examples where standards mandated by law can impede growth and innovation, including food safety regulation being directed at specific process requirements rather than the outcomes for food safety.¹²⁷ Box 10.8 discusses the role of Standards Australia in accrediting standards for goods and services.

Box 10.8: Standards Australia

Standards Australia is a non-government body with a memorandum of understanding with the Australian Government to accredit Australian Standards for goods and services.

There are more than 6,800 Australian Standards, the large majority of which are voluntary. Others are made mandatory through regulation; some are agreed to be mandatory between parties in private contracts.

Standards Australia requires that all Australian Standards, regardless of who develops them, must demonstrate positive net benefit to the community as a whole. One of the required considerations is the impact on competition.¹²⁸ This mechanism provides the opportunity for Standards Australia to examine the impact on competition and ultimately the outcomes for purchasers of the goods or services, not just the burden on industry.

In 2012, Standards Australia committed to review, revise, re-confirm, or withdraw all standards published more than 10 years ago. It considers that this initiative helped to ensure the catalogue is current, internationally aligned, and that the standards are not an unnecessary burden on industry (sub, page 4).

Standards Australia has a policy of adopting international standards¹²⁹ wherever possible,¹³⁰ which should assist in minimising regulatory barriers to import competition.

Given that industry collaboration in relation to standards could be considered anti-competitive, paragraph 51(2)(c) of the CCA provides that agreements relating to the implementation of Australian Standards are exempt from the operation of the competition law.

The Hilmer Review accepted continuation of the exemption recognising that, generally speaking, harmonisation through standards is a good thing, enhancing efficiency, making products more substitutable and facilitating development of service industries for standardised goods. However, the Hilmer Review also noted the risks of standards raising barriers to entry where they are incorporated

127 For example, Australian Food and Grocery Council, sub, page 19 and Attachment 5, provides examples of regulations that impede competition, growth and innovation in the food and grocery sector, including regulation of agricultural and veterinary chemicals residue, industrial chemicals, metrology markings and medicines.

128 Standards Australia, *Net Benefit*, Standards Australia, Sydney, viewed 2 February 2015, www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Net-Benefit.aspx.

129 International standards include those developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).

130 Standards Australia, *Net Benefit*, Standards Australia, Sydney, viewed 30 January 2015, www.standards.org.au/InternationalEngagement/Pages/default.aspx.

into legislation and mandate particular technologies or systems rather than performance outcomes.¹³¹

No submission suggests removing the exemption from the competition law for collaboration on Australian Standards in paragraph 51(2)(c) of the CCA. Differing levels of standards can sometimes be required to meet a public policy objective, on account of localised factors such as climatic, geographic or technological issues — a point recognised by the World Trade Organisation.¹³²

Standards can also create significant barriers to competition by restricting substitution. If a product or service meets international standards, a strong policy case would be needed for a different standard to apply in Australia (particularly if it is to be mandated); otherwise, it may amount to little more than a barrier to import competition. Examples of standards that were noted in submissions as raising concerns are in Box 10.9 below.

The Panel notes that COAG has recently agreed to ‘explore adopting, as a general principle, trusted international standards or risk assessment processes for systems, services and products, unless it can be demonstrated that there is good reason not to’.¹³³ Further, the Australian Government has announced its adoption of this principle in its *Industry Innovation and Competitiveness Agenda*, citing regulation of medical devices and chemicals as priority areas that the Government will reform in addition to broader consultations.¹³⁴ The Panel supports these processes.

Box 10.9: Examples of standards provided in submissions

Issues raised in submissions

Standards can provide a strong disincentive against new competitors entering an industry, growing their enterprise or diversifying.¹³⁵

Further information

Examples include:

- a geosynthetic product imported from Germany that meets EU standards still requires re-testing in Australia by VicRoads;
- vehicle air conditioning refrigerant has strict controls in Australia, including licensing mechanics that use it, whereas the US has no such restrictions; and
- a new conveyor belt lubricant developed in the US but the manufacturer decided against selling it in Australia due to costs and delays in the chemicals approval process (but is available in NZ, where there is stronger recognition of other countries’ accreditation).

131 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 154.

132 World Trade Organisation, *Agreement on Technical Barriers to Trade*, World Trade Organisation, Geneva, viewed 3 February 2015, www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

133 Council of Australian Governments 10 October 2014, COAG *communiqué*, COAG, Canberra, page 3, viewed on 3 February 2015, www.coag.gov.au/node/521.

134 Australian Government 2014, *Industry Innovation and Competitiveness Agenda Report: An action plan for a stronger Australia*, Proposal 1 page 31, Department of Prime Minister and Cabinet, Canberra, viewed 3 February 2015, www.dpmc.gov.au/pmc/publication/industry-innovation-and-competitiveness-agenda-report-action-plan-stronger-australia.

135 Hon. John Lloyd PSM, sub, page 8.

Box 10.9: Examples of standards provided in submissions (continued)

Products that do not conform with regulatory, Australian or industry standards (i.e., non-conforming products) can obtain an unfair cost advantage over the majority of businesses that comply with Australian Standards.¹³⁶

Localised standards should not be assumed to be necessary or desirable per se. If a standard is necessary for other policy reasons, such as safety, it should be mandated by governments and effectively enforced.

The costs to the community and car buyers of policing regulation of safety and environmental standards, as well as the risks to purchasers of less certain vehicle history, outweigh the benefits of lower purchase prices.¹³⁷

The PC's inquiry into Australia's automotive manufacturing industry examined import restrictions and standards for used vehicles. It concluded:

The progressive relaxation of restrictions on the importation of used passenger and light commercial vehicles, within a regulatory compliance framework that provides appropriate levels of community safety, environmental performance and consumer protection, would have net benefits for the Australian community. These benefits include lower prices and/or improved vehicle features at a particular price point, and greater choice for vehicle buyers.¹³⁸

Lack of specificity in requirements of labelling and country of origin-related laws is leading to poor information to consumers and lower competition.¹³⁹

Submissions propose that additional regulation would improve the competitive process for certain food and beverage products.

Calls for greater equality and consistency in enforcement of food standards, regarding imports versus domestic products.¹⁴⁰

Submissions are concerned that the more rigorous processes being applied to domestic products are affecting competition.

Submissions to the Draft Report generally support both the existence of standards and the need to review them periodically to ensure that they remain pro-competitive.¹⁴¹ Standards Australia supports the intent of a standards review but notes that comprehensive reviews require consideration of supporting technical specifications and other referenced documents.¹⁴²

136 See, for example: Australian Industry Group, sub, page 16; and National Electrical and Communications Association, sub, page 4.

137 Federal Chamber of Automotive Industries, sub, page 3.

138 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, Inquiry Report No. 70, Canberra, page 129. See also Recommendation 5.4.

139 See, for example: Cider Australia, sub, page 1; and Griffith and District Citrus Growers' Association, sub, page 4.

140 KAGOME Australia, sub, page 11.

141 See, for example: ACCC DR sub, page 24; Australian Industry Group DR, sub, page 15; Law Council of Australia — SME Committee, DR sub, page 9.

142 Standards Australia, DR sub, page 4.

The Law Council of Australia — SME Committee notes concern that large businesses could use the adoption of voluntary Australian Standards to unduly raise compliance costs for small business or may even have the effect of excluding imports from the market altogether.¹⁴³

The Panel's view

Australia has a range of restrictions on the supply of goods. As in the provision of services, many of them are worthwhile for policy reasons, such as health and safety. However, they can also create barriers to entry. Any necessary restrictions on the supply of goods should be implemented in a way that does not unduly restrict competition.

There are also clear examples where different international and domestic standards are dampening or distorting import competition — particularly where the domestic standards are mandated (directly or indirectly) by law. The Panel supports COAG's recent decision to examine whether international standards can be more commonly accepted in Australia and the Australian Government's recent reforms announced in its *Industry Innovation and Competitiveness Agenda*.

Further, the Panel considers that product standards that are directly or indirectly mandated by law should be reviewed as a priority.

The Panel notes that submissions do not support removing the exemption from the competition laws, contained in paragraph 51(2)(c) of the CCA, for agreements relating to the implementation of Australian Standards. However, as all standards (whether mandated by law or not) have the capacity to restrict competition, Standards Australia should periodically review Australian Standards against the same public interest test used to assess the competition impacts of government regulations (see Recommendation 8).

Implementation

Each jurisdiction should review mandatory product standards in its jurisdiction over two years following its acceptance of Recommendation 10. These reviews should be co-ordinated at a whole-of-government level to determine where such standards are restricting competition and whether it is in the public interest to do so.

Within 12 months of accepting Recommendation 10, state and territory governments that have not recently reviewed the regulation of taxis and ride-sharing (including their impact on competition) should commence a comprehensive review to identify whether regulatory restrictions on competition are in the public interest.

Restrictions that are identified as not being in the public interest should be removed or amended as soon as possible.

Within 18 months of accepting Recommendation 11, the Australian Government should re-negotiate its Memorandum of Understanding with Standards Australia to require periodic reviews of non-mandated (i.e., voluntarily adopted) Australian Standards against the public interest test. These reviews should be conducted on a staggered, ongoing basis — with Standards Australia being able to consult the ACCP (see Recommendation 43) or the ACCC for advice, if it identifies a Standard that may be anti-competitive. Where a Standard appears to be anti-competitive, Standards Australia should seek advice on any possible improvements from the ACCP.

143 Law Council of Australia — SME Committee, DR sub, page 9.

Recommendation 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.

Recommendation 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.

10.4 OTHER POTENTIAL AREAS FOR REVIEW

In addition to the priority areas of planning and zoning, taxis and ride-sharing and mandatory product standards that the Panel has identified for review, other regulations should be considered as part of a national regulation review agenda. Six broad areas that were raised in submissions are set out below, noting that this is not an exhaustive list — potential regulatory restrictions on competition could arise throughout the economy.

Services — professional and occupational licensing

Professional and occupational licensing can promote important public policy aims, such as quality, safety and consumer protection. For example, regulations governing the accreditation of health professionals are a means of assuring that service quality does not fall below minimum acceptable standards. Competition considerations should not override these objectives — but neither should they be ignored.

Licensing that restricts who can provide services in the marketplace can prevent new and innovative businesses from entering the market. It can also limit the scope of existing businesses to evolve and innovate. As a result, service providers can become less responsive to consumer demand. This imposes a cost on consumers without necessarily improving consumer protection. Quantitative limits on the number of providers most obviously restrict competition. Examples raised in submissions are set out in Box 10.10 below.

Box 10.10: Examples of standards restrictions

Industry	Issues raised in submissions
Medical profession	<p>Admission requirements of medical colleges and the accreditation body's unwillingness to accredit new specialties.¹⁴⁴</p> <p>If medical specialist colleges unduly restrict entry to their professions, this has the effect of lessening competition.¹⁴⁵</p> <p>Using nurse practitioners to perform a range of functions formerly restricted to medical practitioners has enabled the delivery of some health services at lower cost without increased risk to patients.¹⁴⁶</p>
Building trade	<p>While supporting the need for a degree of licensing, the industry¹⁴⁷ notes that this constrains the market's ability to provide services. It should only be used where the benefits outweigh the costs and where the objectives of regulation can only be achieved by restricting competition.</p>
Legal profession	<p>Competition is limited by aspects of the self-regulatory regime.</p> <p>Examples include: restrictions on the ability of law schools to offer curricula that do not include 11 core subjects; and state law societies both setting requirements for, and providing, training and professional development.¹⁴⁸</p> <p>Submissions also raise concerns regarding transparency, pricing and self-regulation. They suggest that either self-regulation by Law Societies and Legal Services Commissioners should be abolished and moved to a completely independent authority, or a new super-regulatory function should be assumed by an existing ombudsman. To encourage the legal profession to become more competitive and affordable, a co-ordinated link is needed between governments, independent regulators, the business community and consumers.¹⁴⁹</p>
Dental practitioners	<p>Inconsistencies and anomalies can result from professional restrictions; for example, registered dental practitioners are required to observe advertising guidelines, but private health insurers, where they are the owner/operators of dental clinics, are not bound by the same requirements.¹⁵⁰</p>

IPART's submission draws the Panel's attention to its new licensing framework¹⁵¹ as outlined in Box 10.11.

144 Spier Consulting, sub 1, pages 1-2.

145 National Seniors Australia, sub, page 20.

146 See, for example: National Seniors Australia, sub, page 20; UnitingCare Queensland, DR sub, page 2.

147 Housing Industry Association, sub, pages 12-13.

148 Lynden Griggs and Jane Nielsen, sub, pages 1-2.

149 Eqalex Underwriting Pty Ltd, sub, page 6.

150 Australian Dental Association Inc., sub, page 18.

151 PwC 2012, *A best practice approach to designing and reviewing licensing schemes*, Independent Pricing and Regulatory Tribunal, Sydney.

Box 10.11 IPART's Licensing Framework

IPART has examined New South Wales licences and identified those where reform would produce the greatest reduction in regulatory burden for business and the community. As part of this review, IPART engaged PwC to develop a conceptual framework for licence design.

Applying the licensing framework can ensure that licensing regimes do not restrict competition unless it can be demonstrated that they are the best means of achieving policy objectives.

Where a licence is necessary, the framework also requires an assessment of whether the licence is well-designed, i.e., whether the various aspects of the licensing regime that may restrict competition are the minimum necessary.

The framework requires a regulator to take into account how the objectives of a licence relate to its coverage, duration, reporting requirements, fees and charges, and conduct rules.

IPART has suggested this framework could be used by other New South Wales regulators and in other jurisdictions to limit barriers to competition arising from licensing.

The IPART guidance indicates that, after following the framework:

- the need for licensing will have been established (Stage 1);
- the various aspects of the licensing scheme that may restrict competition will be the minimum necessary (Stage 2);
- the licensing scheme will be efficiently administered (Stage 3); and
- licensing will be the best response to achieve objectives (Stage 4).

Industry bodies often put professional and occupational licensing in place to promote the ethical and quality practices of their professions. This can lead to better consumer outcomes but can also dampen competition and raise barriers to entry into those markets.

During the NCP regulation review process, the NCC stated:

It is totally unfounded to assume that a professional, simply by virtue of his/her qualification, is somehow above the profit motive and therefore should not be subject to market competition like all other service providers in our economy.¹⁵²

Some progress has been made in eliminating unnecessary restrictions on competition, including removing: medical practice ownership restrictions; restrictions preventing lawyers from advertising; and lawyers' monopoly on conveyancing services. Removing conveyancing restrictions is a case in point. Previously, regulations prevented non-lawyers from carrying out conveyancing services, even though this is largely an administrative service.

152 National Competition Council 2000, *Public Interest or Self Interest?*, media release 14 August, Canberra.

The Panel's view

Services will continue to make a growing contribution to economic activity in Australia. It is therefore important to remove unnecessary restrictions on service provision — particularly barriers to entry and expansion that impede competition.

Licensing requirements can raise barriers to entry in markets and impose more costs than benefits on the community. In a range of areas, the competitive impacts of licensing are not adequately considered, either in frameworks or during decision making.

Professional and occupational licensing has a range of potential restrictions on competition — both regulatory and non-regulatory. Although some restrictions are clearly necessary for health, safety or consumer protection, others can unduly impede competition, particularly where they limit the number of providers.

Media and broadcasting services

The media market is highly integrated, incorporating media content delivery platforms, such as television broadcasting — which will increasingly include new technologies, such as multicasting via the internet — and content delivered via media platforms.

Ownership and content issues are intertwined and essential elements in the commercial strategies adopted by media companies and telecommunications partners.

Competition and the diversity of competitors in the media market are affected both by explicit regulatory interventions and by market developments, particularly in relation to content, which require close monitoring to ensure that competition concerns do not emerge.

Regulatory interventions regarding ownership and content exist to achieve other policy objectives, including media ownership diversity and, in the case of broadcasting rules that impose Australian and local content requirements, media content that reflects a sense of Australian identity, character and cultural diversity.

These media diversity objectives, which underpin many of the ownership and control rules, are given force by the *Broadcasting Services Act 1992* and administered by the Australian Communications and Media Authority. The rules within the Broadcasting Services Act are relatively simple, quantitative constraints, which are generally quite clear to existing and potential market participants.

That said, as hard and fast legislative provisions are built around existing market structures and participants at the time legislation is passed, they almost by definition lag developments in a rapidly evolving marketplace. The explicit rules also only cover the most influential media services, such as those delivered by commercial television broadcasters, commercial radio and associated print newspapers.

A large number of competition issues in the media sector have been slated for review this year, as part of the Australian Government's deregulation agenda. Many media broadcasting issues, such as those relating to media control and ownership, are canvassed in a policy background paper released by the Department of Communications in June 2014.¹⁵³

153 For further discussion see Australian Government Department of Communications 2014, [Media Control and Ownership — Background Policy Paper](#), Canberra.

In addition, the Department of Communications is also conducting a review of current spectrum policy arrangements to ease the compliance burden on users and improve accessibility of new technologies.¹⁵⁴ Spectrum use and access arrangements underpin, among other things, existing television and radio broadcasting markets, as well as other uses for the spectrum, such as tablets and smartphones, and importantly, essential public and community services.

These two reviews will likely raise many issues relevant to the competitive environment for media and broadcasting services. Both the spectrum review and the consideration of further reforms to media ownership will be progressed by the Minister for Communications in 2015.

Other related media sector issues, such as the anti-siphoning rules, which prevent pay television broadcasters from buying the rights to events on the anti-siphoning list before free-to-air broadcasters have the opportunity to purchase the rights, are identified as issues for consideration by the Australian Government as part of the roadmap for deregulation in the Communications portfolio.¹⁵⁵

A number of media content issues may raise competition concerns over time, particularly in relation to competition in upstream markets for the provision of content. As technology evolves, and partnerships between media platform owners, content producers and telecommunication providers strengthen, the capacity to restrict consumer choice or access becomes an issue that competition regulators need to monitor closely.

In Australia, concerns around preferential treatment of content by media owners and telecommunications partners appear less pronounced than in some other jurisdictions. However, the capacity for dominant players in one market to leverage market power into another market, such as media content, is an issue in need of constant monitoring.

Submissions on the Draft Report argue for more detailed recommendations on media and broadcasting to support the existing processes underway by the Minister and the Department of Communications. While the Panel welcomes this feedback and support, the Panel considers that its view as outlined below represents a sound statement of principles and directions that can support further reform in these areas, once the more detailed expert analysis has been undertaken as part of the roadmap for deregulation in the Communications portfolio.

154 Turnbull, M (Minister for Communications) 2014, [Spectrum Reform to Drive Future Innovation and Productivity](#), media release 23 May, Canberra.

155 Australian Government, Department of Communications 2014, [Communications portfolio: Deregulation Roadmap 2014](#), Department of Communications, Canberra, viewed 3 February 2015, www.communications.gov.au/deregulation/communications_portfolio_deregulation_roadmap_2014.

The Panel's view

Regulatory restrictions on media ownership and broadcasting rules are designed to achieve other public policy objectives, such as media diversity and support for Australian and local content. In a rapidly evolving technology landscape, inflexible regulatory provisions are unlikely to be sustainable or remain relevant over time.

The Australian Government reviews as part of the broader deregulation roadmap planned for the Communications portfolio should consider the current impact of the regulatory interventions on ownership and control of media and broadcasting services, as well as the impact of rapidly evolving communication technologies on competition over time.

Liquor and gambling

Liquor retailing and gambling are two heavily regulated sectors of the economy. The risk of harm to individuals, families and communities from problem drinking and gambling provides a clear justification for regulation. This is reflected in a number of submissions expressing concern that changes to the regulation of alcohol sales could increase social harm.

Regulating access to alcohol with the objective of minimising harm can only be achieved by restricting the economic and physical availability of alcohol. This justifies the controls that may otherwise be seen as anti-competitive. (National Alliance for Alcohol, sub, page 1)¹⁵⁶

However, such regulations also restrict competition and reduce consumer choice.

The Review received a large number of submissions in relation to liquor¹⁵⁷ and several addressing gambling. Some submissions support removing anti-competitive elements of liquor licensing regimes. However, most oppose any change that would restrict the ability of governments to set trading hours or planning and zoning rules in order to address the risk of harm from alcohol. A number of submitters consider that regulations relating to alcohol should be entirely exempt from any review of regulations against competition principles.

For example, the National Alliance for Action on Alcohol states:

The NAAA reiterates the importance of not only maintaining existing restrictions but also explicitly preserving the ability of Governments to impose further restrictions on liquor in the public interest as and when they consider appropriate. (DR sub, page 7)

Although the recommendations on trading hours (see Recommendation 12), planning and zoning (see Recommendation 9), and regulatory review (see Recommendation 8) are addressed in detail elsewhere in this Report, they have each been raised in the context of liquor retailing. Accordingly, the Panel wishes to clarify how it intends these recommendations to apply in the context of liquor licensing.

In particular, given the Panel's view that the risk of harm from liquor provides a clear justification for liquor regulation, any review of liquor licensing regulations against competition principles must take proper account of the public interest in minimising this potential harm. The Panel agrees with the

¹⁵⁶ This submission is endorsed by the Foundation for Alcohol Research and Education, and the McCusker Centre for Action on Alcohol and Youth.

¹⁵⁷ Approximately 40 such submissions were received, many of which referenced or endorsed one or both of the submissions from the Foundation for Alcohol Research and Education and the National Alliance for Action on Alcohol.

many submitters who note that ‘Alcohol, because of its potential to cause harms, is not like other products. It is not the same as cornflakes, nor is it similar to washing powder or orange juice’ (Foundation for Alcohol Research and Education, DR sub, page 6).

Accordingly, the Panel does not propose that the recommendation to deregulate trading hours for sellers of ‘ordinary’ goods and services (see Recommendation 12) should prevent policymakers from regulating trading times for alcohol retailing (or gambling) in order to achieve the public policy objective of harm minimisation. Similarly, the recommendation that competition be taken into account as an important part of the planning and zoning process (see Recommendation 9) should not be interpreted as removing any ability for governments, in dealing with planning and zoning, to take full account of harm minimisation as an objective.

Rather, these recommendations mean that restrictions on opening hours, or planning and zoning rules, or liquor licensing regimes, or gaming licensing, should not be designed to benefit particular competitors or classes of competitors, but only to achieve the stated public policy benefits.

As noted [Chapter 8](#), submissions in various contexts take issue with the public interest test used in NCP and adopted in the Draft Report, namely, that competition should not be restricted unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the regulation can only be achieved by restricting competition.

In the context of liquor, Marsden Jacob Associates submits that the Draft Report fails to recognise that the second limb of the NCP test should not be (and for at least the last (2004–05) assessment was not) applied literally (DR sub, page 1).

The Panel does not support a change to the public interest test, and the 2005 review of packaged alcohol cited by Marsden Jacob Associates is an example of how the test can be pragmatically applied to a sensitive area of regulation.

Some restrictions on the sale of alcohol (and on gambling) appear to favour certain classes of competitors to the detriment of consumers. All regulations must be assessed to determine whether there are other ways to achieve the desired policy objective that do not restrict competition. However, it is certainly not the Panel’s view that the promotion of competition should always trump other legitimate public policy considerations.

Under the previous NCP review, a number of pre-existing barriers to competition in the sale of alcohol were removed, but the extent of reform varied by state and the NCC withheld payments from several jurisdictions due to lack of progress in this area.¹⁵⁸ There were also changes to gambling regulation, but some stakeholders submit that existing regulations continue to unduly restrict competition in both sectors.

For example, in relation to gambling, the Australian Wagering Council calls for a review of the *Interactive Gambling Act 2001*, which prohibits Australian licensed and regulated online wagering operators from offering in-play sports wagering, arguing that it is failing to meet its original objective of harm minimisation, since technological advances mean that it is now readily bypassed by gamblers using offshore websites.

158 National Competition Council 2005, *Assessment of Governments’ Progress in Implementing the National Competition Policy and Related Reforms: 2005*, Melbourne, pages xxvii, xxx, xxxiii, xxxvi.

This regulation is ... obsolete given the rapid technological changes and increased internet-usage ... (DR sub, page 3)

... [this regulation] only impacts the legally licensed and regulated Australian industry giving a clear advantage to unregulated and/or illegal overseas operators who will continue to offer their services to Australians in a manner that provides little by way of consumer protection and harm minimisation ... (DR sub, page 3)

The Australasian Association of Convenience Stores submits that regulation preventing its members from obtaining liquor licences is not slowing the growth of the alcohol industry but does inhibit its members' ability to meet customers' demands and to compete with Coles and Woolworths (sub, page 7).

Ice Box Liquor, which operates 20 stores in regional New South Wales, submits that because 'liquor license applications are made in respect of specific premises and therefore the applicant must "control" or have tenure of the property during the full application process ... [this] clearly favours the larger business (Coles and Woolworths) who can much more readily afford the cost [of] making applications, more so of unsuccessful applications' (DR sub, page 2).

Three other examples of liquor licensing and gambling regulation restricting competition are provided at Boxes 10.12, 10.13 and 10.14 below. It is not obvious to the Panel that these restrictions serve the public interest rather than serving the interests of incumbent retailers. This illustrates the importance of ensuring that any restrictions are designed to achieve clearly defined policy objectives, and then tested to ensure that they are doing so and that they do not have unintended consequences that can harm competition.

Box 10.12: Queensland takeaway packaged liquor licensing regulations

Several submissions, including from Master Grocers Australia/Liquor Retailers Australia, AURL FoodWorks, and small supermarket operators cite the example of Queensland’s liquor licensing regime, under which only premises with a hotel licence may operate detached bottle-shops, as an impediment to their ability to respond to consumers and compete with Coles and Woolworths.

Deborah Smith, a Toowoomba retailer, submits:

Coles and Woolworths — along with their subsidiary liquor brands — can provide the consumer with the “whole meal” solution, offering licenced bottle shops attached to their hotel licences within their shopping centres. The Queensland Liquor Act is a real barrier to entry for independent supermarket operators, as we are prohibited from offering this same service. This market inequality ensures a non-competitive retail liquor industry in Queensland. (DR sub, page 4)

Even those strongly concerned about changes that would increase alcohol availability, including the Foundation for Alcohol Research and Education (FARE) and the National Drug and Alcohol Research Centre, draw attention to problems with Queensland’s liquor laws. As FARE notes:

[Queensland’s restrictions] prompted Coles and Woolworths to undertake, as IBISWorld describes it “... a pub buying frenzy during the last decade in an effort to circumvent this legislation. These companies now own ... 49 per cent of detached bottle shops [in Queensland].” (DR sub, page 20)

The National Drug and Alcohol Research Centre recommends ensuring public health is given a critical place in any assessment of liquor retailing regulations to ensure that alcohol-related harm is not increased, but notes:

The inconsistencies across jurisdictions in who can sell alcohol, and particularly the Queensland regulations that require anyone operating packaged liquor outlets also requires a pub licence are worthy of review. (DR sub, page 4)

Box 10.13: Costco application for liquor licence in South Australia

On 16 October 2014, the Licensing Court of South Australia declined to grant Costco a licence to sell alcohol in its new Adelaide store.¹⁵⁹ Costco had applied for a ‘Special Circumstances Licence’, since its model for liquor retailing, as used in other Australian and overseas stores, and which involves a limited range of premium products stocked within its warehouse together with other goods sold only to fee-paying members of Costco, would not meet the requirements of a standard licence.

A competitor, Woolworths, and an industry association, the Australian Hotels Association, challenged the application and went to court to object. The Court stated:

I accept the undoubted attractiveness of the Costco’s proposal. The evidence establishes that Costco stores are very popular and no doubt the addition of a facility within the store enabling the purchase of first class liquor at competitive prices is something that the public can be presumed to want. [paragraph 75]

However, ultimately the Court considered that Costco’s model for liquor retailing was not compatible with South Australia’s licensing requirements and to grant a licence would risk setting ‘an undesirable precedent’ [paragraph 72].

Box 10.14: New South Wales restrictions on sale of lottery products

Under the terms of a 40-year lease of New South Wales lotteries to the Tatts Group from 2010, as a transitional measure a five year moratorium was imposed, such that only newsagents and convenience stores were permitted to sell lotteries products.¹⁶⁰

The Panel notes recent proposals to extend this moratorium rather than allow it to expire in 2015. The justification advanced for doing so makes no reference to minimising harm to consumers from problem gambling, only protecting newsagents from competition.¹⁶¹

The PC found ‘The risks of problem gambling are low for people who only play lotteries and scratchies, but rise steeply with the frequency of gambling on table games, wagering and, especially, gaming machines.’¹⁶²

Many submissions cite empirical evidence of the harm caused by alcohol and suggest that further applying competition policy to the regulation of alcohol retailing would exacerbate this harm.¹⁶³ Other parties disagree and submit that various measures of alcohol-related harm have decreased over the period since NCP was introduced.¹⁶⁴

159 *Costco Wholesale Australia Pty Ltd* [2014] SALC 55.

160 Nicholls, S 2015, ‘Treasury warns Labor newsagents plan could cost NSW \$760 million’, *Sydney Morning Herald*, Sydney.

161 Constance, A (NSW Treasurer) and Barilaro, J (Minister for Small Business) 2015, *Cleaning up Labor’s Lotteries Mess: Newsagent Protections Extended in Landmark Deal with Tatts Group*, media release 30 January, Sydney, and NSW Labor 2015, *A Labor Government Will Enact Laws to Protect Local Newsagents*, 20 January 2015, lukefoley.com.au viewed 3 February 2015, www.lukefoley.com.au/a_labor_government_will.

162 Productivity Commission 2010, *Gambling*, Report no. 50, Canberra, page 2.

163 See, for example: Foundation for Alcohol Research and Education, sub; and National Alliance for Action on Alcohol, DR sub.

164 See, for example: Australian Liquor Stores Association, DR sub.

The Panel has neither the expertise nor the resources to assess this evidence, nor to analyse the costs of harm compared to the costs of reduced competition. Such an investigation is beyond the scope of this Review.

However, the Panel does note that the PC's 2010 *Gambling* report suggests there is no simple relationship between restricting competition and mitigating harm.¹⁶⁵ In fact, the PC noted that the anti-competitive effects of current regulations are an important source of consumer detriment.

Considerable time has elapsed since the NCP reviews of regulation in these areas. Those reviews noted the desirability of revisiting these regulations in future to assess their impact and to compare outcomes in jurisdictions that have implemented competition reforms with those that have not.

The Panel's view

Liquor retailing and gambling are two heavily regulated sectors of the economy. The risk of harm to individuals, families and communities from problem drinking and gambling is a clear justification for regulation.

As with other regulations, liquor and gambling regulations should be included in a new round of regulation reviews (see Recommendation 8) to ensure that they are meeting their stated objectives at least cost to consumers and are not unduly restricting competition.

Reviews of these regulations should draw on evidence, including comparing competition and harm reduction outcomes from the different approaches adopted across jurisdictions. The public interest in minimising harm from problem drinking and gambling should be given proper weight as part of any such review.

The impact of regulatory restrictions on the ability of small businesses to compete should be considered as part of such reviews.

Private health insurance

Around 47 per cent of the Australian population is covered by private health insurance with hospital benefits.¹⁶⁶ The Australian Government subsidises the cost of insurance through the private health insurance rebate, and a levy is imposed on higher-income earners who are not privately insured. However, Medibank Private states that private health insurance is among the most heavily regulated industries in Australia, with the regulatory framework bearing on the scope of services covered, product design, pricing, discounts and capital requirements (sub, page 12).

Private health premiums are regulated by the Australian Government Minister for Health, who has discretion as to whether to allow insurers to increase their premiums. Funds may only apply to increase premiums if their cost structures have increased.

The recent National Commission of Audit examined these pricing arrangements, finding that they remove the incentive for firms to become more efficient, and suggested current arrangements be replaced with a system of price monitoring. It also suggested that insurers be allowed to offer a

¹⁶⁵ Productivity Commission 2010, *Gambling*, Report no. 50, Canberra, pages 19-20.

¹⁶⁶ As at 31 December 2013. Private Health Insurance Administration Council 2014, *Privately Insured People with Hospital Treatment Cover*, Canberra, page 5.

wider scope of products to consumers, in particular, to cover care in out-of-hospital (primary care) settings to assist members managing chronic conditions.¹⁶⁷

The prices of some inputs purchased by private health insurers are also regulated. The prices of prostheses (medical devices such as cardiac pacemakers and artificial hips) are regulated under the *Private Health Insurance Act 2007*. Applied Medical states:

As a result of regulatory policy settings which restrict optimal competitive outcomes, products listed on the Prostheses List are being sold at prices that are in some cases multiple times more expensive than the prices at which they are sold in the public health system and in other jurisdictions. Given that the value of total expenditure by private health insurers on prostheses was \$1.6 billion in 2012, there is scope for very substantial efficiencies to be created through the introduction and extension of principles of competition to the regulatory structure that underpins the Prostheses List. (sub, page 1)

Preferred provider arrangements involve customers having lower or no out-of-pocket expenses if they consult one of the preferred providers recommended by their insurer. Some submissions suggest these types of arrangements can be anti-competitive.¹⁶⁸ However, the Panel notes that the ACCC has examined preferred provider arrangements, in sectors including health and motor vehicle smash repair, and finds that they generally raise no competition concerns.¹⁶⁹

167 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, pages 101-102.

168 See, for example: Australian Dental Association Inc., sub, pages 7-8; Australian Physiotherapy Association, sub, pages 3-7; and Optometry Australia, sub, pages 1-2.

169 For example, the ACCC found in its [2010-11 Private health insurance report](#) that consumers were, on the whole, satisfied with preferred provider schemes, and the arrangements were unlikely to contravene the third-line forcing provisions of the CCA (page 33). The ACCC has also found that preferred provider schemes for smash repairs have resulted in a number of consumer benefits, including lower insurance premiums, lifetime guarantees and repair work performed to a high standard: ACCC 2003 *Smash repairers/insurance issues paper published*, media release 19 September, Canberra.

The Panel's view

It is important that consumers have access to products that meet their needs, including in the area of private health insurance.

The National Commission of Audit report suggests there may be scope for 'lighter touch' regulation of the private health insurance sector, which could encourage innovation and wider product availability for consumers. In particular, price regulation of premiums could be replaced with a price monitoring scheme and health funds could be allowed to expand their coverage to primary care settings.

The Panel believes that prices should be fully deregulated when competition is deemed to be effective. This assessment of effectiveness should be undertaken by the proposed ACCP (see Recommendation 43).

The regulation of prostheses should be examined to see if pricing and supply can be made more competitive, while maintaining the policy aims of the current prostheses arrangements. This examination should also be led by the ACCP.

Agricultural marketing

Agricultural marketing arrangements can create barriers to entry through licensing restrictions and weaken incentives for growers to differentiate their products and to innovate.

The PC's 2005 *Review of National Competition Policy Reforms* (see Box 10.15) noted that domestic pricing arrangements and import tariffs needed to support the activities of statutory marketing authorities provide assistance to producers and are effectively paid for by household and business users. Such controls were found often to reduce the scope and incentives for innovation, to the detriment of both consumers and producers.¹⁷⁰

170 Productivity Commission, 2005, *Review of National Competition Policy Reforms*, Report no. 33, Canberra, page 81.

Box 10.15: National Competition Policy reforms to agricultural marketing arrangements

Under the NCP, the NCC identified the following priority legislation review areas in primary industries: barley/coarse grains; dairy; poultry meat; rice; sugar; wheat; fishing; forestry; mining; food regulation; agricultural and veterinary chemicals; quarantine and bulk handling.¹⁷¹

Under the NCP, price and supply restrictions in the agricultural marketing arrangements were progressively removed. The Australian Bureau of Agricultural and Resource Sciences recently noted that these reforms have resulted in Australian agriculture being strongly market-oriented, with farmers now exposed to competition in domestic and world markets and governments having largely removed production and trade-distorting support.¹⁷²

However, restrictions still apply in relation to rice in New South Wales and potatoes in Western Australia.

The New South Wales Rice Marketing Board, initially established in 1928 under the *Marketing of Primary Products Act 1927*,¹⁷³ retains powers to vest, process and market all rice produced in New South Wales — around 99 per cent of Australian rice.¹⁷⁴ Although a party wanting to participate in the domestic rice market must apply to the Board to become an Authorised Buyer, no price or supply restrictions apply to rice marketing in New South Wales.¹⁷⁵ The New South Wales Rice Marketing Board has appointed Ricegrowers Limited (trading as SunRice) as the sole and exclusive export licence holder.¹⁷⁶

The marketing arrangements for rice are subject to regular review and, under the terms of the New South Wales *Subordinate Legislation Act 1989*, a public benefit case must be made for renewal to continue. The Act requires public consultation and an assessment of the costs and benefits, with legislation not restricting competition unless the benefits of the restrictions to the community as a whole outweigh the costs; and the objectives of the regulation can only be achieved by restricting competition.

The most recent review, in 2012, recommended that vesting be renewed until 30 June 2017, with further extension subject to a review to determine that export price premiums relative to other international competitors on export markets continue to be achieved.¹⁷⁷

In Western Australia, licences to grow ware potatoes (i.e., fresh potatoes for human consumption), as well as the price, quantity and varieties grown, are all regulated by the Potato Marketing

171 National Competition Council 2003, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume one — Overview of the National Competition Policy and related reforms*, AusInfo, Canberra, page 4.6.

172 Gray, EM, Oss-Emer, M and Sheng, Y 2014, *Australian Agricultural Productivity Growth: Past Reforms and Future Opportunities*, ABARES research report 14.2, Canberra, page 14.

173 Rice Marketing Board of NSW, 2015, About the RMB, Rice Marketing Board, Sydney, viewed 28 January 2015 www.rmbnsw.org.au/about-the-rmb.

174 Gray, EM, Oss-Emer, M and Sheng, Y 2014, *Australian Agricultural Productivity Growth: Past Reforms and Future Opportunities*, ABARES research report 14.2, Canberra, page 15.

175 National Farmers' Federation, DR sub, pages 6-7.

176 Rice Marketing Board of NSW, 2015, About the RMB, viewed on 12 February 2015 www.rmbnsw.org.au/about-the-rmb.

177 NSW Government Trade & Investment Strategic Policy & Economics Division 2012, *Review of Rice Vesting by the Rice Marketing Board under the NSW Rice Marketing Act 1983*, Sydney, page 14.

Corporation, which is established under the Western Australian *Marketing of Potatoes Act 1946*, and is a statutory marketing organisation of the government of Western Australia.¹⁷⁸

The Potato Marketing Corporation, not consumers and producers, determines the quantities, kinds and qualities of potatoes offered to consumers in Western Australia. In fact, it is illegal to sell ware potatoes grown in Western Australia without a licence from the Potato Marketing Corporation.

The Economic Regulation Authority of Western Australia's *Inquiry into Microeconomic Reform in Western Australia*, released in July 2014, recommended removing the existing restrictions. Overall, it estimates that the restrictions on the Western Australian ware potato market have a net cost of \$3.8 million per annum, equating to a present value of \$33.23 million over a 15-year period.¹⁷⁹

Recent media coverage highlights the extent of potato regulation in Western Australia and has prompted calls for its removal.¹⁸⁰

Submissions also call for deregulation of Western Australia's potato industry, with the Chamber of Commerce and Industry (WA) highlighting how the regulation, which dates from Australia's national security regulations imposed during the Second World War 'has impeded competition in the WA potato market, leading to higher prices and lower choice for consumers' (sub, page 16). The Business Council of Australia recommends Western Australia's potato marketing regulation should be considered as part of a legislative review program (sub, page 21).

The Panel's view

Most price and supply restrictions in agricultural marketing have been removed. However, some unfinished business remains. For example, restrictions still apply in relation to the export of rice in New South Wales and the price, quantity and type of potatoes sold in Western Australia. These restrictions raise barriers to entry and impede consumer choice. Governments should resist calls for past reforms to be unwound.

Air service restrictions

International air services to and from Australia are regulated by air service agreements. These follow the processes set out under the 1944 Chicago Convention on International Civil Aviation, restricting airlines to operating within agreements developed by countries on a bilateral basis.¹⁸¹

178 Government of Western Australia 2014, Potato Marketing Corporation of Western Australia website, viewed on 28 January 2015, www.pmc.wa.gov.au/index.cfm.

179 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final report*, Perth, page 317.

180 For example: Thompson, B 2015, 'Spud price tensions boil over' *The West Australian*, 7 January, Perth; Tinney, M 2015, 'Potato price war', *Sunrise*, 8 January; Burrell, A 2015, 'Spud war: rules give grower the chips', *The Australian*, 13 January, Perth; APP 2015, 'A vegetable producer will give away 200 tonnes of spuds after breaching WA's potato laws by growing too much, and says the industry must be deregulated' SBS, 13 January; Sprague, J 2015 'WA potato rules ignite hot debate', *Australian Financial Review*, 14 January; Orr, A 2015 'Potato board's advertisement proves a hot potato political issue' *WA Today*, 16 January, Perth; Burrell, A 2015, 'Spud missiles fly over \$5m marketing board', *The Australian*, 16 January; and Fitzgerald, B 2015, 'Free potato giveaway drives a wedge between growers' *ABC Rural*, 28 January.

181 See Department of Infrastructure and Regional Development website, *The Bilateral System — how international air services work*, viewed 3 February 2015, www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

Air service agreements amount to an agreement with another country regarding which airlines can service a particular route. They have the effect of constraining how responsive providers can be to consumer demand.

Complexity is added given other countries' need to negotiate 'beyond rights'. For example, for Qantas to fly to London via Dubai, Australia needs the United Arab Emirates to negotiate 'beyond rights' on behalf of Qantas with the UK. Australia therefore uses air service agreements, as do other countries, as a negotiating chip to obtain 'beyond rights' for Australian flagged carriers in exchange for access to the Australian market.

An Australian carrier granted an allocation of capacity must be designated by Australia before it is able to operate an international air service. As a result, air service agreements act to regulate capacity and who can service particular international air routes. This has been thought to raise prices on some routes. As a consequence, some air service agreements may protect Australian carriers from competition or act as barriers to new carriers entering particular markets.

Other parts of the world have moved to a less regulated approach. For example, within Europe international air services effectively operate under an 'open skies policy'.¹⁸²

Australia also has a policy of seeking 'open skies' on a bilateral basis, for example, the agreement with New Zealand.¹⁸³

Unilaterally allowing open skies to Australia would severely disadvantage Australian airlines, so long as the bilateral system remains entrenched in the rest of the world.¹⁸⁴ The Australian & International Pilots Association notes, 'Australia already has one of the most liberalised air service policies in the world' (DR sub, page 2).

However, other submissions raise concerns that, while Australia may have a relatively liberalised aviation market, air service restrictions are still impeding competition.

For example, Sydney Airport Corporation considers that air service agreements may act as a restriction on competition from foreign carriers in the air services market with broader economic implications:

Delays in bilateral capacity negotiations, which are running behind demand in many key growth markets, restrict the level of competition in the market from foreign carriers, preventing travellers from accessing Australia in the most efficient and cost effective manner. These delays also risk economic and tourism growth, which is highly reliant on inbound international visitation. (sub, page 5)

Similarly, Melbourne Airport considers:

At a time when the Australian Government is seeking more liberal market access arrangements with our key trading partners through bilateral and multilateral trade agreements, air services agreements that impose the equivalent of quotas on passengers and freight are anachronistic. They impose arbitrary constraints on the ability of airlines to respond to market demand for additional or new services. (DR sub, page 1)

182 Productivity Commission 1998, *International Air Services Inquiry Report*, Report No. 2, Canberra, page 59.

183 See Department of Infrastructure and Regional Development website, *The Bilateral System — how international air services work*, viewed 3 February 2015, www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

184 Productivity Commission 1998, *International Air Services Inquiry Report*, Report No. 2, Canberra, page 220.

In respect of domestic restrictions, state governments sometimes provide exclusive rights for regional airlines to operate on particular routes. Ostensibly, exclusivity is provided to guarantee service, as it gives the operator confidence that it can run the route profitably. Regional routes are often very lightly patronised, supporting only one operator, i.e., they are natural monopolies. While it might be reasonable in these circumstances to restrict competition to guarantee a stable service, exclusive rights create the potential for monopoly pricing.

Virgin Australia notes:

... the Queensland Government has determined that the Brisbane-Roma route will remain regulated and free from competition until at least 2020, notwithstanding that passenger numbers grew from just under 40,000 in 2008-09 to over 240,000 in 2013-14. This decision cannot be justified from either an economic or public policy perspective. The costs of restricting competition on this route will be borne by passengers, in the form of higher airfares and fewer travelling options, as well as the economy more broadly, including by limiting opportunities for growth in tourism. (DR sub, page 19)

The Panel's view

The Panel considers that air service agreements should not be used to protect Australian carriers. The Australia Government should take a proactive approach on air service agreements to ensure sufficient capacity on all routes to allow for demand growth, including by pursuing bilateral open skies policies with other countries. This will ensure that agreements do not act as barriers to entry in the provision of services to and from Australia.

Where air service agreements act to restrict capacity, the costs will be borne by travellers through higher prices and fewer options, and by the economy more broadly, for example, through lower tourism growth.

Governments should only create exclusive rights for regional services where it is clear that the air route will only support a single operator. Where exclusive rights are created, they should be subject to competitive tender.

AREAS FOR IMMEDIATE REFORM

Although other areas require detailed reviews to determine whether reform is needed, the Panel considers that, in the three areas of retail trading hours, parallel imports and pharmacy location and ownership rules, the need for reform is well established and long-standing. Those areas, which were identified as problematic under the NCP process, still remain today in some jurisdictions. Of course, they still require careful and consultative reform processes to minimise the risk of unintended consequences.

The Panel emphasises that it is not proposing total and unfettered deregulation of these areas, any more than it is in other areas. Each will have its own particular public interest considerations that need to be contemplated carefully along the way. Nevertheless, where there continues to be a need for regulation, governments should thoroughly analyse alternative, less anti-competitive ways to achieve public policy objectives.

10.5 RETAIL TRADING HOURS

Restrictions on retail trading hours impede suppliers' ability to meet consumer demand. They can discriminate among retailers on the basis of factors such as products sold, or retailer size or location.

They can also impose costs on consumers by creating inconvenience and congestion. The rules can be complex and confusing and create compliance costs for businesses.

As the PC noted in its 2014 report *Relative Costs of Doing Business in Australia: Retail Trade*:

Restrictions on trading hours lead to reduced consumer convenience and increased travel costs, higher capital costs to deal with artificial peaks in shopping activity, greater product wastage, lost sales with a likely disproportionate negative impact on the visitor economy, and a restricted ability to compete with online retailers. They add complexity to business operations that are not necessary nor in the interest of consumers or the state economies.¹⁸⁵

Australian governments agreed to review retail trading hours as part of their NCP commitment to review legislative restrictions on competition, as outlined in Box 10.16. The outcomes of more recent reviews of trading hours are outlined in Box 10.17.

Box 10.16: Review of retail trading hours under NCP

Since the mid-1990s, shop trading hours have been deregulated progressively across Australia; however, experience varies across the country. The Australian Capital Territory, Victoria, Tasmania and the Northern Territory have deregulated trading hours and New South Wales has done so to a large extent. In contrast, three States retain significant restrictions: Western Australia, Queensland and South Australia.

The NCC's 2005 assessment of governments' progress in implementing the NCP¹⁸⁶ noted that all governments, except for Western Australia, had substantially liberalised retail trading hours. Western Australia was the only jurisdiction to restrict weekday trading hours and to prohibit large retailers (outside of tourist precincts) from opening on Sundays.

As a consequence, the Australian Government deducted 10 per cent of Western Australia's 2003-04 competition payments and 10 per cent of its 2004-05 competition payments.

Since then, retail trading hours in Western Australia have been partially deregulated, and Sunday trading was introduced for all shops in the Perth metropolitan area on 26 August 2012.¹⁸⁷ This brought retail trading hours in Western Australia closer to those in Queensland and South Australia.

185 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 8.

186 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne, page xxix.

187 Government of Western Australia Department of Commerce 2012, *Sunday Trading*, Government of Western Australia Department of Commerce, Perth, viewed 30 January 2015, www.commerce.wa.gov.au/sites/default/files/atoms/files/sundaytradingfactsheet.pdf.

Box 10.17: Recent reviews of retail trading hours.

A number of recent reviews have recommended further deregulating retail trading hours.

In 2011, the PC found that restrictions on trading hours applied with varying levels of intensity, with Queensland, Western Australia and South Australia having the most restrictive regulations. The PC recommended that retail trading hours should be fully deregulated in all States, and allow trading on public holidays.¹⁸⁸

In its 2014 research report, *Relative Costs of Doing Business in Australia: Retail Trade*, the PC found that trading hours' restrictions are increasingly out of step with changing patterns of work, leisure and shopping.¹⁸⁹ They impose costs on retailers and reduce consumer welfare. The arbitrary boundaries and exemptions found in Queensland, Western Australia and South Australia lead to unintended consequences and anomalies, which can disadvantage businesses of all sizes.

The PC considers that deregulation would: increase economic activity and lower retailers' cost of doing business; increase choice and convenience for consumers; and enhance employment opportunities, particularly for younger and older workers and those working part-time or on a casual basis.

In 2013, the Queensland Competition Authority recommended full deregulation of retail trading hours. It found that the net potential benefit to Queensland of removing the current restrictions was as much as \$200 million per annum, and noted that the 'potential benefits of the reform include an increase in retail productivity, more shopping convenience for the broader community and lower prices'.¹⁹⁰

In its 2014 report, *Inquiry into Microeconomic Reform in Western Australia*, the Western Australian Economic Regulation Authority found no market failure to justify the current restriction on competition. 'As such, consumer choice, rather than government regulation, should determine which shops open and when. Retailers will respond to consumer demand by opening when it is profitable for them to do so and remaining closed when it is not.' The Economic Regulation Authority recommended deregulating retail trading hours in Western Australia, with the exception of Christmas Day, Good Friday and the morning of ANZAC Day.¹⁹¹

However, a 2007 review of South Australia's retail trading hours by Alan Moss recommended that the current shopping hours be retained, with consideration given to the possibility of a later Sunday closing time. Moss found that the existing rules strike a satisfactory balance between the competing interests of the various sectors of the retail industry and the larger interests of the community, 'At the end of the day there are more important human activities than shopping.'¹⁹²

Retail trading hours are governed by state regulations that vary significantly between and within States. Box 10.18 provides examples of some of the existing regulations around the country.

188 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry Inquiry*, Report no. 56, Canberra, Recommendation 10.1, pages XLII and 275.

189 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, Finding 5.1, page 111.

190 Queensland Competition Authority Office of Best Practice Regulation 2013, *Measuring and Reducing the Burden of Regulation*, Brisbane, pages 33 and 39.

191 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia Final Report*, Perth, pages 292-293 and recommendation 29.

192 Moss, A 2007, *Report of the 2006-07 Review of the Shop Trading Hours Act 1977*, National Competition Council, Canberra, page 26.

Box 10.18: Examples of current retail trading hours' restrictions

Retail trading hours regulations vary considerably across States and Territories.

The **Western Australian Retail Trading Hours Act 1987** specifies the hours that a shop can operate, based upon the goods it sells, its location and size.

- Sunday trading in the Perth metropolitan area was introduced in 2012, with 'general retail shops'¹⁹³ now able to open between 11am and 5pm on Sundays.
- 'Special retail shops', which include souvenir shops, pharmacies, domestic development shops, video shops, duty-free shops, motor vehicle spare parts shops, sports venue shops and newsagencies may open from 6 am to 11:30 pm every day of the year but may only sell goods prescribed in the regulations. For example, a domestic development shop can sell light bulbs but not light fittings, and kitchen sinks but not dishwashers (Woolworths, DR sub, page 17).
- 'Small retail shops'¹⁹⁴, for example, greengrocers, butchers, corner stores and many small supermarkets, have no restrictions on their trading hours.
- Petrol stations have unrestricted operating hours but may only sell goods prescribed in the regulations. For example, before 8am on Mondays, they can sell cigarettes but not nicotine patches (Woolworths, sub, page 62).

The Western Australian Retail Trading Hours Act does not apply to restaurants, cafes, takeaway food shops, veterinary clinics or retail shops located in public transport areas.

The Western Australian government introduced special trading rules for the 2014 Christmas period, with all 'general retail stores' in the Perth metropolitan area able to trade every day but Christmas Day from 7am (8am on Sundays, Boxing Day and New Year's Day) until 9pm weeknights (and 6pm weekends, Boxing Day and New Year's Day).¹⁹⁵

The Western Australian Premier has announced that during 2015 his government would continue to address anomalies in the regulation of trading hours.¹⁹⁶ However, this will be limited to removing a discrepancy that relates to hardware stores, and the Premier has again ruled out extending the current opening time of 11am on Sundays.¹⁹⁷

In regional Western Australia, different rules apply. Retailers are unable to trade on Sundays, except where location-specific exemptions apply.

In addition, north of the 26th parallel, which runs from the Northern Territory and South Australian border to Shark Bay on the west coast, the Western Australian Retail Trading Hours Act does not apply, so retail trading hours are not regulated.

193 General retail shops are defined in subsection 10(2) of the Western Australian *Retail Trading Hours Act 1987* as any retail shop that is not a small retail shop, a special retail shop or a filling station.

194 Small retail shops are defined in subsection 10(3) of the Western Australian *Retail Trading Hours Act 1987* as shops owned by up to six people who operate no more than four retail shops, in which up to 25 people work at any one time.

195 Government of Western Australia, *Retail Trading Hours*, Department of Commerce, Perth, viewed 28 January 2015, www.commerce.wa.gov.au/consumer-protection/retail-trading-hours.

196 Barnett, C 2015, Western Australian *Premier's Statement to Parliament*.

197 Strutt, J 2015, 'Sunday trading hours anomalies to be addressed by WA Government', ABC, 19 February 2015.

Box 10.18: Examples of current retail trading hours' restrictions (continued)

New South Wales¹⁹⁸ currently only has four and a half days where trading is restricted: Good Friday; Easter Sunday; ANZAC day prior to 1pm; Christmas Day; and Boxing Day. The restrictions do not apply to some retailers, typically small businesses, that are still able to trade on these public holidays.

Trading hours are almost fully deregulated in **Victoria** and **Tasmania**, with the only restricted trading days being Good Friday, Christmas Day and the morning of ANZAC Day. On these days, only exempt stores are permitted to trade.

In the **Northern Territory** and the **Australian Capital Territory**, trading hours are almost completely deregulated, but many retailers choose not to trade on Good Friday, Christmas Day and the morning of ANZAC Day.¹⁹⁹

A number of submissions call for further deregulating trading hours so that in all Australian States and Territories only Christmas Day, Good Friday and ANZAC Day morning are restricted trading days.²⁰⁰ Submissions also draw comparisons between 'bricks and mortar' retailers and online retailers, which are not inhibited by restrictions on trading hours.²⁰¹ Restrictions on retail trading hours are seen to handicap physical retailers from competing with online retailing, which can be conducted at any time of the day or night, and on any day.²⁰²

For instance, a December 2014 Western Australian survey indicated that 64 per cent of consumers intended to shop locally online for Christmas, an increase of 16 per cent over the 2013 figure.²⁰³

Submissions suggest deregulated retail trading hours would enable businesses to compete on a level playing field.²⁰⁴

However, submissions responding to the recommendation in the Draft Report to deregulate remaining restrictions on trading hours are divided. The existing rules are described as 'retail apartheid' by the Shopping Centre Council of Australia (DR sub, page 8). In contrast, during consultation meetings, small supermarkets describe trading hours as a 'weapon' that can be used by those with market power.

198 New South Wales Government, *Retail trading in NSW*, Industrial Relations, Sydney, viewed on 28 January 2015, www.industrialrelations.nsw.gov.au/oirwww/Industries_and_Awards/Retail_industry.page?.

199 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry Inquiry*, Report no. 56, Canberra, page 282.

200 See, for example: Australasian Association of Convenience Stores, DR sub, page 5; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian National Retailers Association, DR sub, page 16; Business Council of Australia, DR sub, page 57; Business SA, DR sub, page 8; Coles Group Limited, DR sub, pages 4-5; Kim Greeve, DR sub, page 1; Daryl Guppy, DR sub, page 10; Large Format Retail Association, DR sub, page 9; Myer Holdings Limited, DR sub, page 1; Queensland Competition Authority, DR sub, page 1; Shopping Centre Council of Australia, DR sub, page 7; and Woolworths, DR sub, page 14.

201 See, for example: Business Council of Australia, sub, page 28.

202 See, for example: Shopping Centre Council of Australia, sub, page 7.

203 Curtin Business School and Chamber of Commerce and Industry WA, December 2014, *Curtin Business School — CCI Survey of Consumer Confidence*, page 4, Chamber of Commerce and Industry WA, Perth, viewed on 28 January 2015, <http://cciwa.com/docs/default-source/economics/consumer-confidence-results.pdf?sfvrsn=2>.

204 See, for example: Chamber of Commerce and Industry WA, DR sub, page 14; and Shopping Centre Council of Australia, sub, pages 7-8.

Retail workers, unions and religious groups express concerns about deregulation, including that employees could lose family time, and days of religious or cultural significance to the community as well as being subjected to unwelcome pressure to work on public holidays.²⁰⁵

Submissions from individuals and small businesses raise concerns that removing restrictions on retail trading hours will require retailers to open, particularly on public holidays. Submissions also raise concerns about removing penalty rates and that some tenancy agreements may oblige stores within shopping centres to open whenever the centre is open.

Within a major mall, no retailer should feel ‘forced’ into opening beyond the core trading hours if that retailer believes it may be unprofitable to open. With penalty rates of two and a half times on public holidays, retailers often feel pressure to open when in fact because of the high wages costs, that retailer may lose money by opening their store. (Australian Retailers Association, DR sub, p5)

The Panel emphasises that removing restrictions would not require retailers to trade 24 hours a day, seven days a week or to adopt identical trading hours. Rather, deregulation allows retailers to decide for themselves when to open for trade, as is currently the case in those jurisdictions where retail trading hours are already deregulated. In making this decision, retailers will take into account customer demand as well as other factors, such as labour costs and requirements of tenancy agreements. In jurisdictions where deregulation of trading hours has already occurred, shops are not routinely trading 24 hours a day, seven days a week.

A New South Wales review of retail trading hours in 2012 noted that, in both the Australian Capital Territory and the Northern Territory where retail trading is almost completely deregulated, most large retailers choose not to open on Good Friday, Christmas Day or the morning of ANZAC Day.²⁰⁶

The PC also found that, despite concerns that removing trading hours’ restrictions would create extremes in trading hours, it instead provides retailers with greater flexibility, allowing them to more closely align opening hours with consumer demand: ‘...retailers are able to open when they consider it is in their commercial interests and opening hours reflect consumers’ shopping patterns.’²⁰⁷

As was the case in relation to the Planning and Zoning reforms (see [Section 10.1](#)), a significant number of submitters urge the Panel to ensure that competition policy does not interfere with the rights of state and territory governments to impose controls on the sale of alcohol, to limit the trading hours of outlets, the type of outlets and the number of outlets in the interests of community safety and wellbeing.

Liquor is addressed specifically in [Section 10.4](#). In addition, the Panel notes that a general policy of deregulating retail trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing, or indeed for gambling services, to achieve the policy objective of harm minimisation. A time restriction on alcohol retailing may satisfy the public interest test when

205 See, for example: Anglican Church Diocese of Sydney, DR sub, pages 1-3; Anglicare Sydney, DR sub, pages 1-3; Partnering for Transportation, DR sub, pages 1-3; Shop, Distributive and Allied Employees’ Association, DR sub, pages 2-3; Sydney Alliance for Community Building, DR sub, page 1; Unions NSW, DR sub, pages 3-9; and a number of individuals.

206 New South Wales Department of Finance and Services 2012, *Report of the Review of the Retail Trading Act 2008*, Sydney, page 12.

207 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 103.

a review is conducted (see Recommendation 8), even though general retail trading hours' restrictions do not.

Concerns have been raised about employees being forced to work on public holidays, for example, Boxing Day in New South Wales. However, retailer Myer notes:

In our experience there is no shortage of volunteers among team members for work on this day due to the attractive penalty rates. We know from our experience that many casual workers such as students look forward to the extra income from Boxing Day employment. (DR sub, page 4)

Submissions to the Draft Report from small businesses, particularly small supermarkets in Western Australia, South Australia and Queensland, do not support removing restrictions on retail trading hours, with some noting that the current restrictions provide them with a degree of protection from competition, as they are free to open when other retailers are not.

My business will lose that last opportunity to impress customers that come in because we are open earlier than the majors and the flow on effects are immeasurable. (IGA Walloon, DR sub, page 1)

Though we have busy times similar to the chains, we tend to do better when they are closed, either early in the morning or later at night. If the chains have deregulated hours then this will decrease our sales dramatically. (Nicks Supa IGA, DR sub, page 1)

However, the relevant policy question is whether the restrictions are in the public interest, not whether they are in the interest of particular competitors. No compelling evidence has been presented to the Panel that, in the States and Territories with deregulated retail trading hours, the benefits to the community are outweighed by the costs.

Indeed, many have claimed that the restrictions inhibit retailers' ability to meet consumers' needs.²⁰⁸ The Panel's view is that the needs of consumers, not of retailers, drive the structure and diversity of the retail sector.

The South Australian Chamber of Commerce and Industry notes that, in its 2013 pre-state election survey, 73 per cent of respondents supported a move to fully deregulated shop trading hours (DR sub, page 8).

The Panel heard from independent supermarkets that compete by offering a tailored range of products or emphasising customer service. The Panel notes that some retailers already choose to open on Christmas Day to provide an option for last-minute purchases.

The Panel also notes that, where restrictions apply to a particular sector or type of business, this can result in consumers having less flexibility and choice. The PC found that the evidence does not support the claim that deregulating trading hours has a material effect on the structure of the retail sector and the viability of small retailers.

Restrictions on bricks and mortar retailers' trading hours are increasingly out of step with consumer expectations and the rapid growth of online retailing. While these restrictions aim to protect smaller retailers, removing trading hours restrictions does not appear to have a material impact of the structure of the retail sector. Retaining restrictions also ignores the potential for more than offsetting gains for retailers through lowering costs

208 See, for example Myer, DR sub, page 2.

and increasing their ability to compete with online retailers, and greater choice and convenience for consumers.²⁰⁹

The take-up of online shopping clearly demonstrates that consumers are demanding more diversity in how and when they shop. In recent years, online retail sales have grown more quickly than spending at traditional bricks and mortar retailers. In National Australia Bank's December 2014 Online Retail Sales Index, online retail sales were estimated to represent around 6.8 per cent of spending at bricks and mortar retailers, up from 4.9 per cent in 2011.²¹⁰

When consumers can switch to online suppliers outside regulated trading hours, restrictions on retail trading hours merely serve to disadvantage bricks and mortar retailers relative to their online competitors. In any event, many bricks and mortar retailers are also taking up the opportunity to have an online option, which enables them to serve their customers when their stores are closed.

National Australia Bank estimates that Australians spent \$16.4 billion on online retail in the 12 months to November 2014.²¹¹ Customers are already deciding when and how they wish to make their purchases. Retailers should be given freedom to respond by deciding for themselves when to open and close their bricks and mortar stores, referring after-hours customers to their online portals.

Submissions raise concerns that removing restrictions will reduce employment in small supermarkets. However, the PC found that deregulating trading hours in some jurisdictions increased employment opportunities in particular segments of the retail sector.

The sector is a significant employer and further deregulation of trading hours is likely to benefit particularly the youngest and oldest age cohorts, first time job-seekers, and those with a preference for part-time or casual work.²¹²

Box 10.19 relates Tasmania's experience of deregulating retail trading hours.

209 Productivity Commission 2014, *Retailing and dairy manufacturing input costs and policy implications*, media release 10 October, Canberra.

210 National Australia Bank 2012, *NAB Online Retail Sales Index In-depth report, January 2010 — January 2012*, National Australia Bank, viewed 30 January 2015 <http://business.nab.com.au/wp-content/uploads/2014/06/norsi-jan-2010.pdf> and National Australia Bank 2014, *NAB Online Retail Sales Index — November 2014*, National Australia Bank, viewed 30 January 2015 <http://business.nab.com.au/wp-content/uploads/2014/12/Online-Retail-Sales-Index-monthly-update--November-2014-PDF-57KB.pdf>.

211 National Australia Bank 2014, *NAB Online Retail Sales Index — November 2014*, National Australia Bank, viewed 30 January 2015, <http://business.nab.com.au/wp-content/uploads/2014/12/Online-Retail-Sales-Index-monthly-update--November-2014-PDF-57KB.pdf>.

212 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 6.

Box 10.19: Experience of deregulation in Tasmania

Prior to 1 December 2002, major retailers and businesses employing more than 250 people were prohibited from trading on Sundays, public holidays and after 6pm on Mondays to Wednesdays.

A review in 2000 found the restrictions could not be justified as being in the public interest. The private benefits to selected stakeholders, principally the independent grocery retailers, were assessed as being less than the costs imposed on the Tasmanian community as a whole, particularly consumers, the restricted supermarket chains and the total retail sector.²¹³

Tasmanian retail trading hours were deregulated in December 2002, and now all retailers can open at any time except Christmas day, Good Friday and the morning of ANZAC day.

Following deregulation, from January 2003 until June 2006, Tasmania experienced 25 per cent growth in retail sales compared with an Australia-wide growth rate of 16 per cent.²¹⁴

Despite concerns that deregulation could lead to a loss of employment because of a decline in the number of smaller retailers, this was not the case:

- Australian Bureau of Statistics (ABS) data show that employment in retail trade in Tasmania increased significantly, from 23,500 total jobs in November 2002 to 25,500 total jobs in November 2003. This represented 8.3 per cent retail jobs growth over the year, which was greater than the 4.3 per cent average jobs growth across all Tasmanian industries.²¹⁵
- Coles added 280 jobs in Tasmania following deregulation in 2002.²¹⁶
- The retail sector remains a significant employer in Tasmania, accounting for 11 per cent of all employees.²¹⁷

The PC²¹⁸ noted that recent experience (not limited to Tasmania) shows that relaxing retail trading restrictions capitalises on latent consumer demand and allows consumers to shop according to their preferences as determined by their work, leisure and family commitments. It also increases the scope for businesses to achieve scale economies and reduces red tape.

The legislation that removed restrictions on trading hours, the *Shop Trading Hours Amendment Act 2002*, allows councils to request, at any time, the Chief Electoral Officer to conduct a plebiscite on the question of reimposing shop trading restrictions in their municipality. Shop trading restrictions on Sundays and public holidays could be reimposed in a municipality should the community support them.

To date no request for a plebiscite has arisen from any local council in Tasmania.

213 Workplace Standards Tasmania 2000, *Shop Trading Hours Act 1984, Regulatory Impact Statement*, page 10.

214 ACIL Tasman 2006, *Review of Retail Trading Hours in South Australia*, page 2, Shopping Council Centre of Australia, Sydney, viewed 30 January 2015
www.scca.org.au/Pdf%20links/2006PDFlinks/Subs06/Full%20Subn%20Review%20of%20Trading%20Hours%20Sept%2006.pdf.

215 ABS Cat No. 6291.0.55.003 *Labour force*, Australia.

216 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade, Research Report*, Canberra, page 109.

217 *Ibid.*, page 111-112.

218 *Ibid.*, page 103

The Panel's view

Shop trading hours have been progressively deregulated across Australia. However, trading hours in Queensland, South Australia and Western Australia remain regulated to a greater degree than other States and Territories.

The remaining restrictions create a regulatory impediment to competition by raising barriers to expansion and distorting market signals. The Panel believes that consumer preferences are the best driver of business offerings, including in relation to trading hours.

The growing use of the internet for retail purchases is undermining the intent of restrictions on retail trading hours, while disadvantaging 'bricks and mortar' retailers. This provides strong grounds for abandoning remaining limits on trading hours.

The Panel appreciates the concern of some independent retailers about their ability to compete in a deregulated environment. However, the Panel notes that independent and small businesses are able to differentiate their offerings to fulfil consumer demands and compete in the face of deregulated trading hours. The Panel also notes that, where restrictions apply to a particular sector or type of business, this can result in consumers having less flexibility and choice.

A general policy of deregulation of retail trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing or for gambling services to achieve the policy objective of harm minimisation. A time restriction on alcohol retailing may be found to satisfy the public interest test when a review is undertaken, even though general retail trading hours' restrictions do not.

Implementation

Laws and regulations dictating retail trading hours are the responsibility of state and territory governments. The Panel considers that deregulating trading hours should be a priority for those States where the tightest restrictions on retail trading hours apply, because there lies the greatest potential gain. To this end, Western Australia, Queensland and South Australia should aim to complete the reforms within two years.

Experience in those States and Territories that have already deregulated trading hours provides 'best practice' for guidance. The proposed Australian Council for Competition Policy (see Recommendation 43) could provide an independent assessment of progress across the jurisdictions.

Recommendation 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.

10.6 PARALLEL IMPORTS

An overseas manufacturer can supply goods to different distributors in different countries, license the manufacture of goods to different manufacturers in different countries, or both. These supply or licensing arrangements may mean that the goods, all of which are genuine, are available for purchase in different countries (including Australia) at different prices.

Parallel imports refer to genuine goods that are imported into Australia by someone other than the licensed or authorised distributor or manufacturer in Australia.²¹⁹ The Advisory Council on Intellectual Property says:

A concise and exhaustive definition of parallel imports (sometimes referred to as ‘grey’ imports) is somewhat elusive. The basic problem is that while trade may be global, and brands may be global, *trade marks* are national and may be owned or used by different people in different countries. (DR sub, page 2)

Parallel imports provide an alternative source of supply, which promotes competition and can provide consumers with products at lower prices. Woolworths says that in some instances it:

... uses parallel import arrangements to deliver lower price products to consumers or to negotiate more efficient local sourcing options. (DR sub, page 20)

CHOICE says:

Parallel imports play an important role in addressing international price discrimination. They create situations whereby over-priced Australian products compete with identical cheaper products from overseas. Companies essentially compete with themselves, driving prices lower. (sub, page 15)

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local suppliers by shielding them from international competition.

Parallel imports of goods that are protected by certain forms of intellectual property rights are currently restricted by legislation. For example, parallel importation of some copyright products is restricted under the *Copyright Act 1968*.²²⁰

The Copyright Act originally prohibited parallel imports except for personal use.²²¹ In 1991, the Copyright Act was amended to allow limited parallel importation of books.²²² General prohibitions regarding parallel imports were removed for sound recordings in 1998 and computer software in 2003. The general prohibition against parallel imports continues to apply to literary works (other than books), dramatic, musical and artistic works, broadcasts and cinematographic films.²²³

Because parallel import restrictions shield suppliers from international competition, they can be to the detriment of Australian consumers. As the ACCC notes:

Such restrictions effectively provide an import monopoly to the domestic distributor and protect owners of the local IP rights from competition. The restrictions may also enable copyright owners to practice international price discrimination to the detriment of Australian consumers. (sub 1, page 60)

219 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra, page 160.

220 The Copyright Act grants copyright holders the right to restrict parallel imports, extending copyright protection into the sphere of distribution.

221 Fels, A 1999, *Parallel Importing*, speech to the Victorian Employers’ Chamber of Commerce and Industry, International Trade Committee, Melbourne, 21 June.

222 The reproduction and first sale of books in Australia is governed by the *Copyright Act 1968*. In 1991, a ‘30 day release rule’ and a ‘90 day resupply rule’ were introduced to improve the timeliness and availability of titles on the Australian market.

223 ACCC sub 1, page 62.

The ACCC also notes that, under the *Trade Marks Act 1995*, it appears that trade mark owners are able to prevent parallel imports of trade-marked goods into Australia by limiting trade mark licences to specific territories.²²⁴

Australia's parallel import restrictions have been reviewed many times over the past few decades (Box 10.20).²²⁵ Most reviews recommend that parallel import restrictions be removed on the basis that removing the restrictions would provide net benefits to the community. For example:

- A PC report on parallel import restrictions on books found that the restrictions impose a private implicit tax on Australian consumers, which is used largely to subsidise foreign copyright holders (Box 10.20).
- A PC report on automotive manufacturing concluded that, in the long term, the progressive relaxation of restrictions on the wide-scale importation of second-hand vehicles would have net benefits for the community as a whole (Box 10.21).

Studies assessing the impact of removal of restrictions on parallel imports in New Zealand in 1998 have also found that the reforms resulted in lower prices for consumers and improved supply.²²⁶ A recent report commissioned by the New Zealand Ministry of Economic Development on the costs and benefits of preventing parallel imports concluded that:

... the available evidence suggests that removing parallel import restrictions tends to reduce consumer prices, with few negative consequences for domestic creative effort. This suggests that the benefits of removing parallel import restrictions tend to outweigh the costs.²²⁷

Box 10.20: Reviews of Australia's parallel import restrictions

In 2000, the Intellectual Property and Competition Review Committee (the Ergas Committee) looked at parallel import restrictions as part of the Legislative Review Program.²²⁸ The Ergas Committee concluded that the costs of removing the parallel import restrictions were likely to be small relative to the gains to Australia. It also considered that the net income leakage to foreign copyright holders flowing from the parallel import restrictions was potentially significant.

A 2009 PC research report on provisions of the Copyright Act that restrict the parallel importation of books found that the restrictions provide territorial protection for the publication of many books in Australia, preventing booksellers from sourcing cheaper or better value-for-money editions of those titles from world markets.²²⁹

224 ACCC sub 1, page 61, provides details on two recent cases: *Sporte Leisure Pty Ltd v Paul's Warehouse International Pty Ltd* and *Paul's Retail Pty Ltd v Lonsdale Australia Ltd*.

225 See also Prices Surveillance Authority 1995, *Inquiry into Book Prices and Parallel Imports*, Report no. 61, Sydney, and The Copyright Law Review Committee 1988, *The Importation provisions of the Copyright Act 1968*, Canberra.

226 See also Moore, D, Volkerling, M and van der Scheer, B 2007, *MED Parallel Importing Review: impact upon creative industries*, LECG, Auckland.

227 Deloitte Access Economics 2012, *The Costs and Benefits of Preventing Parallel Imports into New Zealand*, New Zealand Ministry of Economic Development, Wellington, page 46.

228 Intellectual Property and Competition Review Committee 2000, *Review of intellectual property legislation under the Competition Principles Agreement*, Canberra.

229 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books, Research Report*, Canberra, page XXI.

Box 10.20: Reviews of Australia’s parallel import restrictions (continued)

Price comparisons found that, in 2007-08, a selection of around 350 trade books sold in Australia were on average 35 per cent more expensive than editions sold in the US (after accounting for the effects of GST). In many cases, the price difference was greater than 50 per cent. While noting the limitations of price comparisons, the PC said ‘these results ... make it clear that, but for the PIRs [parallel import restrictions], Australian booksellers could have obtained and shipped many trade titles to Australia for significantly less than they are currently charged by Australian publishers’.²³⁰

The PC also found that parallel import restrictions poorly target cultural externalities and much of the assistance the restrictions provide does not promote Australian-authored work. PC estimates suggest that the additional income flowing overseas is around 1.5 times that retained by local copyright holders.

The PC recommended that Australia’s parallel import restrictions on books be repealed and (because of the significant adjustment costs for book producers) that the repeal take effect three years after the policy change is announced.

A PC inquiry into the Australian retail industry found that international price discrimination is being practised against some Australian retailers, to the detriment of Australian consumers. The PC stated that some Australian retailers have the option of altering their supply arrangements — either by putting pressure on existing international suppliers and distributors or changing their supply channels. The PC recommended a review of the parallel import restrictions in the Copyright Act that prevent retailers from importing and selling clothing or other goods that embody decorative graphic images sold with the copyright owner’s permission in another market.²³¹

The House of Representatives Standing Committee on Infrastructure and Communications inquiry into IT pricing recommended lifting the parallel import restrictions still found in the Copyright Act, and reviewing and broadening the parallel importation defence in the Trade Marks Act to ensure it is effective in allowing the importation of genuine goods.²³²

A number of submitters question why parallel import restrictions continue to be in force. The International Bar Association says:

The dramatic changes to Australian consumers’ retail shopping practices over the past few years, especially through their on-line purchases, has called into question, among other things, existing parallel trade policies, both with respect to copyright and trade mark legal regimes. (sub, page 10)

The Australian National Retailers Association argues that the restrictions are another example of ‘outdated regulations that distort competition amongst retailers’ (sub, page 18), particularly the remaining restrictions on books and some clothing items that feature images. Also:

230 Ibid., page XVIII.

231 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Canberra, page 163 and page 167.

232 House of Representatives Standing Committee on Infrastructure and Communications, *At what cost? IT pricing and the Australia tax*, Canberra, pages xii-xiii.

Like trading hours, this restriction is becoming increasingly anti-competitive as technology tilts the competitive edge in favour of retailers with overseas stores or warehouses which can circumvent these restrictions at the expense of local-based retailers. (sub, page 18)

The Co-Op also describes parallel import restrictions as ‘effectively an anachronism of a pre digital age’ (sub, page 2).

The ACCC, commenting on parallel import restrictions in the Copyright Act, states that it has:

... consistently held the view that parallel importation restrictions (via legislation) extend rights to copyright owners beyond what is necessary to address ‘free riding’ on the creation of IP (the economic rationale for establishing copyright in the first instance). The ACCC considers that there is no further economic reason to justify a blanket legislative restriction on parallel imports. Rather, any arrangements that seek to address a ‘free rider’ problem in distribution are not unique to IP, and should be subject to the general competition provisions, under which authorisation is available if the arrangements can be shown to be in the public interest. (sub 1, page 62)

In the context of restrictions on imports of second-hand passenger vehicles, Auto Services Group questions the rationale for retaining such restrictions, claiming that they:

... avoid placing undue competitive pressure on local manufacturers. As of 2017, manufacturing of passenger vehicles will cease in Australia, which will, in turn, mean that all new vehicles sold in Australia will be imported from overseas. The original purpose for the restriction of parallel importing of passenger vehicles will no longer apply. (DR sub, page 1)

Submissions also support moving to the New Zealand position, where all restrictions on parallel imports caused by statute have been abolished (Professor Allan Fels, sub, page 14).

Box 10.21: Restrictions on the importation of second-hand vehicles²³³

The *Motor Vehicles Standards Act 1989* sets out national motor vehicle standards and regulates the supply of new and second-hand vehicles being imported into Australia. Under the Motor Vehicles Standards Act, applications for approval to place a used import plate (or to sell a used imported vehicle without such a plate) can only be made in respect of a single vehicle. The *Motor Vehicle Standards Regulations 1989* (as amended up to 2012) also prohibits automotive workshops from importing more than 100 used vehicles in each vehicle category in a 12-month period.

The PC’s report on *Australia’s Automotive Manufacturing Industry* concluded that progressively relaxing restrictions on the wide-scale importation of second-hand passenger and light commercial vehicles would have net benefits for the community as a whole. However, it noted that this relaxation of the restrictions would need to occur within a regulatory framework that provides for appropriate standards of quality and information, if it is to meet community expectations and the economy-wide benefits are to exceed the costs.

233 Productivity Commission 2014, *Australia’s Automotive Manufacturing Industry, Inquiry Report*, Canberra, pages 32 and 154.

Box 10.21: Restrictions on the importation of second-hand vehicles (continued)

The PC stated that second-hand vehicles should be limited to source countries where vehicle design standards are consistent with those recognised by Australia.

The PC recommended that the new regulatory arrangements for imported second-hand vehicles should be developed in accordance with the outcomes of the Australian Government's review of the Motor Vehicles Standards Act and should:

- not commence before 2018, and ensure that reasonable advance notice is given to affected individuals and businesses, such as vehicle leasing companies;
- be preceded by a regulatory compliance framework that includes measures to provide appropriate levels of community safety, environmental performance and consumer protection;
- initially be limited to vehicles manufactured no earlier than five years prior to the date of application for importation; and
- be limited to second-hand vehicles imported from countries that have vehicle design standards which are consistent with those recognised by Australia.

The PC also recommended that the Australian Government remove the \$12,000 specific duty on imported second-hand vehicles from the Customs Tariff as soon as practicable.²³⁴

However, some submitters do not support removing the remaining restrictions on parallel imports. Some argue that there are few remaining restrictions on parallel importation in Australian copyright law. For example, the Australian Copyright Council says:

Consumers already can and do use the Internet to price compare and purchase goods from other jurisdictions. The parallel importation laws do not prohibit this. They only apply to commercial entities wanting to import stock from other jurisdictions.
(DR sub, page 5)

Penguin Random House Australia also claims that the restrictions are not inconsistent with competition policy as they 'relate only to commercial quantities of books' and the '*Speed to Market Initiative*, voluntarily entered into by publishers and retailers in 2012, ensures speed of supply of commercial quantities of titles into the Australian market' (DR sub, page 2).

However, the Panel considers that, even where personal use exceptions currently exist, there are potential benefits from removing remaining restrictions. As the ACCC says:

... own-use exemptions benefit Australian consumers but may create an uneven playing field for Australian businesses (including small businesses) that are not able to parallel import on a commercial scale. (sub 1, page 62)

The report commissioned by the New Zealand Ministry of Economic Development by Deloitte Access Economics has also argued:

... even in markets where internet commerce is widespread, individual consumers who are purchasing for individual use from foreign parallel import suppliers are likely to face higher transaction costs (such as search costs, transport and delivery costs, delays and so

²³⁴ The Australian Government response to the PC's Automotive Manufacturing Industry report was that the importation of second-hand vehicles will be thoroughly considered in the 2014 Review of the Motor Vehicle Standards Act 1989.

on), than domestic retailers, who have a comparative advantage in search, transportation and delivery and arbitrage activities. In other words, even where personal use exceptions mitigate some of the adverse welfare effects of parallel import restrictions, prices would be lower still if the restrictions were removed completely.²³⁵

Others argue that, where restrictions remain, they serve sound policy objectives. For example, the Australian Screen Association says:

Importantly, the restriction on parallel importation of copyright material exists to serve the geographical licensing arrangements that must exist in order to enforce exclusive rights of copyright holders. (DR sub, page 4)

In the context of parallel import restrictions on books, it is argued that the restrictions must be kept in place to maintain a viable local book and publishing industry.²³⁶

In 2012, Deloitte Access Economics also noted that removing parallel import restrictions on books in New Zealand in 1998 ‘had little impact on overall creative effort in the New Zealand book industry’ — the number of new New Zealand book titles published annually remained fairly steady between 2005 and 2008, and that the share of authors in overall employment increased following the changes.²³⁷

The PC report, *Restrictions on the Parallel Importation of Books*, also concluded:

... while removal of the PIRs [parallel import restrictions] should see an increase in imported books where these represent better value, it is probable that most Australian publishers, including the major publishing houses, would generally adapt to the new regime, that Australian stories and content will continue to be demanded and that talented and marketable Australian authors would continue to be widely published.²³⁸

Some submitters argue that removing parallel import restrictions will not result in lower prices for consumers. The Federal Chamber of Automotive Industries states that Australia has one of the most competitive new car markets in the world and removing parallel import restrictions on second-hand vehicles would not lower prices for motor vehicles (DR sub, pages 1 and 11).²³⁹ Queensland Writers Centre also claims, ‘it is not certain that removing parallel importation restrictions would result in cheaper books’ (DR sub, page 3).

Reviews consistently conclude that removing the parallel import restrictions will result in lower prices for consumers (see Box 10.20). For example, the PC’s report on parallel imports of books concluded that parallel import restrictions place upward pressure on book prices in Australia and reform of the current arrangements is necessary to place downward pressure on book prices.²⁴⁰

235 Deloitte Access Economics 2012, *The Costs and Benefits of Preventing Parallel Imports into New Zealand*, New Zealand Ministry of Economic Development, Wellington, page 14.

236 See, for example: Hachette Australia, DR sub, page 4; Harlequin Enterprises (Australia) Pty Ltd, DR sub, page 3; HarperCollins Publishers Australia, DR sub, page 6; Anthony Holden, DR sub, page 1; Law Council of Australia — SME Committee, DR sub, page 8; Queensland Writers Centre, DR sub, page 3; Spinifex Press, DR sub, page 3; and Text Publishing Company, DR sub, page 26.

237 Deloitte Access Economics 2012, *The Costs and Benefits of Preventing Parallel Imports into New Zealand*, New Zealand Ministry of Economic Development, Wellington, pages 24-25 and page 6.

238 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books*, Research Report, Canberra, page XXIII.

239 See also Ford Australia, DR sub, page 10.

240 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books*, Research Report, Canberra, page XIV.

The ACCC also reports that, although the effects of parallel import competition on the price of sound recordings and computer software (following the removal of the restrictions) have not been formally reviewed, periodic price surveys conducted by the ACCC up to the early 2000s suggest that the difference between Australian and overseas prices of sound recordings narrowed considerably after the importation provisions were repealed.²⁴¹

Some submitters raise concerns about removing parallel import restrictions on second-hand passenger vehicles into Australia on the grounds of health and safety. They also suggest that an increased supply of second-hand vehicles would have a detrimental impact on the environment. For example, Ford Australia argues that Australia should continue to focus on encouraging new vehicle ownership as:

... modern vehicles are demonstrably safer and more environmentally friendly. This is in stark contrast to allowing greater market access to the importation of questionable, secondhand 'Grey' vehicles that have been cast off by other advanced economies. (DR sub, page 7)

The Federal Chamber of Automotive Industries states, 'the importation of second hand vehicles is inconsistent with government policy objectives in other areas such as road safety and the environment' (sub, page 3).

However, the PC report on automotive manufacturing concluded that, provided the relaxation of restrictions on second-hand vehicle importation was designed to favour the increased supply of late-model used vehicles, it could lower average vehicle fleet age and improve average vehicle fleet safety and emission standards. The PC also considered that average vehicle standards could improve in the new vehicle market if the additional source of competition encouraged vehicle manufacturers and importers to improve their product specifications.²⁴²

Some submitters argue that the concerns about health and safety and environmental impacts could be addressed through regulatory and compliance frameworks. For example, the Australian Imported Motor Vehicle Industry Association considers that:

All concerns (such as health & safety, and impact to the environment) relating to the relaxing of these laws can be easily addressed through regulatory and compliance framework and consumer education campaigns (*these have been proven and tested for the past 25 years in countries such as NZ*). (DR sub, page 3)

RAWS Association supports the removal of parallel import restrictions but with:

... the use of standards to protect the consumer and ensure the quality of imported vehicles, new and used. The Association generally supports harmonisation with international standards and in the interim would recommend the recognition of International Vehicle Safety and Environmental Standards from jurisdictions that equal or exceed the current domestic requirements. (DR sub, page 2)

The Federal Chamber of Automotive Industries argues that, when considering removing parallel import restrictions on second-hand cars it is important to be aware that Australia's climatic and environmental conditions are significantly different to other substantial right-hand drive markets,

241 Australian Competition and Consumer Commission 2009, [ACCC submission to the Productivity Commission's study into Copyright Restrictions on the Parallel Importation of Books](#), Canberra, page viii.

242 Productivity Commission 2014, [Australia's Automotive Manufacturing Industry, Inquiry Report](#), Canberra, pages 160-161.

such as the United Kingdom and Japan, and such differences ‘necessitate substantial engineering changes to motor vehicles imported into Australia to enable those motor vehicles to perform as intended’ (DR sub, page 4).

The Federal Chamber of Automotive Industries also says it has:

... serious reservations about the government’s resourcing capacity to adequately police, at the time of importation and subsequently, the safety of used vehicles including compliance with the standards that applied when the vehicle was built and the continued compliance with such standards following any modifications or repair. (sub, page 3)

In line with these concerns, the restrictions on importing second-hand vehicles have largely been justified on the basis of consumer protection and road safety, as a way of ensuring that all vehicles meet minimum safety standards. However, they have also restricted the importation of used vehicles into Australia. As the PC’s report on automotive manufacturing concluded, the benefits of relaxing import restrictions on second-hand vehicles are conditional on having an appropriate regulatory and compliance framework in place:

Provided relaxing the import restrictions were undertaken within an appropriate regulatory standards and compliance framework, net benefits would arise through lower prices and/or improved product specification (vehicle features) as well as increased product choice and availability for vehicle buyers, including consumers, businesses and government fleet buyers.²⁴³

In New Zealand, to be registered for road use, second-hand vehicles entering the country for the first time must pass:

- border inspection (checks for vehicle and importer identity, odometer reading, and any obvious defects or damage);²⁴⁴
- biosecurity and Customs clearance (vehicles are denied entry if they have missing or fraudulent odometers); and
- entry certification (to demonstrate compliance with applicable New Zealand standards).²⁴⁵

The Department of Infrastructure and Regional Development is currently reviewing the *Motor Vehicle Standards Act 1989*. The review is looking for ways to reduce regulatory burdens imposed by the Act and improve its safety and environmental provisions.²⁴⁶ Commenting on the Motor Vehicle Standards Act, the Department of Infrastructure and Regional Development states that it:

... sets uniform minimum safety and environmental standards for all road vehicles entering the Australian market, including those that are imported. The Act restricts parallel or other imports of vehicles which are unable to meet these standards. (DR sub, page 7)

²⁴³ Ibid., page 160.

²⁴⁴ NZ Transport Agency, The border inspection process, NZ Transport Authority, Wellington, viewed 9 February 2015 <http://vehicleinspection.nzta.govt.nz/virms/border-inspection/introduction/the-border-inspection-process#heading3-for-tab1>.

²⁴⁵ Productivity Commission 2014, *Australia’s Automotive Manufacturing Industry*, Canberra, page 158.

²⁴⁶ Department of Infrastructure and Regional Development, *2014 Review of the Motor Vehicle Standards Act 1989*, Canberra.

On recommending the progressive relaxation of restrictions on the importation of second-hand vehicles, the PC said that the new regulatory arrangements should be:

- developed in accordance with the outcomes of the review of the Motor Vehicle Standards Act; and
- preceded by a regulatory compliance framework that includes measures to provide appropriate levels of community safety, environmental performance and consumer protection.²⁴⁷

The PC also recommended that relaxing restrictions on importing second-hand vehicles should begin with vehicles under five years old (since the date of manufacture). It considered that the relatively newer second-hand vehicles would be least likely to pose safety, environmental and consumer protection concerns. The PC states that second-hand imports should also be limited to vehicles manufactured in countries with vehicle design standards that are consistent with those recognised by Australia. In addition, the PC recommended accelerated harmonisation of Australian Design Rules with relevant standards applying internationally (see Box 10.21).

Other concerns relating to parallel imports include:

- counterfeits being mixed with parallel imports;
- consumer protection concerns where the packaging of the local and imported goods are similar, but there is a difference in quality or performance; and
- impacts on local distributors (such as warranty issues and recalled products). For example, consumers of parallel imports may seek a repair or replacement under warranty from the licensed distributor in Australia.²⁴⁸

Australian Food and Grocery Council provides some examples:

... chewing gum and confectionery products from global brands that have been parallel imported require very close label scrutiny to identify that the product is not that of the Australian brand owner, and yet it is the Australian brand owner that must carry the costs of call centre contacts and product replacement (with Australian brand product) to protect brand reputation. There is also little practical recourse to global funding arrangements to recompense these costs because the exporting brand owner is often either unaware or not the direct seller of the parallel imported product. (DR sub, page 9)

Australian Industry Group also notes:

The authorised distributor is responsible for marketing and warranty expenses, while the parallel importer does not need to cover these costs and so can undercut on price. On occasion, parallel importers can get caught out as they can end up buying counterfeit product. (DR sub, page 9)

Parallel imports may be confused with counterfeit goods — an issue most likely to occur in easily replicable goods, such as clothing. However, issues around counterfeiting can be addressed directly

247 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, Canberra, page 32.

248 See also: Australian Chamber of Commerce and Industry, sub, page 20; Australian Food and Grocery Council, sub, page 22; Australia Industry Group, DR sub, page 9; Brewers Association of Australia and New Zealand Inc, sub, pages 4-5; and Federal Chamber of Automotive Industries, DR sub, page 8 and attached report, Pegasus Economics 2014, *Implications of Parallel Imports of Passenger Motor Vehicles*.

by regulation rather than by restricting parallel imports and shielding local suppliers from international competition.

eBay notes that it currently has measures in place to remove counterfeit products so as to safeguard consumers. Also, eBay states that it works with law enforcement agencies to ensure appropriate safeguards are monitored, reported and enacted (DR sub, page 12).

Some submitters note that they service or repair products they did not sell because they do not want to risk compromising the reputation of their product or brand. Ford Australia says:

... there exists the potential for significant reputation damage to brands and dealers operating legitimately in Australia from consumers who personally import new vehicles not sold in Australia but expect them to service and repair these vehicles. A lack of replacement parts, suitable diagnostic equipment, specialised tools and trained technicians may lead to significant dissatisfaction when consumers have the expectation that their vehicle will be maintained and supported by the dealers and brand of their vehicle operating in Australia. (DR sub, pages 10-11)²⁴⁹

Consumer education and information disclosure (together with appropriate regulatory and compliance frameworks) are important in ensuring that consumers are aware of the product they are buying, their warranty rights and their ability to seek a refund when purchasing products from overseas traders. The Australian Automotive Aftermarket Association argues:

Many of the concerns regarding consumer safety, counterfeit products and inadequate enforcement can be addressed through regulation and consumer information. Discussion on this matter [parallel imports] is often misinformed and fuelled by exaggerated claims of the consequences. (DR sub, page 3)

The Federal Chamber of Automotive Industries has another view:

Consumer education campaigns are far from pragmatic for a complex technical unit such as a motor vehicle as many of the necessary attributes are not identifiable from simple, or even complex, observations. Consumer expectations are built from the observation in the current Australian market which is supported by the authorised OEM [original equipment manufacturer] distributor. To suggest that the changing of the rules to allow parallel imports ... would see the market respond and brands left undamaged, is fanciful. (DR sub, page 11)

In New Zealand, used vehicles for sale must display a Consumer Information Notice to assist buyers in making informed purchasing decisions. Imported used vehicles must display the year of first registration overseas, country of last registration before import and whether the vehicle was recorded 'damaged' at the time of importation.²⁵⁰

The Panel considers that many of the concerns raised in submissions around relaxing parallel import restrictions, including concerns about consumer safety, counterfeit products and inadequate enforcement, could be addressed directly through regulation and information.

249 The Federal Chamber of Automotive Industries also argues that 'free riding' occurs, DR sub, page 8 and attached report, Pegasus Economics 2014, *Implications of Parallel Imports of Passenger Motor Vehicles*.

250 Consumer Affairs New Zealand, [Consumer Information Notice](http://www.consumeraffairs.govt.nz/for-business/compliance/selling-cars-motor-vehicles/mvt-consumer-information-notice.pdf/view), Consumer Affairs, Wellington, viewed 9 February 2015, www.consumeraffairs.govt.nz/for-business/compliance/selling-cars-motor-vehicles/mvt-consumer-information-notice.pdf/view. See also Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, Canberra, page 159.

Relaxing parallel import restrictions should deliver net benefits to the community, provided appropriate regulatory and compliance frameworks and consumer education programs are in place.

If consumers buy goods without realising that they are parallel imports, there is a concern that consumers could be misled and/or brands damaged. By way of illustration, Box 10.22 describes a dispute between ALDI and Nestlé Australia relating to parallel imports. The Panel expects that the market will respond to these concerns arising from removing restrictions on parallel imports, including through making consumers aware of what products they are buying. The threat of consumers becoming dissatisfied with particular products and/or brands is also likely to motivate international suppliers to rethink their regional arrangements.

Box 10.22: ALDI's imports of Nescafé coffee

In a 2005 notification to the ACCC, Nestlé Australia raised the issue of ALDI selling Nescafé branded instant coffee in its stores sourced from overseas suppliers.²⁵¹ ALDI had previously supplied the locally sourced Nescafé 'Blend 43', which was its highest selling instant coffee, but submitted that it resorted to import-sourcing as a result of uncompetitive local prices and supply difficulties.

The imported coffee did not have the same formulation and taste as instant coffee supplied by Nestlé Australia. Nestlé Australia submitted that consumers may be misled and/or may form negative views about Nestlé Australia's products as a result of drinking the imported coffee.

ALDI had taken steps, including in-store posters, shelf labels, and stickers on the coffee jars, to alert customers to the fact that the imported Nestlé 'Matinal' or 'Classic' blends were different to the locally sourced Nescafé 'Blend 43' product. ALDI also provided a satisfaction guarantee.

However, Nestlé Australia submitted that this disclosure was inadequate to address its concerns. It proposed to cease supply of all of its products to ALDI, unless ALDI made further disclosures as prescribed by Nestlé Australia and published corrective advertisements.

The ACCC concluded that ALDI's disclosure was adequate, noting that ALDI was selling genuine Nescafé products manufactured by a Nestlé subsidiary.

Having regard to internal Nestlé Australia documents it obtained, the ACCC concluded that a substantial purpose of Nestlé Australia's conduct was to lessen competition generated by ALDI's supply of imported Nescafé products, and lessen the likelihood of other supermarkets importing Nescafé products, both of which would place downward pressure on prices.

A number of submissions consider the remaining restrictions on parallel imports should be reviewed:

- The Law Council of Australia — IP Committee submits that, in light of several significant decisions by the courts, it has become difficult to advise clients on what is, or is not, a legitimate parallel import. It argues that the parallel importation of trade-marked goods should be comprehensively examined to determine the costs and benefits of permitting (or not permitting) parallel imports into Australia (sub, page 2).
- The Advisory Council on Intellectual Property also argues, 'if policy favours parallel importation, serious thought needs to be given to exactly how to make that policy work' in the context of trade marks. It suggests considering the approach found in New Zealand's Trade Marks Act (DR sub, pages 1 and 6).

251 Nestlé Australia Limited — ACCC Notification — N31488, 2 December 2005.

- The Australian Chamber of Commerce and Industry recommends reviewing the enforcement requirements associated with parallel imports (sub, pages 20-21).²⁵²

The Panel's view

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local producers by shielding them from international competition. They are effectively an implicit tax on Australian consumers and businesses. The Panel notes that the impact of changing technology means that these restrictions are more easily circumvented.

Removing parallel import restrictions would promote competition and potentially lower prices of many consumer goods, while concerns raised about parallel imports (such as consumer safety, counterfeit products and inadequate enforcement) could be addressed directly through regulatory and compliance frameworks and consumer education campaigns.

Implementation

Enforcing restrictions on parallel imports is the responsibility of the Australian Government.

On the basis that the PC has already reviewed parallel import restrictions on books and second-hand vehicles and concluded that removing such restrictions would be in the public interest, the Australian Government should, within six months of accepting the recommendation, announce that:

- parallel import restrictions on books will be repealed; and
- parallel import restrictions on second-hand passenger and light commercial vehicles will be progressively relaxed.

Transitional arrangements are important to ensure that affected individuals and businesses are given adequate notice before parallel import restrictions are removed. As the PC concluded, the immediate abolition of parallel import restrictions could impose significant adjustment costs on book producers.

Timeframes for removing parallel import restrictions on books and second-hand cars should be set based on the transitional arrangements recommended by the PC. These include that:

- repealing the parallel import restrictions on books takes effect three years after the policy change is announced; and
- progressively relaxing restrictions on the importation of second-hand vehicles commences no earlier than 2018, having been preceded by the introduction of a regulatory compliance framework that includes measures to ensure appropriate levels of community safety, environmental performance and consumer protection.

The Australian Government should also announce an independent review of all remaining provisions of the Copyright Act that restrict parallel imports, and of the parallel importation defence under the Trade Marks Act, to commence within six months of accepting the recommendation.

252 See also the Business Council of Australia, sub, Main Report, page 21.

Recommendation 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.

10.7 PHARMACY

Pharmacy²⁵³ regulation has been the subject of numerous reports and reviews over the past 20 years, including the 2000 Wilkinson National Competition Policy Review of Pharmacy (required under NCP). It has also been examined by the PC²⁵⁴ and, most recently, by the National Commission of Audit, which recommended ‘opening up the pharmacy sector to competition, including through the deregulation of ownership and location rules’.²⁵⁵ The effectiveness and efficiency of the pharmacy location rules was also reviewed in 2010 by Urbis Consultancy in its *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement*.²⁵⁶

The Draft Report recommends, ‘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 and quality of advice on pharmaceuticals that do not unduly restrict competition.’

The Review received some submissions supporting this recommendation and others opposing it. Some submissions also addressed the question of how governments should determine whether the current restrictions are justified.

The Panel recognises that some pharmacy regulation is justified to: uphold patient and community safety; ensure pharmacists provide consumers with appropriate information and advice about their medication; provide equitable access to medication, regardless of the patient’s wealth or location; ensure accountability for appropriate standards and behaviour by pharmacists; and manage costs to patients and governments.

The policy objectives of the pharmacy ownership and location rules are outlined separately below, followed by a discussion drawing on stakeholder arguments about how they have applied in practice. The concluding section covers recent developments and recommendations, including transitional arrangements.

253 In this Report, ‘pharmacy’ refers to community pharmacy and does not include hospital pharmacy.

254 Productivity Commission 2005, *Review of National Competition Policy Reforms, Report no. 33*, Canberra.

255 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, page xlii.

256 Urbis Pty Limited 2010, *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement*, Sydney.

Pharmacy ownership rules

State and territory legislation limits ownership of community pharmacies to pharmacists, with limited exceptions, such as for friendly societies with historical ownership of pharmacies. There are also limits in each State (but not the Territories) on how many pharmacies each pharmacist can own. These limits vary by State. The ownership rules do not prevent pharmacies owned by different pharmacists from operating under a common name and brand, such as Amcal or Terry White.

As the PC submission to the National Pharmacy Review noted, rationales given in support of the ownership restrictions include to:

- maintain ethical and professional standards in the provision of pharmacy services;
- provide a greater capacity to enforce professional standards; and
- promote equitable access to pharmacy services.²⁵⁷

Sitting alongside the ownership rules are state and territory regulations governing the licensing of pharmacists and pharmacy premises, and the advertising of medicines and poisons. The Panel makes no recommendations in relation to these other regulations, but nor does it suggest that they should be exempt from consideration as part of the new round of regulation reviews proposed at Recommendation 8. Arguably, these licensing requirements, together with measures such as codes of ethics enforced by Pharmacy Boards, undergird consumer confidence in pharmacy services meeting minimum quality and safety standards.

The Pharmacy Guild of Australia submits that pharmacies should be seen as agents providing services to consumers on behalf of government and that:

... ownership rules encourage efficiency in the provision of community pharmacy services while ensuring that these services are provided to an appropriate quality standard. By contracting with independent owner-pharmacists, the Government preserves the strong efficiency incentives that exist in franchise relationships. Furthermore, by placing the pharmacist and his or her professional reputation at the centre of the distribution relationship, a position that the pharmacist stands to lose if quality standards are not met, the Government effectively 'raises the stakes' for poor quality performance. Owner-pharmacists therefore have an enhanced incentive to conduct themselves and their pharmacies ethically and professionally, and not risk loss of registration and, therefore, loss of value in the pharmacy.

Additionally and importantly, the ownership rules limit concentration in the supply of dispensing services. (DR sub, page ix)

The Pharmaceutical Society of Australia also supports the pharmacy ownership rules:

... limiting the controlling interest in the ownership of pharmacy businesses to pharmacists promotes patient safety and competent provision of high quality pharmacy services and helps maintain public confidence in those services; and limiting the number of pharmacy businesses that may be owned by a person or entity helps protect the public from market dominance or inappropriate market conduct. (sub, page 7)

257 Productivity Commission 1999, *Submission to the National Review of Pharmacy*, Canberra, page 31.

On the other hand, Chemist Warehouse and Ramsay Health Care submit that the ownership rules are redundant and ineffective:

The societal engagement and relationship is with the dispensing and counselling pharmacist. The Australian public forges a bond of trust and respect with the chemist whom assists their pharmaceutical needs who in many cases (if not most) is not the store proprietor.

We estimate Guild membership today is around 2000 with about 5400 pharmacies in the country. There are about 28,000 pharmacists practising in the country, which suggests a very high proportion of customer interactions are with pharmacists working for someone else. (Chemist Warehouse, DR sub, pages 2-3)

...for many years enterprising pharmacists, families of pharmacists (i.e. spouses and children), and pharmacist business partners have formed operating alliances that combine their personal holdings under State laws, creating loose conglomerates in which each member exercises nominal supervision over their personal pharmacy holdings (and therefore everyone remains within the legislative boundaries).

In effect, supposedly professional practices are operating as commercial businesses, using the rules to maximise returns and profits rather than give consumers the best possible professional service.

In our view, if these restrictions are so easily got around by entrepreneurial pharmacists acting more like business tycoons they are pointless, make a mockery of ownership rules excluding non-pharmacists, and should be removed. (Ramsay Health Care, DR sub, page 6)

No analogous ownership rules apply to GP practices, and the Panel is unaware of any evidence that this absence of regulation compromises high professional standards of care and accountability in the provision of primary medical services.

The Panel also notes that, in every State and the Northern Territory, certain companies, viz., Friendly Society Pharmacy companies, have historically been allowed to own pharmacies and continue to do so. The Panel sees no reason to believe, nor does any submitter suggest, that these companies provide pharmacy services less ethically or professionally than do owner-pharmacists.

Pharmacy location rules

The Australian Government's National Medicines Policy establishes objectives against which medicines are provided and regulations set. This is a co-operative endeavour to bring about better health outcomes for all Australians, focusing especially on access to and quality use of medicines.²⁵⁸

The National Medicines Policy has the following central objectives:

- timely access to medicines that Australians need, at a cost individuals and the community can afford;
- medicines meeting appropriate standards of quality, safety and efficacy;
- quality use of medicines; and
- maintaining a responsible and viable medicines industry.²⁵⁹

258 Australian Government Department of Health 2014, *Post-implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015*, Canberra, page 5.

Since 1990, the remuneration pharmacists receive for dispensing Pharmaceutical Benefits Scheme (PBS) medicines on behalf of government, and regulations governing the location of pharmacies, have been negotiated in a series of Australian Community Pharmacy Agreements between the Australian Government and the Pharmacy Guild of Australia. These Agreements also govern remuneration for in-pharmacy programs and services as well as community service obligation (CSO) arrangements with pharmacy wholesalers.

The pharmacy location rules specified in the current Australian Community Pharmacy Agreement require a pharmacist to obtain approval from the Australian Government to open a new pharmacy or to move or expand an existing pharmacy.²⁶⁰ Box 10.23 provides a brief history of the location rules.

Box 10.23: Australian Community Pharmacy Agreements and location rules — a brief history²⁶¹

The first Australian Community Pharmacy Agreement was signed in 1990. Since then, there have been five agreements, each lasting five years. At the time of the first Agreement (1990-1995), there was concern that there were too many pharmacies on a population basis and that they were unevenly distributed, with clustering in some urban areas but a significantly lower pharmacy-to-population ratio in rural and remote areas.

The first Agreement set out a new remuneration framework and rules to address these concerns. The rules primarily focused on relocating, closing and amalgamating existing pharmacies. It also specified requirements to be met before additional pharmacies would be approved, including that the proposed relocated pharmacy be at least 5km from the nearest approved pharmacy and satisfy an assessment of community need.

The second Agreement (1995-2000) maintained pharmacy location restrictions, both in respect of assessing community need before establishing a new pharmacy and satisfying primarily distance-based criteria for relocated pharmacies.

The third Agreement (2000-2005) relaxed the location requirements for both new and relocated pharmacy approvals, particularly in rural and remote areas. It also introduced financial incentives to establish new pharmacies in rural locations.

New rules under the fourth Agreement (2006-2010) facilitated pharmacy relocation into some medical and shopping centres as well as into single pharmacy towns and high-growth, single-pharmacy urban areas.

259 Australian Government Department of Health 2014, *Post-implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015*, Canberra, page 5.

260 Australian Government Department of Health 2014, *Pharmacy Locations Rules Applicant's Handbook*, Canberra.

261 Australian Government Department of Health 2014, *Post-implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015*, Canberra, pages 7 — 8.

Box 10.23: Australian Community Pharmacy Agreements and location rules — a brief history (continued)

The fifth Agreement (2010-2015) retained the location rules from the fourth Agreement, pending the outcome of an independent review of the Rules (the Urbis Review).²⁶²

The fifth Agreement is due to expire on 1 July 2015 and to be replaced by a sixth Agreement, the terms of which are currently subject to negotiation.

The complexity of the pharmacy location rules has led the Australian Government Department of Health to prepare a 56-page Handbook, which the Department issues to applicants to convey the full requirements of the location rules.²⁶³

The Pharmacy Location Rules include provisions for establishing a new pharmacy or relocating an existing pharmacy. These include four rules for existing pharmacists wishing to expand or contract an existing pharmacy, relocate a pharmacy up to 1km by straight line, or within the same facility (as defined by the location rules) or within the same town, and seven rules for pharmacists wishing to open a new pharmacy. Generally, a new pharmacy may not open within a certain distance of an existing pharmacy (usually either 1.5 or 10 kilometres depending on the location), with some exceptions, including for pharmacies located within shopping centres, large medical centres or private hospitals.

These rules apply differently depending on the distance to the nearest existing pharmacy, the number of supermarkets in a town, and/or the number of medical practitioners in the area.

A pharmacy must also not be located within, or directly accessible from, a supermarket, where a supermarket is defined as ‘a retail store or market, the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods’. This referenced range of goods means that it is the type of store in which a person could do their weekly shopping from fresh food (for example, dairy, meat, bread), pantry items, cleaning products, personal care items and other household staples (for example, laundry pegs, plastic food wrap).

This definition prevents pharmacists from opening stores within or adjoining a supermarket where there is direct access to the pharmacy from within the supermarket, but it does not prevent pharmacists from expanding their ranges to include many of the products sold by supermarkets. Barbara Packer submits that her Pharmacy in Stafford, Brisbane is also an IGA X-press store that seeks ‘... to give our customers the convenience they need of buying pharmaceutical products, prescriptions and convenience groceries before the other larger supermarkets are open’ (DR sub, page 1). In this example, customers are able to access the professional assistance of a qualified pharmacist and to have medicines dispensed by a qualified pharmacist while these functions are co-located with a grocery retailer. Commenting on this example, the Pharmacy Guild said, ‘We don’t support pharmacies in supermarkets but this is different because the supermarket is owned by a pharmacist not a corporate entity...We don’t think that is double standards’.²⁶⁴

262 Urbis Pty Limited 2010, *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement*, Sydney.

263 Australian Government Department of Health 2014, *Pharmacy Locations Rules Applicant’s Handbook*, Canberra.

264 Dunlevy, S 5 February 2015, *A chemist can own a supermarket, but supermarkets can’t own a pharmacy*, news.com.au, viewed 19 February 2015
www.news.com.au/finance/business/a-chemist-can-own-a-supermarket-but-supermarkets-cant-own-a-pharmacy/story-fnkgdftz-1227216267630.

The location rules and their rationale

Submissions from the Pharmacy Guild, Symbion, Australian Friendly Societies Pharmacies Association and the Pharmaceutical Society of Australia, as well as a number of individual pharmacists and small business representatives, support the current arrangements. They argue that the pharmacy location rules are achieving better outcomes than could be achieved under a different regulatory regime. For example, the Pharmaceutical Society of Australia submits:

The location provisions facilitate access to pharmacies by all segments of the population.
(sub, page 4)

The website for the current (fifth) Community Pharmacy Agreement states, 'To ensure that all Australians have access to PBS medicines, particularly in rural and remote areas, Pharmacy Location Rules (the Rules) have been a feature of all five Community Pharmacy Agreements [since 1990].'²⁶⁵

The Pharmacy Guild also commissioned a consultancy report, which it says:

... demonstrates that community pharmacy provides an enviably high level of access not only to metropolitan consumers but also to consumers in regional areas, to older consumers and to consumers in areas of socio-economic disadvantage. (DR sub, page iv)

However, Chemist Warehouse submits that, far from ensuring access to pharmacy services, the location rules reduce the ubiquity of pharmacies by preventing Chemist Warehouse members and other pharmacists from opening new outlets wherever they choose (DR sub, page 2). Chemist Warehouse also submits that evidence from European countries, where similar pharmacy location rules have been reformed, shows that pharmacies, particularly those in regional locations, are unlikely to close if regulation is relaxed to allow competitive entry of new pharmacies (DR sub, page 4).

Pharmacy location rules restrict competition in pharmacy services. The Panel received several submissions complaining that the location rules were responsible, at least in part, for a proposed medical practice at Ingham in Queensland not proceeding.²⁶⁶ These submitters say that the inclusion of a pharmacy was integral to the proposal's commercial viability but that, due to an incumbent pharmacist relocating one of two existing pharmacies within 500 metres of the proposed medical practice, the application to open a new pharmacy as part of the medical practice was denied.

The Panel cannot adjudicate the facts of this particular case but accepts that the location rules limit the options available to those wishing to open a new pharmacy, or to move an existing pharmacy, and thereby restrict competition.

There are no analogous location rules for GP practices. The Pharmacy Guild submits:

The absence of regulations for GPs has clearly not enabled equitable access to health care services for all Australians, while the lack of success of different incentive programs in encouraging medical professionals to move to regional, rural and remote Australia suggests that devising effective mechanisms to achieve this objective is problematic. (DR sub, page 22)

265 5th Community Pharmacy Agreement website 2015, Department of Health and Pharmacy Guild of Australia, viewed 9 February 2015, <http://5cpa.com.au/about-5cpa/>.

266 See, for example: Sue Tack, DR sub; Ingham Family Medical Practice, DR sub; and Madonna Simmons, DR sub.

Although there are challenges in ensuring access to GP services in rural Australia, possible alternative means of addressing those challenges exist that do not restrict competition. The Panel sets out some possible alternatives below.

Recent developments relevant to pharmacy ownership and location rules

The Pharmacy Guild submits that pharmacy ownership and location regulations were reviewed in 2000 under NCP and that any further review is therefore unnecessary (sub, page 6). However, the Panel notes that considerable time has elapsed since then, and there have been a number of significant developments in the meantime.

For example, the introduction, and subsequent expansion, of Price Disclosure arrangements for PBS medicines has lowered the prices the Australian Government pays for key medicines closer to those actually paid by community pharmacies, with a significant downward impact on the incomes of community pharmacies. Changes were also made to the location rules as part of the fifth Australian Community Pharmacy Agreement (2010-2015) following the Urbis Review.²⁶⁷

In 2011, the location rules were amended and, through a targeted easing of existing regulations, simplified. Relocating an existing pharmacy was no longer required in order to establish a pharmacy in shopping centres, large medical centres, private hospitals and one-pharmacy towns. This made it easier and cheaper to establish a pharmacy in such circumstances and provided greater flexibility to respond to community need.²⁶⁸

In October 2014, the Australian Government Department of Health completed a post-implementation review of the 2010 decision to renew the pharmacy location rules, since a Regulation Impact Statement was not prepared at the decision-making stage (see Box 10.24).²⁶⁹

Box 10.24: Post-implementation review of the 2010 pharmacy location rules

In October 2014, the Australian Government Department of Health completed a Post-implementation review of the 2010 decision to renew the pharmacy location rules.²⁷⁰

The post-implementation review notes that the basis of the decision to extend the location rules 'was to ensure Australia continues to maintain a viable and sustainable network of community pharmacies approved to supply PBS medicines and pharmacy health services funded under the Fifth Agreement' (page 4).

The Review concluded that the policy objectives of the location rules are consistent with the broad objectives of national health policy, in particular, the National Medicines Policy, which has timely access to medicines as one of its four key pillars.

267 Urbis Pty Limited 2010, *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement*.

268 Australian Government Department of Health 2014, *Post-implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015*, Canberra, page 11.

269 Australian Government Department of Health 2014, *Post-implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015*, Canberra.

270 Ibid.

Box 10.24: Post-implementation review of the 2010 pharmacy location rules (continued)

The Review examined three possible alternative approaches that might be adopted in place of the location rules. These were:

- targeted easing of the existing rules;
- remuneration-based incentives and disincentives; and
- complete deregulation of pharmacy location decisions.

The Review listed a fourth alternative approach but did not examine it in detail, viz., the Australian Government directly tendering for the delivery of PBS medicines and pharmacy services.

Taking into account the costs and benefits of the alternatives considered, the Review concluded that:

... while there remains a net benefit to consumers and pharmacy owners from the retention of the Rules from the Fourth Agreement, additional benefits can be achieved. These benefits, particularly in relation to consumers and in the government administration of the Rules, could be realised through the targeted easing of the Rules ... (page 30)

Under this option, the restrictions of the Rules would be further relaxed to provide greater opportunity to establish new pharmacies. Such amendments would address emerging or ongoing issues and provide greater flexibility to respond to community need for access to PBS medicines. They would also take into account the changing business environment and health care policy priorities ... (page 22)

In addition to these developments, different business models have emerged in the pharmacy sector since 2000, including specialist and online pharmacy models and discount groups that operate on a larger scale, such as Chemist Warehouse.

Increasingly, pharmacy business models involve selling a much wider range of products, extending beyond health and personal care-related products to include gifts and home consumables. The rationale for pharmacy location rules relates only to their role in dispensing prescription (particularly PBS) medications. There are no location rules governing the sale of non-prescription medications, let alone gifts and home consumables.

There is also a clearer understanding of how well other primary healthcare providers operate without anti-competitive location and ownership restrictions. For example, ownership of medical practices is not limited to GPs, nor are GP practices prevented from locating in close proximity to one another.

Stakeholders also point to the experience of partial deregulation in other jurisdictions as providing new evidence about the merits of location and ownership rules.

Chemist Warehouse cites an Organisation for Economic Co-operation and Development (OECD) review that assessed the impacts on competition of pharmacy sector deregulation in several European countries. Chemist Warehouse submits that the OECD review²⁷¹ found:

271 Vogler, S 2014, *Competition Issues in the Distribution of Pharmaceuticals*, OECD, Paris, 2014, pages 7, 9.

- Accessibility of medicines to consumers increased due to the establishment of new pharmacies and the extension of opening hours.
- Price decreases were observed in many countries — including a dramatic 42 per cent decrease in retail pharmacy prices in Denmark. No country reported increases. (sub, page 6)

However, the Pharmacy Guild submits that this summary seriously misrepresents the conclusions of the OECD Review (sub, pages 19-20).

The Panel considers that evidence of the outcomes of partial deregulation in overseas jurisdictions provides useful guidance for policymakers about the gains that may be available.

Alternatives to current ownership and location rules

The current ownership and location regulations impose costs on consumers directly and indirectly by erecting barriers to entry to the market for dispensing PBS medicines. The Post-implementation Review also noted the following ‘cost impacts’ arising from the location rules:

- possibly reduced geographical access to pharmacies in urban areas;
- the potential for higher cost non-PBS medicines, reflected in higher profits to existing pharmacists; and
- an administrative impost for pharmacists who want to relocate or expand.²⁷²

In their submissions to the Draft Report, the Consumers Health Forum, National Seniors Australia, Chemist Warehouse, and Professional Pharmacists Australia call for changes to the ownership and location rules:

The end result of limiting competition and guaranteeing income has been to create a significant problem in community pharmacy that is leading to poor health outcomes, a stifling of innovation and the taxpayer not receiving value for money. (Professional Pharmacists Australia)²⁷³

The Northern Territory Government also supports removing the pharmacy ownership and location rules (DR sub, page 5).

A range of other options are available to governments seeking to secure the access, community service and other objectives of the present ownership and location rules.

The Panel notes that supply of medicines in remote areas is already partly conducted through channels other than retail pharmacies. For example, under the Remote Area Aboriginal Health Services Programme, clients of approved remote area Aboriginal Health Services receive PBS medicines directly from the Aboriginal Health Services at the point of consultation, without the need for a normal prescription form — and without charge.²⁷⁴

272 Australian Government Department of Health 2014, *Post-implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015*, Canberra, page 29.

273 Professional Pharmacists Australia provided a confidential submission to the Review but gave permission for this extract to be quoted in this Report.

274 Australian Government Department of Health, *Aboriginal Health Services and the Pharmaceutical Benefits Scheme (PBS)*, Canberra, Department of Health, viewed 3 February 2015 www.health.gov.au/internet/main/publishing.nsf/Content/health-pbs-indigenous.

It is also open to government to secure its policy objectives by imposing obligations directly on pharmacies as a condition of their licensing and/or remuneration, noting that the Australian Community Pharmacy Agreement already imposes certain obligations for services that pharmacists provide.

Another alternative model is funding a CSO to achieve specific policy objectives. Such a mechanism currently operates in pharmaceutical wholesaling (see Box 10.25). The Australian Government uses the CSO Funding Pool to directly target its policy outcome of timely access to the full range of medicines for all Australians. Notably, it does so without imposing ownership or location restrictions on pharmaceutical wholesalers. Further, the Australian Community Pharmacy Agreement also includes provisions to fund ‘Specific Programs’ including for medication management, rural support, Aboriginal and Torres Strait Islander access, and research and development.²⁷⁵

Box 10.25: CSO Funding Pool for pharmaceutical wholesalers²⁷⁶

The aim of the CSO Funding Pool is to ensure that all Australians have access to the full range of PBS medicines, via their community pharmacy, regardless of where they live and usually within 24 hours.

The CSO Funding Pool financially supports pharmaceutical wholesalers to supply the full range of PBS medicines to pharmacies across Australia, regardless of pharmacy location and the relative cost of supply.

Under these arrangements, payments are provided directly to eligible wholesalers (known as CSO Distributors) who supply the full range of PBS medicines to any pharmacy, usually within 24 hours, and that meet compliance requirements and service standards. These payments are over and above those made directly to pharmacists to cover the cost of supply from the wholesaler.

Community service objectives in the *retailing* of pharmaceuticals could be recognised and funded via a CSO pool in a similar way, particularly for dispensing PBS medicines and providing other in-pharmacy services in remote and rural locations. This could also occur through a tender arrangement.

As in other contexts, the use of trials and/or a staged approach to easing and replacing the existing rules would be beneficial in pharmacy regulation. This gives existing providers time to adjust their business models and to trial and test for unintended outcomes (both positive and negative).

The Government’s own Post-implementation Review recommends a targeted easing of the location rules. The Panel agrees that this would increase competition to the benefit of consumers, while relaxing the rules gradually would address any concerns about their removal at a single stroke.

Chemist Warehouse proposes possible measures to address the perceived risks of removing the location and ownership rules. These include: imposing a ‘fit and proper person test’ for pharmacy ownership; establishing a licence fee to address concerns about the risk of predatory entry to ‘clear the market’; and retaining a 1-2 kilometre limit on moving an existing pharmacy to address concerns that pharmacies would move away from rural areas to cities (DR sub, page 7).

275 Fifth Community Pharmacy Agreement, pages 20-21 (PDF accessible from [Australian Community Pharmacy Agreement website](#)).

276 Department of Health 2014, *Community Service Obligation for Pharmaceutical Wholesalers*, Commonwealth of Australia, Canberra, viewed 9 February 2015, www.health.gov.au/internet/main/publishing.nsf/Content/community-service-obligation-funding-pool.

Ramsay Health Care proposes that, to reassure the Australian public that dispensing medicines and providing other professional pharmacy services is motivated first and foremost by the best healthcare interests of Australians (rather than commercial or other objectives), Wilkinson's complementary recommendation 4 be adopted. This recommendation proposed establishing a statutory offence, with appropriate and substantial penalties for individuals and corporations, of improper and inappropriate interference with a pharmacist in the course of his or her practice (DR sub, page 9).

The Panel's view

The Panel accepts that, given the key role of pharmacy in primary healthcare, ongoing regulation of pharmacy is justified and needs to remain in place. However, current regulations preventing pharmacists from choosing freely where to locate their pharmacies, and limiting ownership to pharmacists and friendly societies, impose costs on consumers.

Further, developments in Australia strengthen the case for repealing the present arrangements and replacing them with new regulations that better serve consumers and are less harmful to competition. There is also evidence of overseas experience to draw upon.

Recent developments include the rise of discount pharmacy groups and online prescriptions as well as the accumulation of evidence about the effects of deregulation in other Australian health sectors, in particular, general practice medicine. Further changes to the location rules would represent a continuation of steps already taken towards relaxation. This would be consistent with the findings of the Post-implementation Review that further targeted easing of the rules could deliver additional benefits.

Accordingly, the Panel considers that present restrictions on ownership and location are unnecessary to uphold the quality of advice and care provided to patients. Further, it is clear that such restrictions limit both consumers' ability to choose where to obtain pharmacy products and services, and providers' ability to meet consumers' preferences.

The Panel also notes that the current Fifth Community Pharmacy Agreement expires on 1 July 2015, and negotiations for the next agreement will be well under way when this Final Report is delivered to the Australian Government. These negotiations provide an opportunity for the Government to implement a further targeted relaxation of the location rules, as part of a transition to 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 rules during the life of the next agreement.

Competition between pharmacies is not sufficient on its own to meet the access objectives of the National Medicines Policy, most especially in rural and remote areas. The supply of medicines in remote areas is already partly conducted through channels other than retail pharmacies, including through Aboriginal Health Services. That is unlikely to change even if the current pharmacy location and ownership rules are reformed.

However, a range of alternatives to the current pharmacy ownership and location rules exist to secure access to medicines for all Australians that are less restrictive of competition among pharmacy service providers. In particular, tendering for the provision of pharmacy services in underserved locations and/or funding through a community service obligation should be considered.

Since access to medicines is less likely to be an issue in urban settings, the rules for urban pharmacies could be eased rapidly at the same time that rural location mechanisms are established.

Implementation

Reform of pharmacy ownership and location rules will involve the Australian Government and state and territory governments.

Pharmacy location rules arise from the Australian Community Pharmacy Agreement between the Australian Government and the Pharmacy Guild. Accordingly, the negotiations for and

implementation of the next Australian Community Pharmacy Agreement, due to commence in July 2015, provide the opportunity to introduce transitional arrangements towards the eventual removal of location rules. Such transitional arrangements may explicitly recognise CSO aspects of pharmacy.

Pharmacy ownership rules arise from state and territory legislation. The Panel considers that, within two years of Governments accepting the recommendation, these rules should be removed and replaced with regulation that achieves the desired policy outcomes without unduly restricting competition. It is likely that transitional arrangements would be an integral part of any such change.

If alternative mechanisms are introduced for underserved locations, the rules that effectively apply only to urban pharmacies could be eased rapidly at the same time that mechanisms to ensure access in rural locations are established.

Recommendation 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 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.

11 INFRASTRUCTURE MARKETS

The energy, water and transport sectors provide critical inputs to the Australian economy. Applying competition policy to these infrastructure markets significantly affects the choices available to and prices paid by consumers for almost all goods and services consumed in Australia. By helping to reduce the cost of infrastructure services, the National Competition Policy (NCP) reforms increased choice across the economy.

These reforms remain important. The Business Council of Australia nominates removing cabotage restrictions, finalising energy reform, recommitting to water reform and starting a process to introduce cost-reflective road pricing as priorities (DR sub, page 7).

Twenty years ago, infrastructure markets were characterised by vertically integrated, government-owned monopolies that were not responsive to changes in consumer tastes or needs.

For example, electricity consumers across Australia were limited to one tariff from one company; whereas, consumers can now access sites like www.energymadeeasy.gov.au to assist them to choose among a range of offers. This degree of consumer choice and empowerment was almost non-existent when Hilmer reported in 1993. Box 11.1 outlines the electricity sector as a case study of reform.

The extension of the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010* (CCA)) to government businesses, along with competitive neutrality policy, structural reform of government businesses (including the separation of natural monopoly from contestable elements, privatisation, the move to cost-reflective pricing), and third-party access arrangements for infrastructure services have all left their mark on Australia's infrastructure markets.

Although most infrastructure markets have been substantially reformed, the Panel has heard numerous examples that suggest progress has been patchy, the degree of reform differs among sectors and much more needs to be done to provide greater choice and better service levels for consumers and businesses across the economy.

Structural reform

In most sectors, structural reform and separating monopoly from contestable elements has been heavily pursued. In the electricity market, generators have been separated from networks and sold. Competition in retailing has been introduced, and monopoly networks have been subject to price regulation by independent regulators. Networks have also been privatised in some jurisdictions. Reform in gas markets has followed a similar path to electricity, with competition introduced to wholesale gas markets.

Structural separation was extensively pursued in rail. The main interstate freight network was brought together under the ownership of the Australian Rail Track Corporation, while above-rail²⁷⁷ freight operations have been privatised. Jurisdictions have access regimes in place for regional freight lines. Although competition in above-rail services has emerged on some routes, on many others volumes have been too low to support competitive entry. Parts of the rail freight sector face strong

277 'Above-rail' means those activities required to provide and operate train services such as rolling stock provision (i.e. trains and carriages), rolling stock maintenance, train crewing, terminal provision, freight handling and the marketing and administration of the above services.

competition from road transport. The major ports have also been reformed with port authorities now typically acting as landlords for competing service providers rather than directly providing services.

Although competition was introduced in telecommunications, the dominant fixed-line provider, Telstra, was privatised without being structurally separated. Instead, reliance was placed on providing third-party access to Telstra's fixed-line network. On the face of it, this has seen less fixed-line retail competition in telecommunications than might have been expected. Dissatisfaction with access arrangements also led Optus to build its own hybrid fibre-coaxial network.

Over time, changes in technology have strengthened competition in telecommunications. Data rather than voice is now the dominant form of demand in the market, and wireless technologies compete effectively with fixed-line technologies in many applications.

Applying the CCA to government businesses and introducing competitive neutrality requirements for all significant government businesses were also integral to making government businesses more commercially focused (for more detail on competitive neutrality, see [Chapter 13](#)). This enabled private businesses to compete alongside government-owned businesses.

Today there are many privately owned electricity generators competing alongside the remaining government-owned generators. Private operators have also entered the market in rail, with most rail freight services now privately owned and operated.

In contrast, there has been little private investment in urban water supply, except for desalination plants.²⁷⁸ These plants rely on government contracts and are shielded from demand risk. To the extent that roads have been privately provided, this has occurred through direct government contracting.

Similarly, public transport services are either provided directly by government businesses or through contracting out. Restrictions remain on the private provision of public transport services. For example, bus operators in New South Wales providing a public transport service less than 40 kilometres in length must have a contract with the New South Wales Government.²⁷⁹

Privatisation

Since the Hilmer Review, governments have increased the role of the private sector in infrastructure markets. Government ownership of infrastructure assets has been greatly reduced through privatisation in most infrastructure sectors. In the electricity and gas markets, some jurisdictions have already privatised or are in the process of privatising generation, retail and network assets. In telecommunications, assets have been fully privatised, although the NBN is now being built by an Australian Government-owned company. There have also been a number of public-private partnerships (PPPs), particularly in urban roads and water.

All the major airports have been privatised through long-term leases. The Australian Government has also privatised its airline. In rail, above-rail freight operations have been privatised, as have many regional freight lines. However, the Australian Rail Track Corporation remains an Australian Government-owned corporation. In contrast, in the water sector there has been little consideration

278 Productivity Commission 2011, *Australia's Urban Water Sector*, Canberra, pages 42-45.

279 IPART, sub 1, page 9.

given to privatising dams and the water reticulation network. Similarly, privatisation has not been pursued in the roads sector to any extent, although there have been some privately built toll roads.

The increased role of the private sector in infrastructure has brought considerable public benefit. Governments have been able to redirect resources from asset sales into, for example, human services, and retail competition has emerged in many markets. Privatisation has also delivered more efficient management of assets and investments have been more responsive to changes in market demand. For example, airports have been increasing capacity as demand dictates.

The New South Wales Government's *Electricity Prices and Services: Fact Sheet 11*²⁸⁰ shows the movement in average annual real electricity network prices being lower in jurisdictions where network assets have been privatised (Victoria and South Australia) compared to those where they have not (such as New South Wales and Queensland). Further evidence of the benefits of privatisation is provided by the Australian Energy Regulator's (AER) November 2014 *Electricity distribution network service providers Annual benchmarking report*.²⁸¹ The report found 'the state wide average indicates that the Victorian and South Australian distributors appear to be the most productive'. Victoria and South Australia are the only States to have privatised their distribution businesses.

EnergyAustralia notes that there are distortions or inefficiencies caused by government ownership:

... a policy tension is created where Governments continue to own generation and network assets creating the potential to influence policy positions to the detriment of customers and/or taxpayers through unnecessarily high reliability standards or intervention in natural commercial processes. The NEM [National Electricity Market] has developed as a robust market with significant private investment and Government policy has the ability to significantly shape how investment is made. (sub, page 7)

The issue of how to privatise effectively is demonstrated by port infrastructure, where it is important to ensure that the regulatory regime can sufficiently influence port authority activities to constrain monopoly power. While some ports, particularly bulk ports, may have only a few large customers that can exert countervailing power, others may have significant market power in the absence of effective regulation.

The ACCC also cites anecdotal evidence suggesting ports are being sold or considered for sale with restrictions on competition in place to enhance sale prices. It notes:

Privatisation of port assets can raise issues of efficiency where monopoly rights are conferred by state governments, with no consideration to the prospect for competition and/or the need for economic regulation. This has the potential to result in lost efficiencies and/or higher charges which may be hard to remedy after the assets are sold. (sub, page 38)

Sydney Airport serves as another example where privatisation occurred with a monopoly right in place, namely, a first right of refusal to operate a second Sydney airport (ACCC sub 1, page 36). Although the Australian Government may have achieved a higher sale price, this has come at the longer-term cost of a less competitive market structure.

280 New South Wales Government 2014, *Electricity Prices and Services: Fact Sheet 11* NSW Government, Sydney, viewed 6 February 2015 www.nsw.gov.au/sites/default/files/miscellaneous/fact_sheet_11.pdf.

281 Australian Energy Regulator 2014, *Electricity distribution network service providers Annual benchmarking report*, Melbourne, page 6.

Pricing reform and access

Pricing reform and the move to cost-reflective pricing has been pursued extensively in most infrastructure markets, driving efficiency and allowing markets to offer more consumer choice; for example, through facilitating retail price competition.

Benefits from pricing reform in infrastructure sectors arise through encouraging better use of existing infrastructure, which can delay the need for infrastructure investment. Where cost-reflective pricing is present, consumer demand will also provide a more accurate guide to infrastructure investment. This increases the likelihood that such investment is efficient and responds to actual changes in demand and consumer preferences. These factors lower the cost and increase the responsiveness across markets to the benefit of consumers. It also means governments can better target assistance to vulnerable consumers in those markets, reducing the burden on taxpayers.

Pricing reform has generally been pursued through deregulating prices where markets are sufficiently competitive, while subjecting the monopoly parts of markets to price oversight, direct price regulation and access regimes. For example, in the electricity market, wholesale prices are deregulated as are retail prices in some jurisdictions, while network prices are subject to pricing determinations.

Similarly, in telecommunications markets, prices for mobile and retail services are deregulated, but Telstra's fixed-line network is subject to pricing and access determinations. Airports and ports are subject to price oversight and a range of other regulatory tools, which can be used to prevent monopoly pricing. Access declarations remain available as a regulatory tool for airports and ports, but for the most part have not needed to be pursued.

In contrast, in water and in roads there has been little progress introducing pricing that reflects the actual cost of use on the network, such as time and location charging. Investment in those sectors is either funded directly from budgets or by users across the network rather than from users according to the costs they impose on the network. Roads in particular have also been subject to investment bottlenecks.

Box 11.1: Electricity as a case study

Reform of the electricity sector is often considered a success, and the lessons are likely to prove instructive for other sectors. The Australian Energy Market Commission (AEMC) notes:

Energy markets in the Eastern States are generally characterised by competitive wholesale and retail markets. This is due in large part to a history of successful structural and institutional reform that created the framework for competition to develop. (sub, page 1)

Electricity is provided to most of Australia through the National Electricity Market (NEM), which includes all jurisdictions apart from the Northern Territory and Western Australia. The sector is broken into the competitive wholesale and retail markets, on the one hand, and the distribution and transmission networks on the other.

Box 11.1: Electricity as a case study (continued)

The AEMC points out in its *National Electricity Market: A Case Study in Successful Microeconomic Reform*²⁸² that there were a number of factors to that success:

- the material problems were defined and clear reform objectives were set;
- reform took high-level political drive, provision of time, energy and, according to many reform participants, financial incentives;
- strategies were developed to enhance confidence in the reforms;
- strong and appropriate support structures were established with key stakeholder participation;
- the pace of the reform allowed for effective consultation across all stakeholders; and
- getting the industry structures right was key for effective competition.

The way forward

The importance of further reform in infrastructure is clear: the Panel considers that infrastructure reforms are incomplete, even in the sectors where most progress has been made. The Panel recognises some hard-won gains in the infrastructure sectors, but reform needs to be finalised where it is flagging or stalled.

Furthermore, in some sectors very little progress has been made. Consumers are seeing significantly cheaper air travel as a result of reforms to the aviation sector. In contrast, there has been little progress in attempting to introduce cost-reflective pricing in roads and linking revenue to road provision. As a consequence, there is criticism that new roads are being built in the wrong places for the wrong reasons, while too little attention is paid to getting more efficient use of existing road infrastructure.²⁸³

The Panel outlines in the remainder of this part where it has identified further reforms that should be undertaken in the infrastructure markets.

282 Australian Energy Market Commission 2013, *National Electricity Market: A Case Study in Successful Microeconomic Reform*, Sydney, page 6.

283 See for example, City of Whittlesea sub, pages 1-2.

The Panel's view

Reform of Australia's infrastructure markets has generally served consumers well, creating a greater diversity of choice and ability to negotiate prices in utilities and transport compared to two decades ago.

However, further benefits could be harnessed through finalising the application of those reforms and extending further reforms.

Well-considered contracting out or privatising remaining infrastructure assets is likely to drive further consumer benefits through comparatively lower prices flowing from greater discipline on privatised entities. Governments need to approach privatisation carefully, ensuring that impacts on competition and consumers are fully considered and addressed.

Where monopoly infrastructure is contracted out or privatised, it should be done in a way that promotes competition and cost-reflective pricing. Maximising asset sale prices through restricting competition or allowing unregulated monopoly pricing post sale amounts to an inefficient, long-term tax on infrastructure users and consumers.

11.1 ELECTRICITY AND GAS

Electricity

Electricity has seen significant reform as part of the NCP agenda, increasing choice for consumers. However, recent hikes in electricity prices have caused concern among consumers and businesses (see Box 11.2). Further reform must ensure that future price increases are no greater than necessary. National Seniors Australia notes:

Firstly, priorities should include the more important unfinished NCP reforms, in particular those that:

- address unprecedented recent growth in household energy and water bills ... (sub, page 4)

Australian Industry Group submits:

The Federal and State Governments have already formally recognised the importance of this reform to consumers in the COAG Energy Market Reforms Plan (2012). Ai Group would urge the Federal Government to prioritise the implementation of this, and the other reforms contained in the Plan, as important contributions to enhancing competition in the energy sector. (sub, page 41)

The Council of Australian Governments' (COAG) Energy Market Reforms from 2012²⁸⁴ referred to by the Australian Industry Group, include:

- deregulating retail prices, to ensure efficient and competitive retail energy markets for the benefit of consumers and the energy sector alike;
- ensuring consistent national frameworks, including applying the National Energy Retail Law, which is designed to harmonise regulation of the sale and supply of energy to consumers; and

284 Council of Australian Governments 2012, *COAG Energy Market Reform — Implementation Plan*, COAG, Canberra, viewed 9 February 2015, www.coag.gov.au/node/481.

- developing a national regime for reliability standards delivering the right balance for consumers between security of supply and costs of delivery through the development of a national regime.

The Panel supports finalisation of these reforms. In relation to retail price regulation, the Energy Retailers Association of Australia submits:

Much of the increase in energy prices over recent years has been due to higher cost factors outside retailers' control. It was often viewed that regulating prices would protect those consumers most in need. Yet price regulation does not operate to protect hardship customers because of the hardship they are facing. Similarly, price regulation cannot protect hardship customers from being disconnected. Using retail price regulation to artificially suppress retail prices only delays an inevitable price increase in the future and can make increases worse than they otherwise might have been. (sub, page 12)

The Panel also notes concerns raised in submissions, such as EnergyAustralia's (sub, page 8), that inconsistent application diminishes the benefits from a harmonised National Energy Retail Law (sometimes referred to as the National Energy Customer Framework or NECF). These benefits include reduced costs to business and consumers, and improved choice through lowering barriers to energy retailers operating across state and territory borders.

The Queensland Competition Authority notes:

So far, the NECF has commenced in all states, except Queensland and Victoria. No state has adopted the NECF without variations. While some variations may have been considered necessary to reflect the particular circumstances in that state, the higher costs of retailers complying with additional obligations and the potentially negative impacts on competition should be carefully considered against the benefits. Nevertheless, in this case partial harmonisation may be better than the status quo. (sub, page 8)

The AEMC, in its *2014 Retail Competition Review*, found that the state of competition for small customers varies across the NEM and enforced the need to finalise the above reforms to improve competition. The AEMC recommended that jurisdictions:

- consider options for raising awareness of the tools available for comparing energy offers to improve customer confidence in the market;
- ensure concession schemes are delivering on their intended purpose in an efficient and targeted way;
- continue to harmonise regulatory arrangements across jurisdictions to minimise costs, including implementing the National Energy Customer Framework; and
- remove energy retail price regulation where competition is effective.²⁸⁵

While reliability standards are not currently set through a national framework, the Panel notes work is underway to move towards one.²⁸⁶ Other regulatory provisions may usefully be transferred to the national framework as well. Origin Energy notes:

... there are other examples of cross sector regulation that have a significant bearing on energy market participants, such as the various state regimes for licensing. Multiple frameworks increase the regulatory burden for all market participants and ultimately raise

285 Australian Energy Market Commission 2014, *Retail Competition Review, Final Report*, Sydney, page iv.

286 COAG Energy Council, 1 May 2014, *Communique #1*, Brisbane.

costs for consumers. Therefore, achieving framework consistency should be a policy priority. (sub, page 2)

The Panel sees significant benefit in a national framework for reliability standards, noting the link between jurisdictional reliability standards and recent price increases. This is demonstrated in Box 11.2, which outlines the drivers of recent electricity price increases.

Box 11.2: Electricity prices — a failure of competition policy?

A common concern raised through consultation was the impact of electricity price rises on business and consumers. Often stakeholders felt the price rises were the result of privatisation; many others felt it was because of the application of competition policy.

The AEMC undertakes annual pricing trend reports, most recently reporting in 2014 on expected price trends over the three years to 2016-17. Nationally, the AEMC projected residential electricity prices to fall in 2014-15 in most States and Territories, following the removal of the carbon tax. The extent of this decrease varies between jurisdictions, as the savings are offset by changes in other supply chain components that make up electricity prices.

The AEMC noted that, in 2015-16 and 2016-17, prices are expected to show modest declines or be stable across most States and Territories. This trend is being driven by subdued wholesale energy costs and lower network prices. Network prices are expected to fall in response to reduced financing costs and declining growth in peak demand.

The report notes that the average residential electricity price in 2014-15 consisted of:

- 50 per cent regulated network costs, which includes costs associated with building and operating transmission and distribution networks, including a return on capital. This was the main component of the average electricity bill;
- 8 per cent renewable energy target and state and territory feed-in tariff and energy efficiency schemes ; and
- 40 per cent competitive market costs, which includes wholesale energy purchase costs and the costs of the retail sale of electricity.

The AEMC's report on 2011-12 electricity prices identified network costs as the main driver of upward pressure on retail prices at that point. The anticipated stabilisation has been borne out in the new report. The increases in network prices largely reflected the costs of replacing and upgrading the network infrastructure.

A number of processes are underway to improve the efficiency of regulated network costs. For example, new rules made by the AEMC in November 2012 have given the Australian Energy Regulator greater discretion and more tools to determine efficient costs and revenues when undertaking network regulatory determinations.

The AEMC has finalised a rule change process on the way distribution network businesses set their network tariffs. The AEMC considered how distribution businesses can be encouraged to set network tariffs in a more cost-reflective manner in undertaking this rule change.

Rather than finding that competition has contributed to price increases, the report notes that competition in retail markets has allowed consumers to access better deals on price. Policies in most NEM jurisdictions allow for market-based prices and consumers in those States have been able to save by shopping around for the best deal and switching from regulated offers.

Box 11.2: Electricity prices — a failure of competition policy? (continued)

For example, the AEMC estimates that consumers in Queensland could save 7 per cent if they changed from a regulated tariff to a market offer.²⁸⁷ When competition reforms are finalised, such as the full implementation of the National Energy Retail Law, this should further mitigate future price increases.

The Panel sees scope to go further than the previously agreed reforms to develop competition in the sector. For example, the Energy Networks Association writes that it:

... strongly supports the transfer of economic regulatory functions under the National Electricity Law and National Gas Law and Rules from the WA Economic Regulation Authority and NT Utilities Commission to the Australian Energy Regulator, and the consistent application of the third-party access pricing rules (in particular, Chapters 6 and 6A of the National Electricity Rules, and the National Gas Rules) to energy networks in WA and NT. (sub, page 7)

Despite strong arguments — mostly on the basis of geography and high transmission losses — for the Western Australian and Northern Territory markets not to be physically joined to the National Electricity Market, the benefits of those jurisdictions adopting the national legislative and institutional frameworks can be realised without physical connection. The Panel notes and supports moves underway for this to occur.

For example, the Northern Territory Government ‘has committed to adopting the national framework for the regulation of electricity networks which will see greater alignment of arrangements with those operating in the National Electricity Market, including transfer of economic regulation of networks from the Territory’s Utilities Commission to the Australian Energy Regulator and implementing a phased transition to adopting the National Electricity Law and Rules’ (DR sub, page 3).

Alinta Energy notes that it:

... is broadly supportive of the suggestion put forward in the Draft Report that there may be benefits to the Western Australia (WA) and the Northern Territory energy markets in adopting the NEM legislative, institutional and market arrangements in their relevant jurisdictions. This would potentially reduce overall market operational and governance costs, promote greater regulatory consistency and remove unnecessary barriers to entry into other energy markets across Australia for retailers. (DR sub, page 1)

Alinta Energy goes on to note:

The current Electricity Market Review being undertaken by the WA Government has involved broad consideration of whether the existing framework and arrangements remain appropriate, including the underlying wholesale market design and institutional arrangements. Specifically, its remit has included considering whether the NEM arrangements should be adopted which overlaps with the recommendation made by the Draft Report. (DR sub, page 2)

287 Australian Energy Market Commission 2014, *Final Report: 2014 Residential Electricity Price Trends*, Sydney, page iv.

The Panel agrees that Western Australia and the Northern Territory should consider adopting the national framework and urges the Western Australia Electricity Market Review to consider the benefits of doing so.

Gas

Reform in the gas sector has largely mirrored that in the electricity sector. The 2014 Eastern Australian Domestic Gas Study (the Study),²⁸⁸ which examined the market in detail, found that effective competition in wholesale gas markets is linked to access to efficiently priced gas transportation, processing and storage services — which in turn relies on a combination of efficient price signals and regulatory arrangements.

The Study notes that this has worked well to date, with a consistent build and re-development of infrastructure to meet growing demand in recent years. However, it also flags significant changes in the market and notes changes that could be made in the regulatory and commercial arrangements to address gas supply.

The Study summarises options for government consideration, including addressing regulatory impediments to supply, improving title administration and management, jointly facilitating priority gas projects and improving access to and co-operation on pre-competitive geoscience.

The Study also indicated that a review into competition in the gas market is an option to consider. This was echoed by EnergyAustralia in its recommendation:

The Commonwealth Government request that the Productivity Commission conduct a high level coordinated review of market design, gas market competition, the direction and structure of the existing trading and related financial markets, and the suitability of carriage models for pipeline regulation. (sub, page 6)

The Energy Green Paper²⁸⁹ states:

An ACCC Price Inquiry into the eastern Australian wholesale gas market, under Part VIIA of the Competition and Consumer Act 2010, or a Productivity Commission review, could examine the levels of competition in the eastern gas market. Such an inquiry could inform consumers about future market conditions and opportunities to increase competition in the upstream market, including opportunities to remove unnecessary regulation, and issues that may limit wholesale market competition.

The Panel considers the White Paper should go further than the Green Paper and commit to a review examining, among other things: barriers to entry in the gas market; whether access regimes are working effectively to encourage upstream and downstream competition; and regulatory and policy impediments to Australia's gas market operating efficiently.²⁹⁰

288 Department of Industry and the Bureau of Resource and Energy Economics 2014, [Eastern Australian Domestic Gas Market Study](#), Canberra, page 47.

289 Australian Government 2014, [Energy White Paper: Green Paper](#), Canberra, Page 45.

290 Although the Draft Report did not make a recommendation on a review of competition in gas, support for the Panel's view on the matter was provided by the Australian Pipeline Industry Association (DR sub, page 3) and Business SA (DR sub, page 6).

The Panel's view

Energy sector reform remains important, since energy is a critical input to other sectors of the economy. Increasing competition in energy will help place downward pressure on energy prices to the benefit of consumers.

Reform of the electricity and gas sectors is well progressed compared to other sectors, but it is unfinished. Reforms COAG committed to in December 2012 are still not complete.

Examples of previously agreed reforms that should be finalised are the National Energy Retail Law implementation (designed to harmonise regulations for the sale and supply of energy) and retail price deregulation. The Panel notes with concern changes to the template legislation some jurisdictions have made in applying the National Energy Retail Law and observes that this will detract from the originally intended benefits.

Further benefits may be realised in the electricity and gas sectors from transferring more functions, such as reliability standards and licensing arrangements, to the national regime.

Competition benefits may also be realised from greater integration of the Western Australia and Northern Territory energy markets with the National Electricity Market, noting this does not require physical interconnection.

The Panel notes the findings of the Eastern Australian Domestic Gas Market Study that competition is largely working, but that further monitoring of the market may be needed, as it is currently in a transitional phase. The Panel supports a further, more detailed review of competition in the gas sector as proposed in the Study and in the Energy Green Paper.

Implementation

The Australian Government should commit to a detailed review of competition in Australian gas markets, to commence within six months of accepting the recommendation.

States and Territories should finalise previously agreed electricity market reforms within two years, with progress monitored by the Australian Council for Competition Policy (ACCP).

Recommendation 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.

11.2 WATER

Water sector reform has not progressed as far as electricity reform and, perhaps as a result of the absence of a national framework, has been more piecemeal. Each jurisdiction has made progress, but none could be said to have fully realised the potential consumer choice and pricing benefits from reforms in the sector.

The Panel notes comments in the *Report of the Independent Review of the Water Act 2007* that arrangements for the Murray-Darling Basin in the *Water Act 2007* will not be rolled out fully until 2019. The Panel supports the view that ‘Australian and Basin State governments and their agencies need to work together to clearly and transparently communicate how reforms are being implemented’.²⁹¹

Under the 2004 National Water Initiative, governments committed to best-practice water pricing. In 2011, the Productivity Commission (PC) identified economic efficiency as the overarching objective for urban water pricing.²⁹² The PC considered that equity issues are best dealt with outside the urban water sector through, for example, taxation and social security systems.

Notwithstanding this (and other) reports, the National Water Commission (a body that provides advice to the Council of Australian Governments on water and was announced in the 2014-15 Budget to be abolished)²⁹³ found that a failure to implement pricing reforms meant that jurisdictions were not realising the full intended benefits.

The National Water Initiative encompasses the objectives of two reforms: independent economic regulation; and the institutional separation of service providers from the regulatory and policy functions of governments. However, in the Panel’s view, neither of these objectives have been met on a nationally consistent basis. Both reforms are important to delivering efficient pricing where there is a natural monopoly or where markets are not well developed. The National Water

291 Australian Government 2014, *Report of the Independent Review of the Water Act 2007*, Canberra page x.

292 Productivity Commission 2011, *Australia’s Urban Water Sector*, Canberra, page 69.

293 National Water Commission 2011, *Review of Pricing Reform in the Australian Water Sector*, Canberra, page xii.

Commission notes²⁹⁴ that it continues to support independent economic regulation and institutional separation as important complements to pricing reforms.

PwC identified a number of drivers for reform in the water sector in its 2010 report (prepared for Infrastructure Australia), *Review of Urban Water Security Strategies*.²⁹⁵ They are:

- **Drought and climate change.** In the past decade, rainfall and inflows to water storages in southern Australia have been considerably lower than long-term averages.
- **Higher than expected population growth.** In September 2008, the Australian Bureau of Statistics updated its projections for the States and capital cities based on the results of the 2006 census.
- **A legacy of under investment in water infrastructure.** Until recently, expenditure on water infrastructure to service urban populations has been relatively small (compared to other essential services) due to a combination of capital/funding constraints, political constraints to the construction of new dams and the belated recognition of a changing climatic pattern.
- **Inadequate institutional structures and management arrangements.** The scale of changes in water demand and rainfall are such that some States are not sufficiently equipped to respond to achieve adequate levels of urban water security and consumer choice.

Pricing that better reflects the cost of provision may address these concerns by increasing incentives for the private sector to invest in water infrastructure. This would allow the market to better address issues related to meeting increased demand. The Australian Water Association notes:

In order to attract private investment the regulation of the water sector will need to change. There is a desperate need for consistency of economic regulation across all states and territories to attract long-term private investment. (DR sub, page 2)

The Panel agrees, noting that governments have been slow to respond to changing demand for water, and to put in place incentives for sufficient investment (either private or public). The PwC report also states, 'Most jurisdictions can point to ongoing pricing reform, and it is important to acknowledge that phased implementation is a justifiable policy' (page 59).

Major 'overnight' changes to water prices would impose a considerable economic shock on individuals and businesses, whose capacity to change water-use behaviour in the short term is limited. Unfortunately, institutional inertia and the lack of political acceptability and public understanding of reforms are also impediments to progress.

IPART notes:

... there is significant scope to reform the water sector. (sub, page 14)

Postage stamp pricing reflects the average cost of servicing a given area (eg, Sydney Water's area of operations). The National Water Initiative (NWI) pricing principles allow postage stamp pricing, but state a preference for differentiated prices in specific areas. However, postage stamp pricing remains NSW government policy. (sub, page 17)

294 Ibid., page xiv.

295 PwC 2010, *Review of Urban Water Security Strategies*, Sydney, Page 9.

IPART further notes that it is:

... important to develop nationally consistent principles in relation to competition and private sector participation in the water market, similar to the reform of water entitlements from the 2004 National Water Initiative. (sub, page 20)

This view is supported by Infrastructure Australia in its National Infrastructure Plan.²⁹⁶ The Plan states that Australia's water industry has a complex regulatory structure, with each State and Territory having its own economic regulator. In comparison, the UK has one water regulator to serve 60 million people. The Panel has proposed creating an Access and Pricing Regulator (see Recommendation 50) which may reduce this complexity should States and Territories refer national water functions to it.

The Panel's view

Progress in the water sector has been slower than reforms in electricity and gas.

The National Water Initiative set out clear principles which, if fully implemented, would better reflect the cost of providing water, promote greater private involvement in the sector and establish more rigorous economic regulation. Those principles remain appropriate and state and territory governments should continue to progress their implementation.

The Panel believes that the ACCP (see Recommendation 43) can play a role in improving pricing in jurisdictions through working with state and territory regulators to develop a national pricing framework, with potential application to all jurisdictions.

Implementation

Further reform in the water sector is the responsibility of States and Territories. All jurisdictions should develop timelines to implement the principles of the National Water Initiative within six months of the ACCP developing pricing guidelines.

The ACCP should develop best-practice pricing guidelines in consultation with state and territory regulators.

296 Infrastructure Australia 2013, *National Infrastructure Plan*, Sydney, page 60.

Recommendation 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.

11.3 TRANSPORT

Aviation

All major Australian airports have been privatised either through outright sale or through 50-year leases.²⁹⁷ Airports tend to have strong natural monopoly characteristics. Consequently, the effectiveness of the regulatory framework applying post-privatisation is important to ensure appropriate prices and quality of service.

In 2011, the PC reported on the regulation of airport services, concluding that: airports' aeronautical charges, revenues, costs, profits and investment look reasonable compared with airports overseas, which are mostly non-commercial; and existing safeguards have seldom been used — including Part IIIA access declarations. There has also been significant investment at airports, which as a result have not suffered bottlenecks compared to other sectors.²⁹⁸

The PC noted that capital city airports possessed significant market power and found that price monitoring data since 2002-03 showed substantial price increases at most of the monitored airports. However, taken in context, price increases did not indicate systemic misuse of market power.²⁹⁹

The increase in prices has, however, raised concerns with users. The Board of Airline Representatives Australia notes:

While the industry has achieved large improvements in productivity, international aviation in Australia is facing significant cost pressures from the prices associated with its 'aviation infrastructure' (jet fuel supply, airports, air traffic management and fire services), which will have consequences for air travel affordability and the economic growth the industry generates. (sub, page 3)

297 With a 49-year extension available.

298 Productivity Commission 2011, *Economic Regulation of Airport Services*, Canberra, Finding 4.1, pages XX, XLVI.

299 Ibid., Finding 7.2, page XLVIII.

Despite substantial regulation in place constraining the market power of airports, an opportunity for promoting competition was lost when Sydney Airport was privatised. When it was sold in 2002, the Australian Government provided the acquirer with the right of first refusal to operate a second Sydney airport. The ACCC notes that the right of first refusal confers a monopoly to Sydney Airport over the supply of aeronautical services for international and most domestic flights in the Sydney basin. While including this right increased the sale price, it likely had an anti-competitive impact on the aviation sector (sub 1, page 36).

The Australian Airports Association considers that land use planning and other restrictions limit the ability of smaller airports to compete with larger ones (sub, page 5).

Other issues raised in submissions include the lack of competition between jet fuel suppliers at airports and the cost of services provided by Airservices Australia.

The Board of Airline Representatives Australia notes that international airlines operating to Australia pay some of the highest 'jet fuel differentials' globally (sub, page 7).

In relation to services provided by Airservices Australia, the Board of Airline Representatives Australia notes that the existing structure of Airservices' prices encourages inefficiency in the aviation industry and distorts competition, both between regional airports and with other modes of transport (sub, page 4). The Panel notes the PC has recommended that the Australian Government conduct a scoping study to investigate efficiency gains and other merits of privatising some or all of the business activities of Airservices Australia, including reviewing its capital expenditure program.³⁰⁰

A number of submissions raise the potential need for access regulation at Australian airports. This issue is discussed in [Chapter 24](#).

The Panel's view

The price monitoring and 'light-handed' regulatory approach in aviation appears to be working well overall. However, if prices continue to increase as fast as they have been, that would raise concerns and may warrant a move away from light-handed regulation for individual airports.

Although the regulatory framework for airports appears to be working well, airport privatisation could have been handled better. A significant opportunity for greater competition was lost as a result of Sydney Airport being privatised with the new owner given first right of refusal to operate the second Sydney Airport.

Privatising in a way that restricts competition may result in a higher sale price, but it comes at the long-term cost of a less competitive market structure.

Competition in jet fuel supply and the pricing structure for services provided by Airservices Australia should be a focus of further reform efforts in the sector.

Ports

Port reform has resulted in the corporatisation of ports in all States and the Northern Territory. Most major ports have moved to a landlord model, where the authority is involved in providing core activities only and more contestable elements, such as stevedoring, dredging and towage, are

300 Productivity Commission 2014, *Public Infrastructure*, Canberra, Recommendation 2.2, page 41.

provided by private contractors.³⁰¹ Some ports have been privatised while others remain in government hands.

Declaration of harbour towage services was repealed in 2002, as the industry was deemed sufficiently competitive.³⁰²

Stevedoring activities remain declared services and subject to price monitoring by the ACCC. The most recent report by the ACCC, *Container stevedoring monitoring report no. 15*, highlights that competition in the sector is increasing and past reform focused on improving productivity has been successful, with users benefiting through lower real prices and better service levels.³⁰³

However, the ACCC notes that returns in the industry remain persistently high, suggesting more investment in capacity and greater competition may be needed.³⁰⁴ This raises the question of whether port authorities are giving sufficient consideration to the need to foster greater competition through making land available for new entrants. New terminals are opening in Brisbane and Sydney and one is in prospect for Melbourne. However, as Hutchison Ports Australia notes, for its entry to occur:

... governments had to decide to develop and offer extra land for a new operator and Hutchison needed to submit a winning bid and invest hundreds of millions of dollars establishing new terminals. (sub, page 2)

As with airports, an important issue when privatising ports is ensuring the regulatory regime can sufficiently influence port authority activities to constrain their monopoly power. Some bulk ports may have only a few large customers that can exert countervailing power, but others may have significant market power in the absence of effective regulation. This creates the potential for monopoly pricing in the absence of effective post-sale regulation.

An example of the former is the Hunter Valley coal chain, which brought together 11 coal miners, four rail haulage providers and three terminals to optimise the coal export chain in the Hunter Valley.³⁰⁵ Most city container ports are likely to fall into the latter category, with neither shipping lines, stevedores nor shippers having the countervailing power and/or the incentive to effectively constrain the port authority or each other.

The ACCC also cites anecdotal evidence suggesting ports were being sold or considered for sale with restrictions on competition in place to enhance sale prices (sub, page 37). The ACCC notes:

Privatisation of port assets can raise issues of efficiency where monopoly rights are conferred by state governments, with no consideration to the prospect for competition and/or the need for economic regulation. This has the potential to result in lost efficiencies and/or higher charges which may be hard to remedy after the assets are sold. (ACCC sub 1, page 38)

301 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 15.

302 Ibid., page 15.

303 Australian Competition and Consumer Commission 2013, *Container stevedoring monitoring report no. 15*, Canberra, page viii.

304 Ibid., page ix.

305 Hunter Valley Coal Chain Coordinator, viewed 9 February 2015, www.hvccc.com.au/AboutUs/Pages/History.aspx.

The Panel considers that land leased at ports to terminal operators and other service providers should reflect the opportunity cost of that land rather than the ability of the port authority to charge monopoly prices.

The recent policy focus has largely been on infrastructure provision at the ports and in the port surrounds rather than the regulatory framework. For a port to operate effectively, road and rail links also need to be optimised. Better use of ports is linked to improvements in land-use planning as well as pricing of other transport modes.³⁰⁶

A number of submissions raise the potential need for access regulation at privatised ports in the future. This issue is discussed in [Chapter 24](#).

The Panel's view

Significant reform of ports has been achieved, which has benefited users. Nonetheless, various participants in many of the port services chains have significant market power. Regulators and regulatory frameworks need to recognise this, including through the application of pricing oversight and, if necessary, price regulation.

Leasing costs at ports subject to price regulation should aim to reflect the opportunity cost of the land and not the ability to extract monopoly rents. The latter represents an inefficient tax on consumers and business.

As with other privatisations, port privatisations should be undertaken within a regulatory framework that promotes competition and prevents monopoly pricing, even though this may result in a lower sale price.

Cabotage (coastal shipping and aviation)

Australia has a policy of reserving coastal shipping for locally flagged vessels, although foreign-flagged ships may carry cargo and passengers between Australian ports after being licensed to do so.

Significant changes were made to the process of licensing foreign vessels under the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

This process is intended to grant Australian ships the opportunity to argue that they are in a position to undertake voyages proposed to be undertaken by foreign vessels, and therefore foreign vessels should not receive licenses. This represents a form of protection for Australian-registered ships.

On 8 April 2014, the Australian Government announced separate Department of Infrastructure and Regional Development-led consultations on coastal shipping regulation.³⁰⁷ In view of the separate Government process to consider possible reforms to coastal shipping, the Panel has not examined this issue in detail.

However, the Panel has received many submissions arguing that changes made under the Coastal Trading (Revitalising Australian Shipping) Act have raised the cost and administrative complexity of coastal shipping regulation without improving its service or provision.

306 For further discussion see Australian Competition and Consumer Commission 2013, *Container stevedoring monitoring report no. 15*, Canberra, page 18 and Infrastructure Australia 2011, *National Ports Strategy*, Sydney.

307 See Australian Government 2014, *Options Paper: Approaches to regulating coastal shipping in Australia*, Canberra.

This is highlighted by the Tasmanian Farmers and Graziers Association that notes:

... one of the key regulatory impediments in Tasmania is the lack of competition and demarcations surrounding coastal shipping.

These onerous regulations result in the 420 km distance across Bass Strait being the most expensive sea transport route in the world. (sub, page 8)

The Department of Infrastructure and Regional Development notes:

A review into coastal shipping regulation is currently underway by the Australian Government, with a view to revising or reversing measures that hinder the competitiveness of Australia's shipping services. (DR sub, page 7)

Similar to coastal shipping, Australia also prevents foreign-flagged airlines from picking up domestic passengers on a domestic leg of an international flight. The Panel received representations during its visit to Darwin that aviation cabotage prevents domestic passengers from embarking on foreign-flagged international flights that transit through Darwin.

For example, a foreign-flagged flight originating in Malaysia and travelling to Darwin and then on to Sydney cannot embark domestic passengers for the Darwin to Sydney leg, yet an Australian international carrier flying the same route could embark passengers for the Australian leg.

Air cabotage restrictions in Australia are stricter than those in shipping. Generally foreign-flagged ships can apply for permits to engage in coastal shipping where there is no Australian-flagged vessel to undertake the task, but this is not available to foreign-flagged airlines.

Lateral Economics notes:

Banning foreign carriers everywhere is a blunt instrument for assisting domestic operators who care mainly about protecting their east coast custom. (DR sub, page 4)

The Department of Infrastructure and Regional Development considers that reducing restrictions on air cabotage could compromise safety.

The Draft Report's proposal is likely to be seen as winding back some of the safety arrangements applicable to domestic aviation. (DR sub, page 5)

However, it is not clear what additional safety considerations emerge from allowing flights that are already transiting Australia or allowed to fly to Australia to embark domestic passengers or cargo.

As Lateral Economics notes:

While no supranational body exists for ocean travel, safety, security, environmental standards for air travel are already set by the International Civil Aviation Organisation. Expectations and legal frameworks around labour conditions for foreign workers servicing short stay planes are also less contentious than for longer stay coastal ships. (DR sub, page 5)

The Panel sees considerable benefits flowing from removing air cabotage restrictions for remote and poorly served domestic routes and regards the current blanket air cabotage restrictions on foreign-flagged carriers as inefficient.

Consideration should be given to removing cabotage restrictions for all air cargo, and for passengers for specific geographic areas, such as island territories, and for poorly served routes. One way this

could be achieved is through a permit system, allowing foreign carriers to carry domestic cargo or passengers on specific routes for a defined period of time.

The Panel's view

The Panel considers that reform of coastal shipping and aviation cabotage regulation should be a priority.

Consistent with the approach the Panel recommends for other regulatory reviews, the Panel considers that restrictions on cabotage for shipping and aviation 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 policy can only be achieved by restricting competition.

This approach should guide the current Australian Government consultation process in relation to coastal shipping.

The Panel sees considerable benefits flowing from removing air cabotage restrictions for remote and poorly served domestic routes and regards the current blanket air cabotage restrictions as inefficient.

Implementation

Within 12 months of accepting the recommendation, the Australian Government should identify remote and poorly served routes on which air cabotage restrictions could be removed for passenger services. Within two years of accepting the recommendation, cabotage restrictions that are not in the public interest could be removed on these routes for air passenger services as well as for air cargo. Cabotage restrictions on coastal shipping that are not in the public interest should also be removed following the current Australian Government review.

A permit system could be used if needed to monitor and regulate foreign-flagged air services operating domestically.

An independent body, such as the proposed ACCP (see Recommendation 43), should report on progress in reducing cabotage restrictions.

Recommendation 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.

Rail freight

In the rail sector, the NCP reforms focused on the structural separation of the interstate track network from above-rail operations. This included forming the Australian Rail Track Corporation and developing access regimes and regulatory bodies. Networks have been declared under the National Access Regime or equivalent state-based regimes. Open access was also applied sporadically to related rail assets, such as bulk handling assets, intermodal terminals, coal ports and grain export facilities.

At a national level, the objectives set by the original NCP have been largely met. The application of price controls and the oversight of regulators appear to have addressed concerns about possible monopoly pricing. Regulatory regimes have generally promoted competition and entry has occurred in some access-dependent markets.

Issues raised in submissions include: the complexity of access issues, with some above-track operators having to contend with multiple access regimes to provide a single rail service; that structural separation has been imposed in areas where above-rail competition has not and is unlikely to emerge; and that vertically integrated railway operators can discriminate anti-competitively against above-rail competitors.

In relation to access regimes, Asciano notes:

Asciano operates its above rail operations under six different access regimes with multiple access providers and multiple access regulators. This multiplicity of regimes adds costs and complexity to rail access for no benefits, particularly as many of the access regulation functions are duplicated across states. (DR sub, page 7)

The value of structural separation of track from above-rail operations is more contentious. Aurizon considers that costs of structural separation may pose an additional impost in an industry that struggles to compete with road transport. Aurizon notes:

The fundamental economic problem for the interstate rail network is a lack of scale, which manifests as an inability to compete effectively with road transport. (sub, page 39)

While rail track may be considered a natural monopoly, intermodal competition can act as an effective constraint. This has reduced the need for heavy-handed regulation in much of the rail sector.

However, other stakeholders contend that important parts of the rail freight industry are not competitively constrained by road. Asciano notes:

Rail networks predominantly carrying coal, for example, in the Hunter Valley and Central Queensland, are not competitively constrained by road. The nature of the product (i.e. volume and weight) means that the freight task cannot be met by road. In this situation the track providers have significant unconstrained monopoly power. (DR sub, page 10)

And

... a constant concern is the lack of constraint upon the vertically integrated monopolist's ability to anti-competitively discriminate against its above rail competition such as Asciano. (DR sub, page 11)

Australian Rail Track Corporation considers:

Structural separation has been successful at promoting competition on the interstate network, since the reforms of the 1990's there has been around 25 operators enter the market, three have exited and 15 have consolidated into four main operators. (DR sub, page 2)

The Panel's view

Rail reform has been relatively successful and proceeded at a reasonable pace. Many rail freight tasks face significant competition from road freight, which has made efficiency-enhancing reforms relatively palatable.

Structural separation of track from above-rail operations has increased competition and innovation in the sector, improving rail's efficiency to the benefit of consumers. However, regulators and policymakers should be pragmatic about structural separation of railways, recognising that on some low-volume rail routes vertical integration may be preferable. This may be particularly so where road freight offers effective competition.

Policymakers should look to reduce the number of access regimes and regulators in the rail sector as far as possible as excessive complexity imposes costs on users.

Where rail operators are vertically integrated, access regimes need to have strong non-discrimination provisions and effective compliance and enforcement to promote competition in above-rail operations.

Road transport

Australia is highly reliant on its road network for the efficient movement of goods and people both in cities and the regions. More than 70 per cent of domestic freight is transported by road.³⁰⁸

Australia's road transport industry has historically operated in a diffuse regulatory and funding framework, which has imposed significant costs on some road users. Government involvement in the road transport sector covers licensing, access rules, safety regulation and road construction, maintenance and safety.

The pace of road reform in Australia has been slow compared to other reforms of transport and utilities. This is partly due to roads and road transport being traditionally administered through

308 Australian Trucking Association 2013, *A Future Strategy for Road Supply and Charging in Australia* Canberra, page 3.

government departments, while airlines, airports, and rail have been operated by public companies. Roads have also been seen as public goods, administered by a large number of authorities at the Commonwealth, state and territory and local level, and it has not been widely accepted that a public utility-style organisation could charge directly for them.

As a consequence, the Australian Government and state and territory governments have shown reluctance to explore more direct charging arrangements for roads. Instead, road users are subject to general revenue-raising taxes such as fuel excise, registration and licence fees and other taxes such as stamp duties and the luxury car tax. As a result, road investment decisions are made in the absence of price signals about road network use that would indicate where increased capacity is warranted.³⁰⁹

To date, heavy vehicles, being a significant contributor to road damage over time, have been the main focus of road-charging reforms. The current heavy vehicle charging regimes use a combination of registration fees and fuel-based charges to recover cost on average and do not reflect the actual cost to the road network of an individual vehicle. Moreover, taxes and charges on road users in general are not directly linked to the provision of roads.³¹⁰

By contrast, other natural monopoly sectors, such as electricity and water, are independently regulated to identify efficient costs and prices, with fixed and use-based charges used to fund the provision of the service.³¹¹

Several submissions raise the lack of effective institutional arrangements to support efficient planning and investment in the roads sector.

The Australian Automobile Association considers:

... changes to the current public infrastructure governance model are now well overdue and should be at the forefront of the Government's response to this review or more appropriately, through response to the Productivity Commission's review into public infrastructure. The AAA supports any governance model that bolsters the link between consumer demand and investment in an economically efficient way while taking into consideration equitable access to infrastructure. A move to user pays system for roads will lead to greater efficiency and fairness for motorists, so long as existing indirect taxation is reduced. (DR sub, page 2)

The Business Council of Australia recommends:

Governments should promote efficient investment and use of road transport infrastructure through adoption of broad-based user charging, as part of comprehensive tax reform and reform of Commonwealth and state funding arrangements. (sub, Summary Report, page 15)

Lack of proper road pricing distorts choices among transport modes: for example, between roads and rail in relation to freight, and roads and public transport in relation to passenger transport. Aurizon notes that the lack of commercial viability of much of the rail freight industry is:

309 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 145.

310 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 145.

311 Australian Trucking Association 2013, *A Future Strategy for Road Supply and Charging in Australia*, Canberra, page 3; also Productivity Commission 2014, *Public Infrastructure*, Canberra, page 142.

... exacerbated by the lack of competitively neutral pricing for heavy vehicle freight transport on national highways and arterial roads, despite Federal, and State Government policy advocating the shift of long-haul freight from road to rail for economic and social policy reasons. (sub, page 4)

Lack of proper road pricing also contributes to urban congestion, which is a growing problem in Australia's capital cities.³¹² With road users facing little incentive to shift demand from peak to off-peak periods, greater road capacity is needed. As IPART notes:

During peak periods of demand, roads are allocated through queuing which imposes a far greater cost to road users and the economy than would an effective pricing mechanism. (sub, page 22)

A large number of submissions to the Draft Report come from individuals who consider that existing roads should not be subject to tolls on the basis that they 'have already been paid for'. The Panel considers that roads need to be viewed as a network, since pricing decisions on any road can have implications for other roads. Further, maintenance, traffic and safety improvements to existing roads consume a significant proportion of road budgets and need to be funded just as new road construction must be funded.

Importantly, direct road pricing need not lead to a higher overall financial burden on motorists since existing indirect taxes should be reduced as direct charging is introduced. Road authorities would be subject to prices oversight and independent pricing determinations in similar fashion to monopoly networks in other sectors. As the revenue from direct charging increases and is channelled into road funds, direct budget funding for road authorities should be reduced.

Modelling undertaken by Infrastructure Partnerships Australia suggests that rural and regional drivers will benefit most from a move to replace indirect charges with cost-reflective direct road user charges. This is because rural and regional drivers typically pay large amounts in fuel excise while imposing little cost on the network in the form of congestion or road damage.³¹³ There is also a case for part of the road network to be funded from Community Service Obligations (CSOs), which is likely to favour rural and regional residents.³¹⁴

The Panel draws a distinction between current tolling arrangements, which are for the most part designed to facilitate private financing of roads, and cost-reflective road pricing, which is designed to provide signals to users and road providers.³¹⁵ Imposing tolls on new roads but not on existing roads creates distortions and inequities among road users. Tolls do not provide a signal about which roads are most heavily used and therefore where additional investment is most needed.

The Panel recommends that proper investment and demand management signals for the road network should be the long-term goal. A shift to more direct charging for roads should be pursued in a way that reconfigures current revenues and expenditures to deliver the best results for road users

312 The Bureau of Infrastructure, Transport and Regional Economics estimates the costs of road congestion in Australian capital cities to have been \$9.4 billion in 2005 and projected to more than double by 2020; see Bureau of Infrastructure, Transport and Regional Economics 2007, *Estimating urban traffic and congestion cost trends for Australian cities*, Canberra.

313 Infrastructure Partnerships Australia 2014, *Road Pricing and Transport Infrastructure Funding*, Sydney, page 9.

314 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 159.

315 For an extensive discussion of road pricing see Infrastructure New South Wales 2012, *Pricing Congestion in Sydney*, Sydney.

and the community rather than as an additional tax impost. This will build public confidence in the reform.

Technologies are available that allow greater use of cost-reflective pricing (i.e., a regulated price that estimates the cost of providing the road). Revenue generated from road pricing should be used for road construction, maintenance and safety. This would make the provision of roads more like the provision of other infrastructure, since road authorities would charge directly for their use and allocate the revenue raised towards the operating and construction costs of the road network. As the PC notes in its recent report on infrastructure:

The adoption of a well-designed road fund model or a corporatised public road agency model is paramount to delivering net benefits from the funding and provision of roads. In the future, road funds may be able to consider direct road user charges, which would facilitate more effective asset utilisation and more rigorous assessment of new investments.³¹⁶

Consult Australia considers:

... a comprehensive debate regarding the full application of road user charging, including the development of a national scheme, is long overdue in Australia. Reliance on traditional fuel excise as the key revenue tool to fund infrastructure is internationally recognised as having limited longevity, with diminishing reserves and increased fuel efficiency curtailing revenues. An infrastructure funding regime based on fuel taxes has no sustainable future. (DR sub, page 2)

Importantly, greater use of cost-reflective pricing linked to road provision holds the prospect of both more efficient use of road infrastructure as well as more efficient investment based on clearly identified demands. The Department of Infrastructure and Regional Development notes:

The Department is of the view that road investment and pricing reform is the next area of major economic reform for Australia, reflected by activities already included in the current reform agenda. (DR sub, page 1)

Considerable work has been undertaken by the Heavy Vehicle and Investment Reform project to progress both user-charging and institutional reform.³¹⁷ The project identified the necessary elements of an integrated charging, funding and investment framework and the processes needed to successfully implement the reforms. The framework includes:

- planning and expenditure reforms to encourage better investment decisions in Australia's road network;
- funding reforms to link revenue raised from road users to road investments and reduce reliance on taxation at a local, state and territory and Commonwealth level through the annual budgetary process;
- better investment in the road network to provide more access for high-productivity vehicles;
- an appropriate system of accountability through economic regulation to ensure that charges are set so as to promote efficient and sustainable use of the road network; and

³¹⁶ Productivity Commission 2014, *Public Infrastructure*, Canberra, page 21.

³¹⁷ National Transport Commission, *Heavy Vehicle Charging and Investment Reform, Overview*, Canberra.

- charging that is fair, transparent and sustainable and reflects the costs road users impose on the network.³¹⁸

The challenge is now to agree on a model of implementation.

Given the size and importance of the road transport industry for the economy, and the importance of efficient road use and provision for urban and regional amenity and consumer wellbeing, much greater progress needs to be made in this area.

This policy shift will require co-operation from all levels of government. As road pricing is introduced by the States and Territories, the Australian Government should reduce excise and grants to the States and Territories. This would allow the reform to be fiscally neutral.

The Panel's view

Reform of road pricing and provision should be a priority. Road reform is the least advanced of all transport modes and holds the greatest prospect for efficiency improvements, which are important for Australian productivity and community amenity.

Technologies are available that allow for more widespread application of cost-reflective pricing in roads, taking into account location, time and congestion. Revenue raised through road pricing should be channelled into road funds to promote more efficient road use and investment.

Co-operation from all levels of government will be needed to ensure that road pricing does not result in an additional impost on road users.

Implementation

Introducing road pricing to fund road provision is a long-term reform that requires community confidence in the benefits to be gained.

Governments should make a long-term commitment to transform the road transport sector to operate more like other infrastructure sectors. Infrastructure providers should bill users directly for usage and base investment decisions on their economic value, supplemented by government CSO payments where necessary.

As an initial step, road funds could be set up separately to governments' general budgets to increase transparency around road funding. Fuel taxes and other indirect taxes levied on road users should be hypothecated to these road funds. Over time, as direct road charges increase, these taxes should be reduced. Australian Government grants to the States and Territories should also be adjusted in line with the fall in Australian Government revenue from fuel excise.

Within 12 months of agreeing to this recommendation, a working group of Australian Government and state and territory transport and treasury officials should be commissioned to develop pilots and trials. This working group will advise governments around: choosing technologies to allow mass time-of-use and location-based charging; creating road funds and directing revenues to these funds; and reforming road authorities to restructure their operations along the lines of other infrastructure network providers.

318 For more details, see [National Transport Commission, *Heavy Vehicle Charging and Investment Reform, Elements of Reform*](#), Canberra.

The proposed ACCP (see Recommendation 43) should report on progress in road transport reform as part of its annual competition policy assessments.

Recommendation 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.

Public transport

Public transport reforms have not been pursued as part of competition policy. Public transport governance systems vary from State to State and city to city. However, public transport is mostly owned and operated by government. Where the private sector provides substantial operations (for example, private bus operators, taxis and hire car services), these are often regulated or licensed by governments.

The experience in Victoria serves as an example of public transport reforms that have ultimately delivered significant benefits despite some initial problems. In the early 2000s urban rail, tram and country passenger rail operations were privatised. However, within a few years most of the operators needed to be bailed out by the Victorian Government. Despite significantly improved service levels and increased passenger satisfaction, overestimates of patronage built into the bids meant that the subsidies agreed to under the contracts were insufficient to keep the operators solvent.³¹⁹

Although the Victorian Government needed to bail out operators, it did not retake ownership of services. Train, tram and bus services continue to be operated privately and managed through complex contractual arrangements that provide incentives to maintain and improve service quality.

Applying the lessons learned from other sectors to public transport could see greater use of contracting out, privatisation or franchising, subject to a regulatory regime imposing safeguards to maintain service levels. Through careful contracting, service levels and choice can be maintained or improved. Bus services are likely to be contestable and, although governments may wish to mandate a minimum level of service, they should not restrict other providers from entering the market.

The Panel's view

Extending NCP principles to public transport could see more franchising and privatisation of potentially competitive elements of public transport, stronger application of competitive neutrality principles and removal of regulation that limits competition. This holds the prospect of providing services more efficiently and improving service levels.

319 Victorian Department of Infrastructure 2005, *An Overview of Passenger Rail Franchising in Victoria*, Melbourne, pages 8-9.

12 HUMAN SERVICES

The lives of Australians are immeasurably richer when they have access to high-quality human services. The human services sector covers a diverse range of services, including health, education, disability care, aged care, job services, public housing and correctional services.

Good health makes it easier for people to participate in society. Education can help put people on a better life pathway; quality community services, including aged care and disability care and support, can provide comfort, dignity and increased opportunities to vulnerable Australians.

Given the size of the human services sector, which is set to increase further as Australia's population ages,³²⁰ even small improvements will have profound impacts on people's standard of living and quality of life. As Australian Unity notes:

Without fundamental change to the health and aged care systems, the ageing of Australia's population will mean a future of greater government-managed care and increased rationing of health services. Fundamental change must revolve around the greater adoption of market economy ideals including a focus on consumer, rather than producer, interests. Competition reform is a critical component. (DR sub, page 4)

Governments at all levels have traditionally played an important role in delivering human services. A number of human services serve important social objectives (for example, equal access to education and health services) and users of human services can be among the most vulnerable and disadvantaged Australians. Because of these characteristics, the scope to use competition or market-based initiatives may be more limited than in other sectors.

Despite the complexity of many human services markets, there is growing interest, both in Australia and overseas, in opportunities to make use of competition-based instruments to secure better outcomes for users of human services and better value for money. As the ACCC states:

There is scope for greater competition in human services, the potential benefits of which may include lower prices, greater efficiency in service provision, greater innovation and improved consumer choice. (sub 1, page 8)

In many human services, choice and diversity of service providers already exist, for example, general practitioners, dentists, physiotherapists, private hospitals and private schools. In recent years, governments have also introduced choice in areas such as disability and aged care.

Panel discussions with States and Territories also highlighted innovative approaches to delivering human services, with policies reflecting the unique characteristics of each jurisdiction and the service in question (see [Section 12.1](#)).

320 Australian Government 2015, *2015 Intergenerational Report, Australia in 2055*, Canberra.

A number of submissions to the Draft Report support the principles identified in the Panel's Draft Recommendation on human services³²¹ that:

- user choice should be placed at the heart of service delivery;
- funding, regulation and service delivery should be separate;
- a diversity of providers should be encouraged while not crowding out community and voluntary services; and
- innovation in service provision should be stimulated while ensuring access to high-quality human services.

However, some submitters note that changes in human services require a cautious approach, due to the unique challenges of implementing choice and competition in the diverse human services sector, and the impact on people's lives if changes are poorly implemented.³²²

Some submissions and feedback from consultations note that the Panel's discussion of the separation of funding, regulation and service delivery in human services in the Draft Report could have been more nuanced. In particular, the Panel is urged to acknowledge that governments will continue to play a role as market stewards, even where they no longer provide services (see National Disability Services, DR sub, page 2).

The importance of access for users to appropriate data and information in human services is also stressed in feedback. These issues are discussed separately in [Chapter 16](#) on 'Informed choice'.

12.1 EVOLVING APPROACHES TO HUMAN SERVICES

The Panel recognises that Australians' experiences of human services vary significantly between jurisdictions and across sectors and sub-sectors. As the Joint Submission from Regional Victorian Not-for-profit agencies notes:

Human services does not really describe a single sector at all. It is a variety of sub-sectors, where both supply and demand differ dramatically. (DR sub, page 3)

Differences across jurisdictions and between sectors (and sub-sectors) mean that a variety of approaches is needed to improve people's experience of human services. As the Joint Submission from Regional Victorian Not-for-profit agencies notes 'Because the availability of and access to services differs so dramatically it is hard to design a one-size fits all approach' (DR sub, page 3).

Over time, governments have played an ever larger role in determining which human services are supplied, how much is supplied (through the budget process) and in delivering many of the services as well. However, all Australian jurisdictions have also gone some way towards including choice and competition principles into various human services sub-sectors.

321 Submissions that generally support the principles include: ACCC, DR sub, page 17; National Disability Services, DR sub, page 1; Northern Territory Government, DR sub, page 1; and NSW Business Chamber, DR sub, pages 1-2. Submissions that generally do not support the principles in the context of some or all human services include: Australian Education Union, DR sub, page 2; Community and Public Sector Union, DR sub, page 2; and Consumer Action Law Centre, DR sub, page 2.

322 See, for example: CHOICE, DR sub, pages 10-12; National Seniors Australia, DR sub, pages 5-6; and South Australian Government, DR sub, pages 6-10.

The Business Council of Australia notes:

Most governments in Australia have already started to introduce competition into the delivery of some areas of human services ... They are giving consumers more choice, taking regulation out of government departments and giving it to independent authorities ... Each area of human services is different and each jurisdiction is at varying stages of reform in these sectors. (DR sub, page 8)

The concept of best practice in service delivery has also changed. Alford and O’Flynn conclude in their book, *Rethinking Public Service Delivery*:

In the post-war era, when services were delivered by the governments’ own employees, the quest was to make them work more efficiently, so managerialist reforms... were the keys to better government. In the 1980s, the answer changed. Better and cheaper government would come from handing public services over to private enterprise, in a new era of contractualism — separating purchasers from providers, and subjecting providers to classical contracting and competitive tendering. By the turn of the twenty-first century, the answer changed again. More integrated and responsive public services would come from greater collaboration — between government agencies, private firms and non-profits ...

In fact, none of these waves of reform eliminated what had come before. Rather, each phase overlaid its predecessor, so that today, public managers deal with a whole variety of external providers, through an array of relationships... It may be that there is a new public sector reform panacea waiting in the wings. But...we offer a different answer: *there is no ‘one best way’*. Instead, the new world of public service delivery is one where there are different ways for different circumstances.³²³

Panel discussions with States and Territories highlighted innovative approaches to human services delivery, with policies reflecting the unique characteristics of each jurisdiction and the service in question.

Box 12.1 provides some examples of these innovative approaches to improving human services delivery across Australian jurisdictions through: designing contracts to focus on user demand and outcomes (rather than outputs or inputs); governments partnering with not-for-profit providers and communities to deliver services; and using new forms of financing, such as social benefit bonds.

Governments have also moved towards directly funding users to purchase services. Box 12.2 provides examples of these innovative approaches.

323 Alford, J and O’Flynn, J 2012, *Rethinking Public Service Delivery*, Palgrave Macmillan, Basingstoke, page 254.

Box 12.1: Innovations in human services delivery

Jurisdictions across Australia have developed human services delivery models that better reflect outcomes desired by service users and local communities.

Australia has a long tradition of using public-private partnerships (PPPs) to deliver infrastructure projects. More recently, PPPs have been used to improve human services delivery outcomes. The Western Australian Economic Regulation Authority notes that newer PPPs are a:

... mechanism to introduce incentives for a greater level of private sector innovation and contestability into government services and associated infrastructure delivery.³²⁴

The West Australian Joondalup Health Campus PPP, which is the largest health care facility in Perth's Northern suburbs, provides 24-hour acute care from an integrated public and private campus. Established in June 1996, it is operated by Ramsay Health Care — Australia's largest private hospital operator. The hospital treats public patients on behalf of the State Government under an outcomes-based contract.³²⁵

Infrastructure Partnerships Australia notes that the Joondalup Health Campus is 'widely considered to be one of the nation's best examples of a successful healthcare PPP',³²⁶ achieving consistent 'A' ratings in reviews conducted by the Western Australian Department of Health's Licensing Standards and Review Unit.³²⁷ Joondalup offers innovative services, responding to user feedback by introducing an online patient admission system in late 2013.

South Australia is using a PPP framework for the new Royal Adelaide Hospital³²⁸, and the New South Wales Government PPP for the new Northern Beaches Hospital includes clinical and other services for public patients under a contract with the New South Wales Government (New South Wales Government sub, page 24).³²⁹

Governments are also working with communities and not-for-profit providers to design service delivery systems that meet the needs of local communities. Under the Australian Government's Communities for Children initiative,³³⁰ non-government organisations are funded as 'Facilitating Partners' to develop and implement a whole-of-community approach to early childhood development in consultation with local stakeholders. Examples of services delivered under this initiative include home visits, early learning and literacy, and child nutrition. A national evaluation of Communities for Children found:

324 Western Australia Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final Report*, Perth, page 128.

325 The Western Australian Department of Health Annual Report states: 'The Department of Health contributes to "Outcomes Based Service Delivery."' As part of the annual report, Joondalup Health Campus is assessed against several outcomes-based KPIs including: Proportion of privately managed public patients discharged to home, unplanned readmission rate, and survival rates for sentinel conditions of privately managed public patients. See Western Australian Department of Health, *Annual Report 2011 — 12*, Perth, page 62.

326 Infrastructure Partnerships Australia 2013, *A Submission on the Future Direction for Public Private Partnerships*, Sydney, page 16.

327 Joondalup Health Campus 2011, 2011 *Annual Report*, Joondalup, page 2.

328 SA Health Partnership 2013, *The new Royal Adelaide Hospital*, SA Health Partnership, Adelaide, viewed 24 October 2014, www.sahp.com.au.

329 New South Wales Government 2015, *Northern Beaches Health Service Redevelopment*, New South Wales Government, Sydney, viewed 5 February 2015, <http://nbhsredev.health.nsw.gov.au/>.

330 Australian Government Department of Social Services 2014, *Families and Children's Services*, Department of Social Services, Canberra, viewed 5 November 2014 www.dss.gov.au/our-responsibilities/families-and-children/programs-services/family-support-program/family-and-children-s-services.

Box 12.1: Innovations in human services delivery (continued)

The number and strength of networks increased, as did trust and respect between service providers ... Facilitating Partners have been most effective when the non-government organisations they represent have been well-known in the community ... Having a community focus has enabled service delivery to be flexible to meet the needs of the community.³³¹

The Western Australian government partners with local community groups through its Delivering Community Services in Partnership Policy. This policy moves away from input funding and funds not-for-profits for achieving outcomes and sustainable prices. It seeks to improve outcomes for all Western Australians by building partnerships between the public and community sectors in policy, planning and delivery.

Governments also use new funding channels to increase the reach of social programs. The New South Wales Government has partnered with the private and community sectors to develop two social benefit bonds:

- with UnitingCare Burnside for the New Parent Infant Network (Newpin) bond; and
- with a consortium of The Benevolent Society, Westpac and Commonwealth Bank.

These programs are initially funded by private investors, who receive a return on their investment if improved social outcomes are achieved.

Newpin is a child protection and parent education program that works with families to enhance parent-child relationships. The social benefit bond has allowed UnitingCare to expand and enhance its existing program. An early evaluation of the program recognises that much has been achieved in a short timeframe, including:

- Newpin staff working more closely as a team, translating to better continuity of care for families, more informed practice, and a greater focus on priority needs;
- formalising family assessments, planning and reporting processes, creating a more transparent basis for action and tracking progress over time — which is energising and motivating for both staff and parents; and
- introducing more comprehensive data capture and reporting, forming a stronger basis for reflecting on and improving practice.³³²

In Victoria, the Homelessness Innovation Action Projects have supported innovative approaches to tackling homelessness. In Stage One the government selected 11 projects to be delivered by private organisations based on their ability to provide a new approach to service delivery in the area of homelessness, with a focus on prevention and early intervention.

After a comprehensive and independent evaluation of the project performance the seven projects that demonstrated the best outcomes for clients were funded to continue to Stage Two. These included a project linking employment, housing, and personal support programs for vulnerable young people; and a regional outreach project for elderly homeless people.³³³

331 Muir et al 2010, 'The national evaluation of the Communities for Children initiative', *Family Matters* No. 84, Australian Institute of Family Studies, Melbourne.

332 Urbis 2014, *Evaluation of the Newpin SBB program Implementation Report*, NSW Treasury, Sydney.

333 Victorian Department of Human Services 2015, *Homelessness Innovation Action Projects*, Department of Human Services, Melbourne, viewed 29 January 2015

www.dhs.vic.gov.au/about-the-department/funding,-grants-and-tenders/homelessness-innovation-action-projects.

Box 12.2: Examples of direct user choice

With the introduction of the National Disability Insurance Scheme³³⁴ (NDIS) over the next five years, disability service providers will move from being contracted by governments to being registered providers with the National Disability Insurance Agency (NDIA). Funding for disability support will follow individual service users rather than service providers, allowing individuals to choose the providers from whom they wish to receive services. Individuals electing to receive direct payments for purchasing their support (subject to a risk assessment) will not be restricted to choosing providers registered with the NDIA.

This builds on previous work undertaken by the States to personalise disability care and support. For example, in Queensland the ‘Your Life, Your Choice’ disability support initiative allows eligible Queenslanders to participate actively in planning and delivering their own disability support and services. The South Australian Government submission also notes:

Prior to the Australian Government’s announcement of the NDIS, the South Australian Government had already commenced a transition towards individualised funding for clients, including self-management, in order to allow people with disability to have choice and control over their own support packages. (DR sub, page 8)

In the area of dental services, both New South Wales and Queensland have introduced voucher schemes for citizens who are eligible for publicly funded dentistry. These vouchers can be redeemed at private dental practices, providing more accessibility and choice for users. In Queensland, the dental voucher scheme has reduced the number of people waiting more than two years for dental procedures from 62,513 to zero.³³⁵

The Australian Government is providing consumer-directed Home Care Packages for older Australians who want to remain in their own home but need some assistance with transport, domestic chores or personal care. Under these packages, government provides funding to users who have the right to use their budget to purchase the services (within the scope of the program) they choose. Users enter into a contract with home care providers to deliver the services. An advocate can represent the user in this process, if desired.

There are a large number of government approved home care providers across the States and Territories, including for-profit and not-for-profit, religious and non-denominational bodies. Users may choose to ‘top up’ their packages by purchasing additional care and services through their home care providers.³³⁶

12.2 GOVERNMENTS AS STEWARDS

Innovation in the design and management of human services receives cautious support in submissions, including from organisations that supply human services to the most vulnerable

334 National Disability Insurance Scheme 2015, *National Disability Insurance Scheme*, National Disability Insurance Agency, Canberra, viewed 29 January 2015 www.ndis.gov.au/.

335 Queensland Government 2014, *Queensland’s Renewal Program: Achievements, July–September 2014 Quarterly Update*, Brisbane, page 14.

336 Australian Government Department of Social Services 2015, *Home Care Packages*, Commonwealth of Australia, Canberra, viewed 29 January 2015 www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/reforms-by-topic/home-care-packages.

members of the community.³³⁷ However, they stress that the Panel’s approach should not be seen as bolstering simplistic arguments for privatisation or contracting out of public services, nor giving comfort to a philosophy of ‘private good, public bad’.

The Panel heard two particular notes of caution expressed through consultations and in submissions.

First, governments cannot distance themselves from the quality of services delivered to Australians. Policy in human services cannot simply be set and then forgotten. It needs to evolve over time in response to user experience with different approaches to service quality and access.

Second, although changes in human services can often be urgent, they should not be rushed. There are complex issues that will take time to work through so that people’s lives, particularly those facing disadvantage, are not unduly or unhelpfully disrupted.

For example, Western Australia began work to reform disability care and support services well in advance of the NDIS being introduced. Western Australia’s disability system has ‘evolved through 25 years of bipartisan reform and funding growth’ to a place where it is recognised for its focus on ‘individualised funding, on developing local relationships and for the support provided to people through the network of local area coordinators’.³³⁸ Even after 25 years, Western Australia continues to refine its disability services system, with a focus on giving people with disability, their families and carers genuine choice and control in their lives.

These notes of caution emphasise the need for governments to retain a stewardship role in the provision of human services.

This will have some similarities with the ongoing stewardship role of government in other sectors, such as the electricity market. Governments have established both an energy market operator to keep energy services delivered and a separate rule-maker to change the way the energy market operates over time so that it continues to meet the long-term interest of consumers. In reforming the electricity market, governments have recognised the role of a strong consumer protection framework in building confidence in the market.

Good stewardship is important in human services since human services can be just as essential to many Australians, especially those facing disadvantage, as access to electricity in securing the quality of their daily lives. As the National Disability Services submission states:

Establish a market stewardship function: Where governments apply choice and competition principles in the field of human services there is a corresponding responsibility to invest in overseeing the impact of the policy on the market. Governments must also respond to findings and as required, adjust funding, investment in sector development and regulation settings. (DR sub, page 2)

Market stewardship is about governments’ overall role in human services systems. Australia’s systems of human services cover policy design, funding, regulation and provision — and they also reflect our federal structure. Across many human services, the policy responsibility for human services lies with the States and Territories; however, the Australian Government has some leverage through financial grants and Council of Australian Governments (COAG) processes. For example, tied

337 See, for example: Jesuit Social Services, DR sub, page 2; National Employment Services Association, DR sub, page 5; and South Australian Government, DR sub, page 7.

338 Commonwealth of Australia Parliamentary Debates 2012, Senate, No. 13, 1 November, page 103.

grants made to tertiary education institutions give the Australian Government an ongoing and dominant role in university policy.

Stewardship relates not just to governments' direct role in human services but also to policies and regulations that bear indirectly on human services sectors. For example, the Productivity Commission (PC) identified planning restrictions as affecting the provision of child care services in Australia.³³⁹

Given the importance of human services to the everyday lives of Australians, policies and regulations that indirectly affect human services must be subject to review, including against a public interest test as set out in Recommendation 8.

Market co-design

In fostering a diverse range of service models that meet the needs of individuals and the broader community, governments can benefit from working collaboratively with non-government human services providers to effectively 'co-design' the market, incorporating the services that users are demanding and how they might be best delivered.

As the South Australian Government notes:

... co-design of human services is an emerging policy direction in human services delivery ... Co-design refers to the involvement of consumers of services, as well as other partners such as service providers and non-government organisations (NGOs), in the design of human services. (DR sub, page 7)

There are advantages for governments in partnering with community organisations to design and deliver services. The Joint Councils of Social Service Network notes, 'Community organisations are usually embedded within the communities they serve, creating trust' (DR sub, page 2).

Collaboration in the design and delivery of human services will be particularly important where users have an ongoing relationship with their service provider built on mutual trust. While some human services are 'transactional' in nature (for example, a knee replacement operation generally does not require a patient to have an ongoing relationship with a surgeon), many others are 'relational', meaning that users benefit from continuity of service provision from a trusted and responsive provider.

Jesuit Social Services states:

A transactional approach to human services simply won't work when it comes to people leaving prison or state care, young people living with mental illness or drug and alcohol issues, refugee or newly arrived migrant communities, or Aboriginal communities. Instead, services are at their best when they comprise longstanding and sophisticated networks made up of people, places and institutions that are grounded in relationships of trust. (DR sub, page 4)

A necessary first step in co-design is to articulate the desired impact or change. Governments can work with service providers and prospective users to discuss their needs and the best strategies to meet those needs. This allows co-design to play an important part both in policy formation and in the actual delivery of services.

339 Productivity Commission 2014, *Childcare and Early Childhood Learning*, Inquiry Report No. 73 Canberra, page 298-308.

One example of the results from a co-design approach is the ‘Family by Family’ program currently operating in Adelaide and in Mount Druitt, New South Wales. This program aims to reduce the number of families in need of crisis services and help to keep kids out of the child protection system.

The Australian Centre for Social Innovation, a not-for-profit agency, spent 12 months working with service users to co-design a program that would enable them to make changes in their lives. The resulting program takes a ‘peer to peer’ approach. The not-for-profit agency provides training and coaching to families that have overcome challenges, such as debt and addiction, so they can mentor and assist families that are still struggling.³⁴⁰ In its first year of evaluation, most families participating in Family by Family met their goals, with 90 per cent of families saying things were ‘better’ or ‘heaps better’.³⁴¹

Ways of funding human services

Funding is and will continue to be the most important part of both human services policy and governments’ role as market stewards. The Panel makes no recommendations regarding overall levels of funding for human services — funding decisions are a matter for governments and are generally determined through budgetary processes. However, funding levels and methods can have important implications for choice, diversity and innovation in human services markets.

Funding decisions centre on setting the bounds of services that will be paid for or subsidised by governments and structuring the funds that flow from the government to users or providers. While some human services are block-funded, others have ‘entry criteria’ that qualify an individual for funding associated with a level of service. Policymakers may change entry criteria from time to time; for example, to better reflect changing demographics.

The NDIS rollout required an initial policy decision as to who will qualify for public disability funding. During the launch period (July 2013 to 30 June 2016), individuals qualify if they are in a launch location, are the right age for that location and meet either the disability or early intervention requirements.³⁴²

As a general policy, wherever possible, funding should follow user choices to ensure that providers are rewarded when meeting, and being responsive to, user preferences.

Although some human services funding is transparent and directly related to a specific service — for example, Medicare provides a direct benefit to patients when they visit a GP — other types of funding is less transparent.

Several submissions point to traditional methods of funding community service obligations (CSOs) as typically lacking transparency. A CSO is a service that provides community or individual benefits but would not generally be undertaken in the normal course of business. Many human services are expected to be available on a universal basis, which is a CSO. Government providers may be required to fulfil CSOs or the government may contract with private providers to deliver CSOs on its behalf.

340 The Australian Centre for Social Innovation 2014, *What is Family by Family?*, The Australian Centre for Social Innovation, Adelaide, viewed 30 January 2015 <http://tacsi.org.au/project/family-by-family/>.

341 Family by Family 2014, *Our first independent evaluation report is in!*, The Australian Centre for Social Innovation, Adelaide, viewed 5 February 2015, <http://familybyfamily.org.au/2012/10/our-first-independent-evaluation-report-is-in/>.

342 National Disability Insurance Scheme 2014, *My Access Checker: Access Requirements*, National Disability Insurance Agency, Canberra, viewed 3 June 2014 www.ndis.gov.au/sites/default/files/media/mac_access_requirements.pdf.

IPART points out:

... providers are often required to absorb the cost of CSOs into their operating budgets, often involving non-transparent internal cross-subsidies ... because CSOs are not directly funded by the government, agencies have to overcharge for some of their other services in order to cover the costs of their CSOs ... This in turn can lead to the restriction of competition in otherwise contestable areas so the internal cross-subsidies can be maintained. (sub, pages 4-5)

More transparent CSOs can improve diversity and choice. Where there are significant CSOs, potential suppliers may not be able to match the cost structure of public providers, which can limit the private and not-for-profit providers entering the market. On the other hand, providers tasked with delivering CSOs may become unsustainable as the 'higher prices needed to fund the subsidy to CSOs can be undercut by competitors that only supply those users which generate profits'.³⁴³

By making CSOs transparent and funding them directly, important community services can continue while leaving room for new providers to enter and offer other innovative services.

Separating policy-making from regulation and service provision

In the Draft Report, the Panel recommends separating funding from regulation and provision of human services. Separating funding, regulation and provision of human services need not involve any reduction in government funding. However, it will involve introducing greater independence into service regulation and the potential for competition into service delivery.

This is underpinned by the notion that good market stewardship delivers clarity about whose interests the government is serving when it acts. In many human services sectors in Australia, there are still instances where the government develops policy, block funds, regulates and provides services through the one organisation.

Some submitters note actual or potential difficulties with separating functions in human services. For example, the Australian Education Union states, 'there should not be a separation between funder and provider of service delivery' (sub, page 2) and adds that separating these functions may lead to increased costs to users and issues of access and equity (sub, page 3).

The New South Wales Government also notes, 'In some cases, however, the separation of funding, regulation and service provision roles may bring unintended consequences if incentives and roles are not appropriately aligned' (DR sub, page 16-17).

While the potential challenges associated with separation must be recognised, separating policy (including funding) and regulation decisions from provision can ensure that providers have greater scope to make decisions in the best interests of users and that policy settings do not give special preference to public providers.

Many States, including New South Wales and South Australia, have recently separated public TAFE providers from policy functions in vocational education and training. As South Australia's former Minister for Employment, Higher Education and Skills noted:

343 Australian Government, House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, *Cultivating Competition, Report of the Inquiry into aspects of the National Competition Policy Reform Package*, Australian Government Publishing Service, Canberra, pages 33-34.

This separation [of policy from provision] allows the department to focus on driving [policy] reforms and make independent decisions regarding the availability of funding for training, a crucial element of this increasingly competitive sector.³⁴⁴

TAFE New South Wales notes that, in response to its recent separation from the New South Wales Department of Education and Communities, ‘Becoming a separate agency again will give us greater opportunity to adapt and respond to our changing customer needs.’³⁴⁵ Further, the PC has observed that, where a regulator and provider are the same entity, regulators ‘often find ways of favouring the arms of their own businesses’.³⁴⁶

Regulation that is independent of any provider (including government providers) can help to encourage entry into service delivery markets by ensuring all providers operate on a ‘level playing field’ — leading to greater choice, diversity and innovation in service provision.

With regard to separating policy (including funding) from regulation, the OECD has noted:

A high degree of regulatory integrity helps achieve decision-making which is objective, impartial, consistent, and avoids the risks of conflict, bias or improper influence ... Establishing the regulator with a degree of independence (both from those it regulates and from government) can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes.³⁴⁷

The submission from National Disability Services discusses challenges that arise from insufficient distance between the regulator and policymakers, including that ‘there can be a tendency for bureaucracies to create unwieldy regulation in response to risk which reduces the effectiveness of service providers’ (DR sub, page 4).

Box 12.3 describes the role of the NDIA as an independent regulator in the disability care and support sector.

344 Kenyon, T (Minister for Employment, Higher Education and Skills) 2012, *TAFE SA Established as Statutory Corporation*, media release, 4 October, Adelaide.

345 Christie, P (Managing Director TAFE NSW) 2014, *Announcement: TAFE NSW*, news item, 1 July, Sydney.

346 Productivity Commission 2011, *Disability Care and Support Report Vol. 1*, Canberra, pages 407-408.

347 OECD 2014, *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, page 47.

Box 12.3: Disability care and support regulator

The NDIA is a statutory agency whose functions include delivering the NDIS.

The NDIA assists participants in the NDIS to develop plans with individualised packages of support, which include the reasonable and necessary support directly related to meeting a participant's ongoing disability support needs. These plans are reviewed regularly and can be modified, for example, when a participant's circumstances and needs change.

The NDIA (through its CEO) has a range of decision-making powers under the *National Disability Insurance Scheme Act 2013* including:

- **access decisions** — assessing whether a person meets the access criteria to become a participant in the NDIS;
- **planning decisions** — for NDIS participants, approving and reviewing plans, including the reasonable and necessary supports that will be funded or provided through the NDIS;
- **registered provider decisions** — approving persons or entities to be registered providers of supports under the NDIS; and
- **nominee decisions** — appointing a nominee for certain NDIS participants who need assistance in developing and managing their plan.

In its Disability Care and Support Report, the PC argued that the type of individualised assessment of participants undertaken by the NDIA is 'an essential element of avoiding ... chronic underfunding'³⁴⁸.

The design of the NDIS is intended to ensure that the NDIA is able to change individual plans quickly and efficiently when required.

The Panel's view

High-quality human services can significantly improve peoples' standard of living and quality of life. Particularly with Australia's ageing population, the size and importance of the human services sector will increase into the future.

Governments cannot distance themselves from the quality of human services delivered to Australians — they will continue to have an important role as market stewards in human services sectors, including through policy and funding decisions.

In undertaking their stewardship role, governments should:

- foster a diverse range of service models that best meet the needs of individuals and the broader community;
- co-design markets with human services providers to build on the trust and relationships that already exist between service providers and users;
- separate their interest in policy (including funding) and regulation from provision;
- vest rule-making and regulation with a body independent of government's policy (including funding) role;
- allow funding to follow people's choices; and
- fund community service obligations in a transparent and contestable manner.

348 Productivity Commission 2011, *Disability Care and Support Report Vol. 1*, Canberra, page 21.

12.3 EXPANDING USER CHOICE

Traditionally, governments have decided which human services would be delivered, in what quantities and to whom. One result of this practice was that individual needs were rarely reflected in the standard service offering.

The PC points to some important reasons for expanding choices for people who use human services.

- There is a social expectation that people should be able to run most aspects of their lives.
- Users will have different and changing preferences about what matters in their lives, and these are not easily observable by others.
- Lack of choice can result in poorer quality and more expensive services, and less diversity and innovation. In contrast, user control of budgets creates incentives for suppliers to satisfy the needs of users, given that they would otherwise lose their business. That in turn typically leads to differentiated products for different niches.³⁴⁹

In many instances, users (rather than governments or providers) are best placed to make appropriate choices about the human services they need.

Providing users with a direct budget may allow them to effectively exercise choice. However, there will not just be one model of user choice. For example, in school education effective choice may come down to making sure that schools are able to respond to the needs and demands of families in the local community. This could be achieved by providing more autonomy to the school decision-makers, such as allowing principals to hire teachers with special skills or qualifications (for example, teaching English as a second language) to meet the needs of students and families in the community.

Box 12.4 provides examples of the benefits of choice in aged care from the perspective of service users.

349 Productivity Commission 2011, *Disability Care and Support Report Vol.1*, Canberra, pages 355-357.

Box 12.4: Benefits of choice — aged care examples

The Brotherhood of St Laurence released a paper³⁵⁰ on user choice in aged care services, which surveyed some of the advantages aged care users have enjoyed from increased choice.

Overall, aged care users found that having control of funds meant that service providers became more responsive to their individual requirements. This increased the bargaining power that users had with service providers, case managers and other professionals.

The paper provided some examples of choice:

- One man employed someone to fetch a meal from his local pub after rejecting ‘meals on wheels’. In another case, a user employed a support worker who cooked meals of the person’s choosing.
- An aged care user applied funding to purchasing assistive technology, such as sensors that automatically switched on a light when the person got out of bed and a lifeline alarm to summon help in case of a fall.
- One group of users of mixed ages living independently in their own flats pooled their funding to buy services, giving them greater purchasing power.
- Aged care users also benefited from being able to choose their support workers rather than being assisted by pre-assigned agency staff, who often rotate through their positions. One user stated:

Direct payments give me control. I now have a say in what I eat and drink, what I do and when I do it. I can choose carers that can help me to live my life. I can have continuity instead of a different carer every day.³⁵¹

There are various approaches to expanding user choice in human services. The UK Government has decided to put user choice at the heart of service delivery across the board, accepting a presumption that user choice will generally be the best model (discussed in Box 12.5).

An alternative approach is to analyse services market-by-market, extending choice gradually into selected human services as appropriate.

350 Laragy, C and Naughtin, G 2009, *Increasing consumer choice in aged care services: A position paper*, Brotherhood of St Laurence, Fitzroy.

351 *Ibid.*, pages 8-9.

Box 12.5: UK reform of public services

The UK has gone further than Australia in introducing competition and choice into the delivery of public services. The Open Public Services White Paper³⁵² proposes five principles for modernising the UK's public services.

- **Increasing choice** wherever possible — which means putting people in control, either through direct payments, personal budgets, entitlements or choice. Where direct user control is not possible, elected representatives should have more choice about how services are provided.
- **Decentralising** to the lowest appropriate level — where possible, this will be individuals; otherwise to the lowest-level body, such as community groups or neighbourhood councils.
- Opening service delivery to a **range of providers** — high-quality services can be provided by the public sector, the voluntary sector and the private sector. This means breaking down regulatory or financial barriers to encourage a diverse range of providers. It also means transparency about the quality and value for money of public services so that new providers can enter and challenge under-performers.
- Ensuring **fair access** — government funding should favour those with disadvantage.
- **Accountability** to users and to taxpayers.

Different public services have different characteristics. The White Paper identifies three categories of public services and more detailed principles for each type of public service.

1. Individual services:

- funding follows people's choices;
- robust framework of choice in each sector;
- publishing key data about public services and provider performance;
- target funding at disadvantage (for example, a 'pupil premium' paid to schools that take on disadvantaged students);
- license individual providers through a relevant regulator; and
- access to redress, including through an ombudsman.

For specific services, users have a legal right to choose and must be provided with choices by law. For example, when GPs refer health services users to medical specialists, they must offer a shortlist of hospitals or clinics among which the users can choose.

2. Neighbourhood services: these are services used by the community collectively, such as local libraries and parks. In line with the principle of decentralising to the lowest appropriate level, the UK is looking to encourage higher levels of community ownership.

352 UK Government 2011, *Open Public Services White Paper*, The Stationery Office, Norwich.

Box 12.5: UK reform of public services (continued)

3. Commissioned services: these are services where user choice is unlikely to work as a model, for reasons such as:

- the service is a natural monopoly;
- the service is being provided for people who are not able to make the appropriate choices themselves (such as drug rehabilitation); or
- there are security-related or quasi-judicial issues (such as the court system or planning laws).

In this case, the UK has decided to switch the default from the government providing the service to the government commissioning the service from a range of providers — and to separate purchasers from providers to encourage innovation.

Should user choice be applied to every human service?

Different factors make it easier or harder to apply user choice to particular services. A user choice model might not be right for every service. The traditional block-funding approach, where the user is a passive recipient of services often from one provider, may remain appropriate in some circumstances. The Panel recognises that access to quality services will be a prerequisite for effective choice and that accessibility will be particularly important in remote and regional areas.

The diagram below provides high-level guidance on some of the features that may determine the suitability of user choice for particular human services.

The application of user choice to human services

Easier to apply user choice		Harder to apply user choice	
Nature of the market			
Competitive range of providers	Somewhat competitive/contestable	Natural monopoly	
Complexity of service			
Simple, or good information available to guide users or intermediaries		Highly complex outputs and uncertain outcome	
Nature of the transaction			
Repeat transaction		One-off or urgent transaction	
Capacity constraints			
Low		Very high	
Switching costs or transaction costs for users			
Low		Very high	
Government specifications on service delivery			
Performance-based standards which allow for innovation and product differentiation		Highly prescriptive standards with limited ability for suppliers to compete on price or quality	

Sometimes the market will be a natural monopoly, which can only support one supplier or where the government achieves efficiencies by being the only supplier or purchaser. For example, the Australian Government is currently the sole purchaser of Pharmaceutical Benefits Scheme (PBS) subsidised pharmaceuticals, which may achieve lower pharmaceutical prices.

In situations where the service is highly complex and there are uncertain outcomes, it may be more difficult to apply user choice; for example, providing support services to people who are experiencing multiple sources of disadvantage.

It will be easier to apply user choice to a repeat or ongoing transaction (for example, choice of in-home disability support) rather than to a one-off transaction. In addition, users who are in a catastrophic situation, such as requiring emergency surgery, may not have the capacity to exercise choice.

Capacity constraints are a broader issue in human services since the number of places that can be offered may restrict user choice. For example, not all children can go to the same school and not all emergency patients can be treated in the same hospital simultaneously. If choice leads to an excess of demand over supply, some way of managing demand will be needed. This may lead to constrained choice or queuing, which may nevertheless still be a better outcome for users than no choice at all.

On the other hand, allowing for user choice, particularly in areas where the government was previously the main or sole service provider, opens up the possibility that some providers will not attract enough customers to survive. Provider failure is a normal part of providing goods and

services. Moreover, if providers face no credible threat of exit when they underperform, the full user benefits of provider choice are unlikely to be realised. Part of governments' stewardship role includes making arrangements for service continuity in case of provider failure.

It will be easier to apply user choice where users can easily switch between service providers. User choice may not lead to efficient or competitive outcomes where there are financial costs (for example, increased travel costs associated with a new provider) or non-financial costs (for example, a child may be unwilling to change schools on account of the loss of his or her social networks). Wherever possible, governments should take steps to lower switching costs, so users can easily switch to a provider better placed to meet their needs. For example, users should not 'lose their place in the queue' if they switch providers, nor need to undergo further eligibility assessment.

If governments wish to exercise tight control and set prescriptive standards over the products or services provided to users, the usual benefits of competition — diversity of product, innovation and price competition — are unlikely to materialise. In these cases, it may be more efficient for governments to remain sole providers of the service or to pursue joint ventures or managed competition models with non-government providers.

Limits to user choice in human services

In some circumstances, users may not be in the best position to choose the appropriate service, and hence another model (for example, government choice or service provider choice) may be more appropriate.

Some vulnerable users are less able to exercise choice. In other cases, users may view choice as a burden they do not wish to bear, suggesting that a 'default option' should always be available. There also may be cases where choice is limited, such as in rural and remote locations.

Special consideration is also needed to empower people with multiple disadvantages or severe disadvantage to exercise effective choice. Even when presented with perfect information, severely disadvantaged users may lack the confidence or experience to choose the best pathway to meet their needs.

The Joint Councils of Social Service Network notes:

... some people experiencing poverty and inequality are placed at a significant disadvantage in exercising choice in market-based mechanisms. Factors influencing this disadvantage include mental or chronic illness, unemployment, insecure housing or homelessness, and income inadequacy or insecurity. (DR sub, page 9)

The consequences of users making the wrong choice in certain contexts can be very severe. As the Consumers' Federation of Australia notes:

... the risk of making a 'wrong' choice in health or education can have significant long-term consequences ... it is not appropriate or fair to pass on those risks [to users] in the absence of an appropriate, and high standard, safety net in public services. (sub, pages 8-9)

In different circumstances, choice may need to be balanced against other factors, including access to high-quality services and social equity. For example, in school education, a recent OECD report found:

School systems with low levels of competition among schools often have high levels of social inclusion, meaning that students from diverse social backgrounds attend the same

schools. In contrast, in systems where parents can choose schools, and schools compete for enrolment, schools are often more socially segregated.³⁵³

Someone will always be making a choice about what service is provided to users: governments, service providers (for example, doctors), purchase advisors or users themselves. The question is how best to match the choices made with the needs and preferences of users of human services.

User information in human services

In order to choose what is right for them, users must be able and willing to gather and process the right information. Ideally, this information should be freely available, aggregated (for example, on a single website), easy to interpret and access, and relevant to the users' needs. Users should have access to objective, outcomes-based data on available services, and/or to feedback from previous users of the service — noting that this may raise issues of privacy and misinformation.

CHOICE highlights:

... the importance of better information on factors that matter to consumers, in forms that they can use, in any extension of competition within health and education. This will require government to ensure that suppliers make base data available, in usable formats. (sub, page 27)

Box 12.6 describes some of the websites that provide users with information on health and school services.

Box 12.6: Human services user information systems

Health information: Some national Australian databases of health information (for example, myhospitals.gov.au), publish comparative data on hospital performance, including average waiting times and infection risks. Health service users can also visit ahpra.gov.au to check that their health practitioner is registered and check whether he or she has been reprimanded or has conditions imposed on his or her right to practice.

The UK has gone even further. The national website, [NHS choices](http://NHSchoices), provides extensive health information to health service users in an accessible format. Information includes: services offered by individual health professionals; their risk-adjusted patient mortality rate; and user reviews of health services.

When data on individual consultant treatment outcomes were first provided, the National Medical Director of NHS England noted:

This is a major breakthrough in NHS transparency. We know from our experience with heart surgery that putting this information into the public domain can help drive up standards. That means more patients surviving operations and there is no greater prize than that.³⁵⁴

353 OECD 2014, 'When is Competition Between Schools Beneficial?', *PISA in Focus*, No. 42, OECD Publishing, Paris.

354 NHS England News 2015, *Major breakthrough in NHS Transparency as consultant mortality data goes online for first time*, NHS England, Redditch, viewed 29 January 2015 <http://www.england.nhs.uk/2013/06/28/mjr-brkthgh-nhs-transp-cons/>.

Box 12.6: Human services user information systems (continued)

School information: myschool.edu.au enables parents and carers to search detailed profiles of Australian schools simply by entering a school's name, suburb or postcode. It contains data on factors including academic achievement (as measured by the NAPLAN national testing), school finances and a mapping function to show a school's location along with other schools in the same area. The site now has six years of data available, which parents and carers can use to compare a particular school's progress with that of schools serving similar student populations. It is widely used, with over 1.2 million visitors in 2013.³⁵⁵

Disadvantaged individuals and groups may need greater assistance in navigating the choices they face. This can include providing information through accessible communication channels that suit individual users' needs.

Where complexity is high, there can be a role for 'mediated choice', such as using purchase advisors (for example, a GP to assist in choosing a surgeon), or where the individual is not in a good position to make a choice (for example, a relative to assist in choosing care for a dementia sufferer).

Where a purchase advisor is used, the incentives facing the advisor must be aligned with those of the user. The purchase advisor should not have financial or other incentives to over-service the user (for example, by referring them for unnecessary health tests) or to refer the user to one particular service provider.

Mediated choice could also be facilitated through community co-ordinators. For example, Western Australia's disability care and support program includes a role for Local Area Co-ordinators. Co-ordinators are located throughout Western Australia and have local knowledge to help advocate, plan, organise and access the support and services people with disabilities need. Each Co-ordinator works with between 50 and 65 people with disability, providing support that is personalised, flexible and responsive.³⁵⁶

Information systems can also play an important role in helping service providers better understand their strengths and weaknesses. Service providers can use feedback and data to improve their own performance, leading to more responsive services and better overall outcomes. An example from the US is presented in Box 12.7.

355 My School 2014, *My School*, Commonwealth of Australia, Sydney, viewed 25 August 2014 www.myschool.edu.au/.

356 Government of Western Australian Disability Services Commission 2015, *Local Area Coordination*, Government of Western Australia, Perth, viewed 29 January 2015 www.disability.wa.gov.au/individuals%1efamilies%1eand%1ecarers/for%1eindividuals%1efamilies%1eand%1ecarers/local%1earea%1ecoordination/.

Box 12.7: Service providers and feedback systems

Since 1990, the US State of New York has publicly released risk-adjusted outcomes for patients undergoing coronary artery bypass graft surgery, with the goal of enhancing the quality of care for heart surgery patients.

The collection and release of this information involves collaboration between hospitals and doctors involved in cardiac care as well as the New York State Department of Health and the New York State Cardiac Advisory Committee. The program promotes improved outcomes not just through service user knowledge but also through competition between hospitals and surgeons.

New York State Department of Health's 2008 — 2010 evaluation of the program notes:

The overall results of this program of ongoing review show that significant progress is being made. In response to the program's results for surgery, facilities have refined patient criteria, evaluated patients more closely for pre-operative risks and directed them to the appropriate surgeon. More importantly, many hospitals have identified medical care process problems that have led to less than optimal outcomes, and have altered those processes to achieve improved results.³⁵⁷

American news outlets also reported in 2012 that, since the program began, the death rate for bypass surgery has dropped around 40 percent, and continues to fall.³⁵⁸

An important aspect of any feedback system is that providers should not be able to 'game' the system. Although the New York State program reports risk-adjusted outcomes (i.e., the reported data are adjusted to take account of each patient's specific health profile), several media outlets report that high-risk patients are often turned away by doctors who fear that the patient may affect their outcomes score.³⁵⁹

Governments or other providers must therefore ensure that data systems avoid creating opportunities for providers to protect their ratings by turning away those most in need.

Australian governments already collect and store significant amounts of data on various human services, including health and education. Careful release of existing data, with particular attention to ensuring that the information is not 'gamed', could play an important role in helping users make informed choices and helping providers to deliver responsive and high-quality services.

Informed choice is discussed more broadly in [Chapter 16](#).

357 New York State Department of Health 2012, *Adult Cardiac Surgery in New York State 2008 — 2010*, Albany, page 11.

358 Sternberg, S 2012, 'At New York Hospitals, Heart Patients' Death Rates Are an Open Book', *US News*, 18 October, Washington DC.

359 Altman, L 1990, 'Heart-Surgery Death Rates Decline in New York', *The New York Times*, 5 December, New York; Kolker, R 2005, 'Heartless', *New York Magazine*, 24 October, New York.

The Panel's view

User choice in human services, as in other areas, can provide benefits to users and promote diversity and innovation in service delivery.

The UK has a 'presumption of choice' operating across most public services, and has adopted high-level choice principles. The Panel considers that, in a federation such as Australia, it would be useful for all governments to agree on common principles to guide the implementation of user choice in human services.

The Panel's view is that the Australian Government and state and territory governments should agree on choice principles and that user choice should continue to be implemented in Australian human services markets, beginning with markets where choice is most easily established.

In putting user choice at the heart of service delivery, governments should:

- recognise that users are best placed to make choices about the human services they need and design service delivery, wherever possible, to be responsive to those choices;
- recognise that access to quality services will be a prerequisite for effective choice and that accessibility will be particularly important in remote and regional areas;
- ensure that users have access to relevant information to help them exercise their choices, including, where appropriate, feedback from previous users of services;
- in sectors where choice may be difficult, make intermediaries or purchase advisors available to help users make decisions, with policies designed to align the incentives of purchase advisors with the best interests of users;
- ensure that a default option is available for users unable or unwilling to exercise choice;
- lower financial and non-financial switching costs to enable switching wherever possible — for example, users should not 'lose their place in the queue' if they switch providers, or need to undergo further eligibility assessment; and
- offer disadvantaged groups greater assistance in navigating the choices they face through, for example, accessible communications channels that suit their needs.

12.4 COMMISSIONING SERVICE DELIVERY

Although it is possible to introduce user choice into many human services, including aged care and disability care and support, in other human services governments will continue to play a role in commissioning services on behalf of users.

Over recent years, governments have looked at different approaches to commissioning human services. Approaches have evolved from early, less sophisticated attempts at competitive tendering towards approaches reflecting contestability and some degree of user choice (see Box 12.1).

Consultations with, and submissions from, human services providers emphasise the value of social capital and community service contributions that providers can bring to their relationships with service users. These 'value added' services can be overlooked in traditional tender processes.

For example, the Joint Councils of Social Service Network notes:

Competitive price tendering undermines the integration and coordination of services; favours larger, more established services over smaller agencies and community groups; and measures efficiency in terms of low cost, when the measurement of social and

economic outcomes requires a far more nuanced approach and a capacity to identify preventive benefits over long-term periods. (DR sub, page 13)

As in Australia, tendering decisions in the UK have historically focused on cost and value for money, which may come at the expense of care and relationships. A 2014 UK report on the future of the home care workforce presented findings about the impacts of commissioning practices. It found:

[home care] is not organised nearly as well as it could be and it appears designed to keep caring professional relationships from forming between workers and those they care for ...

[home care is an] inflexible system that is defined by specific tasks and little continuity among care workers ...

No one would have designed commissioning to achieve the state of care we have now, but incremental changes to drive down price and the need to be able to monitor care contracts has meant that the time and task commissioning [commissioning that focusses on inputs, such as time spent with a user, or outputs, such as tasks completed, rather than outcomes] is where we have ended up.³⁶⁰

Contestability and commissioning

Australian jurisdictions have begun to focus on more innovative and collaborative methods of service delivery. As the New South Wales Government states:

There are more significant benefits from competition and innovation when governments take a less prescriptive approach to service delivery reform. This can allow greater adaptability and flexibility ... the focus should be on specifying desired outcomes and ensuring space for innovation. (sub, page 27)

The New South Wales Government submission to the Draft Report says:

... a truly contestable system provides the competitive tension that ensures the provider is always incentivised to cost effectively provide the best service to the customer. There is a broad range of service delivery models which can underpin a truly contestable system ... including:

- Keep-and-improve: applying contestability to government service provision by benchmarking it against potentially alternative service providers...
- Recommissioning: redesigning previously outsourced or privatised services to improve outcomes
- Payment by results: paying providers based on outcomes rather than inputs or outputs...
- Public-private joint ventures: allows the technical expertise of the public sector to be brought together with the commercial and managerial expertise of the private sector ... (DR sub, pages 17–18)

Newer approaches to commissioning focus more on collaboration and contestability rather than strict competitive tender processes. A paper on contestability in the UK health system noted:

360 Koehler, I 2014, *Key to Care*, LGiU, London, page 16.

In recognition of the limits of competition, managers and doctors have moved increasingly to establish collaborative arrangements in which purchasers and providers work together on a long term basis ...

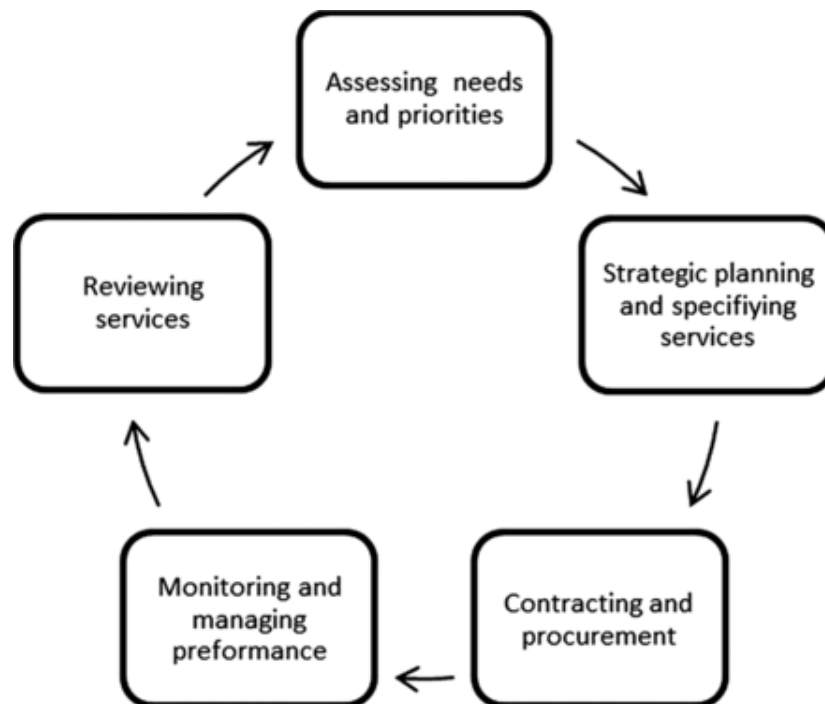
... the stimulus to improve performance which arises from the threat that contracts may be moved to an alternative provider should not be lost. The middle way between planning and competition is a path called contestability. This recognises that health care requires cooperation between purchasers and providers and the capacity to plan developments on a long term basis. At the same time, it is based on the premise that performance may stagnate unless there are sufficient incentives to bring about continuous improvements.³⁶¹

Contestability necessarily includes performance management, such that service providers face credible threats of replacement for poor performance. This requires careful management by governments, who must balance performance management with the need to give providers certainty.

The commissioning cycle recognises that assessing needs and priorities (including the unique priorities of each jurisdiction or local community) and monitoring and reviewing services are both important and necessary steps in commissioning for service delivery.

361 Ham, C 1996, 'Contestability: A Middle Path for Health Care', *British Medical Journal*, Vol 312, London, pages 70-71.

The Commissioning Cycle³⁶²



Moves to introduce greater contestability in human services commissioning need to be approached with care. In many cases, service providers will need to undergo significant cultural change to adapt to new methods of commissioning. In the context of the NDIS, National Disability Services notes ‘An example of cultural change is that disability providers lack marketing skills’ (DR sub, page 2).

Governments will need to work with existing providers to build capacity and ensure that they can continue to offer high-quality services that meet user needs during the transition to new forms of service delivery.

Contracting for outcomes

Contracting for outcomes is an important method that allows governments to engage with service providers to directly meet user needs.

Contracting for outcomes may require significant investment by government agencies in specifying what the desired outcomes are. This may involve a cultural shift for both government agencies and service providers. The Joint Councils of Social Service Network notes ‘Too often public services are delivered ... without a clear and articulated set of outcomes to be achieved’ (DR sub, page 7).

An outcomes focus allows service providers to suggest different approaches for achieving the desired result rather than having to demonstrate specific activities, tasks or assets. It allows potential providers to offer new and innovative service delivery methods and helps to encourage a diverse range of potential providers.

362 Shaw SE, Smith JA, Porter A, et al. 2013, *The work of commissioning: a multisite case study of healthcare commissioning in England's NHS*, BMJ Open, London.

Governments have used contracting for outcomes for some time. As the National Employment Services Association notes:

There has long been an emphasis on outcomes in employment services. However, in the 2015 model, there is a strengthened focus on outcomes and longer term (26 week) outcomes payments. (DR sub, page 6)

Contacting for outcomes also needs to recognise that different users may need different levels of care or support. For example, the National Employment Services Association notes the different payment levels for employment placement outcomes, 'For a 26 week outcomes the range of payment is between \$3,400 (Stream A) and \$11,000 (Stream C: hardest to place)' (DR sub, page 6).

In some cases, innovation and high-quality user outcomes can be encouraged by offering financial rewards for performance above specified targets. For example, in the New South Wales social benefit bonds program, discussed in Box 12.1, private investors receive a return on their investment if agreed social outcomes are achieved. The New South Wales Government is now building on the success of social benefit bonds with a range of social impact investments, which bring together capital and expertise from the public, private and not-for-profit sectors. These initiatives aim to deliver better outcomes in areas such as managing chronic health conditions and supporting offenders on parole to reduce their levels of re-offending.³⁶³

Contracting for outcomes can also allow governments to recognise and reward the social capital and value-add that community organisations bring to service delivery.

For relational services, a stable and predictable regulatory environment, including through sufficiently long contracts, will be important in the contracting and procurement phase. Moving away from very short-term contracts allows service providers to invest in necessary infrastructure, systems and 'front line' staff. The Western Australian Delivering Community Services in Partnership Policy (discussed in Box 12.1) encourages a move to longer-term contracts (up to five-year terms) to 'provide funding certainty ... and minimise transition and re-bidding costs'.³⁶⁴

Even simple steps by governments commissioning services can make an important difference to human services providers and their ability to be responsive to user needs. The Joint Councils of Social Service Network suggests:

... service procurement processes should include better notification and greater clarity; and tendering timelines should allow sufficient time for collaboration, the formation of consortia and innovative service design. (DR sub, page 7)

As with any other method of service delivery, great care is needed when moving to outcomes-based contracting. For example, if the provision of a certain education service is commissioned based on students successfully completing a course, this may lead to providers passing students who have not effectively met the course requirements.

In many cases, it may be preferable to commission services using a carefully specified blend of outcomes and outputs.

363 NSW Government Premier & Cabinet, Social Impact Investment Knowledge Hub, Accessed on 12 February 2015, www.dpc.nsw.gov.au/programs_and_services/social_impact_investment/nsw_policy.

364 Western Australian Department of Premier and Cabinet 2012, *Partnership Forum Fact Sheet 6*, Perth.

The Panel's view

In the past, contracting for the provision of human services was often achieved through competitive tendering. However, tendering can focus on price at the expense of other factors, including fairness and responsiveness to individual needs.

More recently, governments have begun to trial innovative approaches to commissioning that give providers greater scope to meet user needs, while allowing governments to step in and remove poor performers.

By commissioning the provision of human services with an outcomes focus, governments can encourage a diversity of provider methods and types, which can have important benefits for users in relation to choice, adaptability and innovation.

In commissioning human services, governments should:

- encourage careful commissioning decisions that are sensitive and responsive to individual and community needs, and recognise the contribution of community organisations and volunteers;
- ensure that commissioned services are contestable and service providers face credible threats of replacement for poor performance;
- establish targets and benchmarks for service providers based on outcomes, not processes or inputs; and
- offer financial rewards for performance above specified targets.

12.5 DIVERSITY OF SERVICE PROVIDERS

Having a diversity of service providers is not a goal in and of itself, but it can lead to more choice for service users and more efficiency in service delivery due to increased competitive pressures.

The Panel notes that diversity in the provision of human services offers a number of potential benefits. For example, the National Employment Services Association notes 'diversity is critical to job seeker and employer choice, and provides for the creation of specialist expertise to be targeted to individual cohorts' (DR sub, page 5).

As noted in the *Reform of the Federation White Paper on Roles and Responsibilities in Health*, the existence of multiple providers, including smaller providers, can be beneficial. It can enhance competition and allow small providers to respond flexibly to local issues.³⁶⁵

Although the Panel favours encouraging diversity in provider methods and types, it recognises that some markets may not have sufficient depth to support a number of providers — for example, certain services in remote and regional areas. Providing access to services and regulation to maintain and improve service quality will be an important implementation issue, even in the absence of competitive pressures.

Also, where there are economies of scale, good quality services may best be achieved by having a few large providers. For example, in some highly specialised health services, having 'centres of specialisation' can avoid duplicating infrastructure and machinery, allowing medical specialists to

³⁶⁵ Australian Government 2014, *Reform of the Federation White Paper: Roles and Responsibilities in Health*, Canberra, page 31.

practice frequently and collaborate to sharpen and extend their skills. In such situations, competitive pressures could still be maintained by having competition for the contract to supply the services or by benchmarking the quality of service provided.

In Australia, many human services, including health, education and social housing are delivered by a range of public and private for-profit and not-for-profit providers. The Panel is conscious of the current diversity of human services providers and does not underestimate the contribution currently made by the private sector and non-government organisations.

The UK has again gone further than Australia in its *Open Public Services White Paper*, which establishes a policy principle to open service delivery to a range of providers. This means that:

... high-quality services can be provided by the public sector, the voluntary and community sector or the private sector ... That means breaking down barriers, whether regulatory or financial, so that a diverse range of providers can deliver the public services people want, ensuring a truly level playing field between the public, private and voluntary sectors. It means being totally transparent about the quality and value for money for public services so that new providers can come in and challenge under-performance.³⁶⁶

In recommending a greater diversity of providers in human services, the Panel does not wish to diminish, discourage or crowd out the important contribution made by the not-for-profit sector and volunteers to the wellbeing of Australian users of human services.

Human services providers

The delivery of human services is widely seen as a responsibility of government. Yet, in practice, few human services are delivered exclusively by government.

In some instances, including in early childhood education and hospital care, private for-profit and not-for-profit providers operate in the same market as governments, offering similar services and increasing the range of user choice.

Increasingly, services are being delivered outside the government sector. The significant changes in the disability services sector are a recent example of this development. As the ACCC points out:

Despite the historical role of government in providing human services, a degree of competition already exists in many human services markets. This includes competition between private hospitals, doctors, secondary schools and vocational training providers, to name but a few examples. (sub 1, page 68)

Government, not-for-profit and private for-profit providers are likely to have different strengths. There is a place for all of these different types of providers in human services markets.

366 UK Government 2011, *Open Public Services White Paper*, The Stationery Office, Norwich, page 9.

Government providers

One of the features of the competition reforms at the time of the National Competition Policy (NCP) was a change in the organisational arrangements for government providers of infrastructure services. Rather than being provided by government authorities, electricity and water entities were set up as Government Business Enterprises, which were more independent of Ministers but subject to clearer objectives and overseen by a board of directors.

Part of the reason for the Government Business Enterprise form in utilities was that it largely replicated the corporate for-profit form of competitors that were emerging in markets such as electricity. As the non-government organisational forms in human services markets are more complex (they include for-profit and different types of not-for-profit), developing a single model for government providers is unlikely to be practical.

Rather, government reforms to the provision of human services have focused on an expanded role for the for-profit and not-for-profit sectors. In many human services sectors, particularly in aged care and disability care and support, governments have encouraged not-for-profits and charities to play an important role in meeting user needs.

For-profit providers

The private, for-profit sector makes up a large part of service provision in some human services markets, including aged care and child care (see Box 12.8).

Box 12.8: For-profit provision of human services in Australia

Private hospitals service around 40 per cent of hospital inpatients.³⁶⁷ Around 60 per cent of private hospitals operate on a for-profit basis.³⁶⁸

General practitioner, allied health and dental services are largely delivered by the for-profit sector.

In child care, around 70 per cent of long-day care is provided by the for-profit sector.³⁶⁹

The private for-profit sector provides 36 per cent of residential aged care.³⁷⁰

Private prisons hold around 18 per cent of prisoners in Australia.³⁷¹

For-profit providers can bring particular strengths to human services markets. They are likely to face stronger incentives to minimise cost, including through adopting new technologies and innovative methods of service delivery. This may improve the diversity of providers and service offerings in human services markets and increase the efficiency of government expenditure.

Users have been willing to place their trust in for-profit providers, with high levels of confidence and satisfaction recorded in relation to for-profit providers, such as local GPs.³⁷²

367 Productivity Commission 2009, *Public and Private Hospitals*, Research Report, Canberra, page 46. Data is for 2007-08.

368 Ibid., page 46. Data is for 2006-07.

369 Productivity Commission 2014, *Childcare and Early Childhood Learning*, Inquiry Report No. 73, Canberra, page 351. Data is for 2012.

370 Steering Committee for the Review of Government Service Provision 2015, *Report on Government Services Volume F: Community Services*, Productivity Commission, Canberra, page 13.5. Data is for June 2014.

371 Steering Committee for the Review of Government Service Provision 2015, *Report on Government Services Volume C: Justice*, Productivity Commission, Canberra, page 8.5. Data is for 2013-14.

Concerns have been raised that for-profit providers are likely to ‘cherry pick’ the lower-risk or more profitable users.³⁷³ Policy design needs to be sensitive to this issue. For example, policy can include measures such as: limiting the amount of control service providers have over which customers they can accept; or designing the scheme to reward service providers on a ‘value added’ basis (for example, providing greater rewards to job service agencies that find jobs for long-term unemployed people).

Not-for-profit providers

In its report on the *Contribution of the Not-for-Profit Sector*, the PC observed:

[Not-for-profits] have long been part of the Australian community landscape, encompassing both secular and non-secular organisations ...

The most recognised part of the sector is involved in human service delivery, including community services, education and health ... More recently, the sector is being viewed as a means to address social disadvantage. [Not-for-profits] are generally viewed as more trustworthy than government or business, and hence, worthy of support.³⁷⁴

The Panel recognises that the not-for-profit sector makes an enormous contribution to the lives of Australians. In 2006-07 the sector accounted for 4.1 per cent of GDP (excluding the contribution of volunteers), employed close to 890,000 people and utilised the services of some 4.6 million volunteers.³⁷⁵

The Panel is concerned to preserve and enhance this contribution, while advancing diversity, innovation and choice in human services. As National Disability Services notes:

Increased competition would be counter-productive if it undermined the ability of not-for-profit disability support services to cooperate and collaborate, particularly in relation to community development and the production of social capital. (sub, page 3)

Mutual providers

The Business Council of Co-operatives and Mutuals and the Australian Public Service Mutual Task Force have released *Public Service Mutuals: A Third-way for delivering public services in Australia White Paper* (White Paper) on public service mutuals that seeks to explore an alternative where co-operatives and mutuals play an expanded role in delivering human services.

A public service mutual is:

372 Roy Morgan 2014, *Image of Professions Survey 2014*, Melbourne — Doctors were rated as ‘ethical and honest’ by 86 per cent of survey participants, coming second only to nurses.

373 Hems et al 2014, *Public Service Mutuals: The case for a Third-way for delivering public services in Australia Green Paper*, Net Balance Research Institute, Sydney, page 20.

374 Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra, page 2.

375 Ibid., page 53.

An organisation ... whereby members of the organisation are able to be involved in decision-making, and benefit from its activities, including benefits emanating from the reinvestment of surpluses.³⁷⁶

The White Paper suggests public service mutuals deliver several benefits, including that they can:

- Increase organisational diversity in public service markets.
- Harness the ethos and professionalism of public service employees and unleash their entrepreneurialism.
- Increase consumer choice and control.
- Stimulate public service innovation.³⁷⁷

The White Paper notes that:

... innovation through consumer, employee or enterprise ownership structures can help address issues in areas such as disability, aged care, affordable housing and employment services.³⁷⁸

In the case of disability care and support, the White Paper discusses potential advantages of mutuals, including: purchasing co-operatives being used for rural and Indigenous groups and other people with common equipment or treatment needs; and staff-based co-operatives being used in areas where staff attraction and retention have proven problematic.³⁷⁹

Although public service mutuals are not common in the provision of human services in Australia, there is evidence of mutuals working with communities to deliver human services. The recent *Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services* provides an example:

Westfund Health Insurance, which operates throughout Australia, [reinvests] its profits into healthcare. As a result its members have access to state of the art dental clinics which has taken the stress off public dental service provision.³⁸⁰

Public service mutuals now play a significant role in some other jurisdictions, including the UK where there has been concerted effort through public policy levers and capacity-building activities to establish and expand public service mutuals.

As user needs and preferences continue to evolve, public service mutuals could play a greater role in meeting individual and community needs, possibly in conjunction with other significant government initiatives. Indeed, the White Paper suggests that NDIS trial sites could prove ideal for piloting a disability staff co-operative.³⁸¹

376 Hems et al 2014, *Public Service Mutuals: A Third-way for delivering public services in Australia White Paper*, Net Balance Research Institute, Sydney, page 9.

377 Ibid., page 13.

378 Ibid., page 13.

379 Ibid., page 14.

380 Department of Social Services 2014, *A New System for Better Employment and Social Outcomes — Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services*, Canberra, Page 123.

381 Hems et al 2014, *Public Service Mutuals: A Third-way for delivering public services in Australia White Paper*, Net Balance Research Institute, page 14.

The role of government in fostering diversity

As discussed in [Section 12.3](#), in many human services, users benefit from direct choice and control. In these instances, a range of diverse providers and provider types can be an important factor in ensuring that users have access to meaningful choice.

Minimum quality standards will be important in most aspects of human services, even where users have access to good information. Standards must be set to balance necessary quality requirements without raising artificial barriers to entry — so that new entrants can offer innovative and responsive services to users.

Where direct user choice is not possible, governments can play an important role in encouraging diversity through commissioning processes and decisions. Where they directly commission services, governments can: specify contracts with duration periods that do not exclude potential competitors for extended periods of time; and institute processes that avoid allowing monopoly providers to develop over time.

Governments have experience with encouraging a diversity of providers through commissioning processes. For example, diversity was a key consideration for the Job Services tender, with the former Department of Employment and Workplace Relations noting, ‘Job seekers and employers would benefit from the diversity in provider type, philosophy and approach to employment services by choosing a provider that suited them best.’³⁸²

Contestability is also an important factor in structuring contracts. As discussed in [Section 12.4](#), performance may stagnate unless there are sufficient incentives to bring about continuous improvement. Governments can introduce contestability through benchmarking incumbent providers against potentially alternative service providers.

Governments should encourage diversity through promoting low barriers to entry for new providers, while maintaining appropriate quality standards. Low barriers to entry could be promoted through allowing independent regulators to license any provider that meets and maintains prescribed standards. This is the case under the NDIS model, where the NDIA fulfils the role of regulator.

Government contracts could be co-ordinated and designed so that particular services are commissioned, where possible, with overlapping timeframes. This can allow different providers to enter the market at different points in time (and/or retain some attachment with the market), supporting a diversity of providers.

Commissioning should also provide for sufficient information and feedback loops to improve the design and targeting of contracts over time, including by identifying the relative strengths of different service provider types.

Users may require access to different types of human services as part of dealing with complex issues, such as chronic or mental illness. Governments should recognise the integrated nature of many human services markets and their joint role contributing to end-user outcomes. This will require understanding the relative strengths of different providers in different parts of a co-ordinated service supply chain. It may be appropriate to have one provider co-ordinating services for an individual, or

382 Department of Employment and Workplace Relations 2002, *Submission to the Independent Review of Job Network*, Canberra, page 14.

alternatively to put the individual in contact with a diverse range of providers, depending on the circumstances.

The Panel's view

Many human services are delivered by a range of public, private and not-for-profit providers. Each type of provider makes an important contribution to individual users of human services and to the broader community.

Governments may have significant influence over the diversity of providers in human services, particularly through commissioning arrangements.

Recognising the beneficial impact on innovation and user responsiveness that arises from a diversity of providers, governments should encourage diversity by:

- allowing independent regulators to license any provider that meets and maintains prescribed standards, where minimum standards address quality requirements without raising artificial barriers to entry; and/or
- directly commissioning services with co-ordination and processes that:
 - avoid monopoly providers developing over time; and
 - specify contracts with duration periods that balance the need to afford providers some level of certainty without excluding potential competitors for extended periods of time; and
- in support of their role as market stewards, undertake commissioning that:
 - provides for sufficient information and feedback loops to improve the design and targeting of contracts over time, including by identifying the relative strengths of different types of service provider;
 - recognises the integrated nature of many human services and their joint role in contributing to end-user outcomes, and the relative strengths of different providers in different parts of a co-ordinated service supply chain; and
 - is co-ordinated over time, where possible, maximising opportunities for contracts with overlapping timeframes and supporting a diversity of providers in the market at any point in time.

12.6 IMPLEMENTATION ISSUES

Like any changes to public policy, implementing changes to human services needs to be well considered. Human services have a lasting impact on people's lives and wellbeing, increasing the importance of 'getting it right' when designing and implementing policy changes.

The PC notes:

Experience with market-based instruments in human services (and other sectors) in Australia suggests that such mechanisms often require refinement over time to promote improved outcomes. (sub, page 37)

National Disability Services similarly notes that reform of human services, including introducing choice and competition, 'must be introduced slowly with ongoing monitoring' (DR sub, page 1).

Policy changes in this area have often been implemented via a staged process, sometimes involving trials or pilot schemes, with feedback from such trials being used to refine the program. Western Australia's continued work to refine its disability care and support, 25 years after it was first introduced, demonstrates the benefits of measured implementation with careful monitoring.

Human services reform must focus not just on users but also on providers, whose ability to respond positively to policy change will be an important factor in ensuring that Australians continue to enjoy access to high-quality human services.

Through consultations and submissions, the Panel heard representations from many human services providers noting that reform often involves cultural adjustment by providers. Governments, through retaining a market stewardship function, can play an important role in assisting providers to adjust to cultural change, including through introducing reform that progresses at an appropriate pace. For example, Catholic Social Services notes 'Governments need to develop sector adjustment policies so that the professional capability of the sector is not jeopardised by the introduction of competition policy' (DR sub, page 2).

Post-implementation reviews are an important part of monitoring the impacts of reforms. Box 12.9 describes the post-implementation review of the Job Network competition reforms.

Box 12.9: Assessing the outcomes of competition — example from Job Network

The PC reviewed³⁸³ the impact of the Job Network reforms, and drew some general lessons for areas where government purchases services. Although the overall impact of these reforms was positive, the PC made specific recommendations for improving some implementation issues.

Choice and information

With the advent of competition in the market, most job seekers could choose from a number of providers in their area. However, the PC found that only around one in five job seekers were making an active choice. Providing accurate and relevant information would enhance user engagement and improve choice. In addition, once a job seeker was allocated to a provider, he or she was generally not permitted to switch providers.

Tendering versus licensing

The move from a monopoly provider to a tendered market did result in some benefits. However, tendering can be complex and expensive, and it might also result in an excessive focus on price, ultimately leading to a lower quality of service. The PC recommended that a licensing system could be more appropriate, which would allow any agency that met and maintained the prescribed standards to provide services at the going prices.

Regulation

In the job services market, the PC found that regulatory oversight imposed excessive compliance burdens, undermining the desirable flexibility of the system. The PC recommended adopting a risk management approach to contract monitoring based on minimum necessary surveillance to ensure accountability and achievement of specified goals.

Box 12.10 describes a UK post-implementation review of choice reforms, which had a particular focus on how the most disadvantaged users were exercising their new right to choice.

383 Productivity Commission 2002, *Independent Review of Job Network*, Report No. 21, AusInfo, Canberra.

Box 12.10: The UK experience — Barriers to Choice Review³⁸⁴

In 2013, the UK undertook a review to examine how people were using the choices they had been given in human services, with a particular focus on how choices were used and valued by the most disadvantaged.

The review's main were:

- Around half the population were exercising choice.
- The three top factors that people considered when choosing were the location (55 per cent), quality (15 per cent) and reputation (15 per cent) of the service.
- There was strong public support for being able to choose, but around one-third of the population found choice difficult.
- The biggest barriers to choice were a combination of access and information — people without access to computers or cars were at a double disadvantage when it came to exercising choice.
- People were generally happy with the service provided, including in situations where they had no choice.

The report proposed some improvements to the UK's choice-based system, including:

- The system should give more power to service users, especially disadvantaged groups — it was found that these groups were less comfortable about exercising choice, more frustrated by bureaucratic barriers and more affected by difficulties like transport.
- It should be simple and easy for users to switch providers without 'losing their place in the queue' or having to undergo further assessments of eligibility.
- Users should have a right to request flexible service delivery (for example, to talk to consultants on the phone or to study a different combination of subjects at school), and providers unwilling or unable to accommodate requests would be obliged to explain why not.
- Disadvantaged groups should be given more assistance with navigating the choices before them, since many do not use the internet and may be bewildered by choice — there was a need for better information about available choices, and access to face-to-face advice to assist users to interpret the information.

The review concluded that, although competition between rival service providers is a very important element of choice, the choice agenda needed to be broader. The focus should be on treating service users with dignity and respect and treating them as equal partners in the delivery of services.

The Panel recognises that reform in human services sectors can seem slow, but that the ultimate goal of improving the lives of Australians makes pursuing reform both important and worthwhile.

Potential issues with implementation do not mean that competition reforms in human services should be abandoned. In his review of government service sector reform, Peter Shergold noted:

384 Boyle, D 2013, *The barriers to choice review: How are people using choice in public services?*, UK Government, London.

A culture of innovation needs to be actively encouraged. Risk should be managed prudently by a willingness to pilot, demonstrate and evaluate new approaches. In the public arena, as elsewhere, any innovation carries risk of failure. In the design of community services, there should be a willingness to trial often, fail early, and learn quickly from mistakes. At present too much public innovation involves frontline employees finding workarounds to heavily prescribed processes.³⁸⁵

The Panel favours an environment where individual jurisdictions work together and share lessons learned in an effort to encourage high-quality user outcomes. The process for working together need not be prescriptive. The Panel notes comments from the New South Wales Government:

... governments could consider developing their own frameworks for reform ... alongside this, there could be some merit in jurisdictions crafting a high-level agreement on reform principles as it could drive reform within jurisdictions and could align the efforts of jurisdictions to build deeper and more competitive national markets. (DR sub, page 16)

Results and feedback from trials or pilot schemes can be disseminated via an intergovernmental process. Through encouraging communication and knowledge sharing among jurisdictions, continuous learning can be factored into human services delivery models.

The Panel's view

Implementing changes to human services needs to be well considered and will require refinement over time to promote high-quality user outcomes.

Governments can progressively introduce change through trials or pilot schemes.

Although any change may result in implementation issues, the Panel considers that potential issues with implementation ought not to mean that competition reforms in human services should be abandoned.

Feedback and lessons learned from trials can be disseminated via an intergovernmental process that encourages jurisdictions continuously to improve service delivery.

In encouraging innovation in service delivery, governments should:

- encourage experimental service delivery trials whose results are disseminated via an intergovernmental process; and
- encourage jurisdictions to share knowledge and experience in the interest of continuous improvement.

Implementation

Within six months of accepting the recommendation, the Australian Government and state and territory governments should each develop an implementation plan reflecting the unique characteristics of providing human services in its jurisdiction. This plan should be founded on the guiding human services principles as well as the more detailed points set out in 'The Panel's view' boxes throughout this chapter. Although jurisdictions can undertake this work independently, collaboration among jurisdictions may confer significant benefits.

385 Shergold, P 2013, *Service Sector Reform — Reflections on the Consultations*, Victorian Council of Social Service, Melbourne, page 6.

Jurisdictions should then each nominate trial or pilot projects based on the human services principles within 12 months of accepting the recommendation. Each government should work with the Australian Council for Competition Policy (ACCP, see Recommendation 43) to discuss areas of overlap or areas where collaboration may lead to better user outcomes. Once the trials and pilots are completed, the ACCP should report on the outcomes.

A significant factor in the current environment is the reconsideration of the roles and responsibilities of the Australian and state and territory governments through the White Paper on the Reform of the Federation and the White Paper on Reform of Australia's Tax System (the White Papers).

The level of government with lead responsibility for policy in each market for human services will need to align with outcomes of the White Papers.

Recommendation 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.

13 COMPETITIVE NEUTRALITY

13.1 WHAT IS COMPETITIVE NEUTRALITY?

The concept of competitive neutrality is broad. The Organisation for Economic Co-operation and Development (OECD) recently defined competitive neutrality as occurring:

... where no entity operating in an economic market is subject to undue competitive advantages or disadvantages.³⁸⁶

Competitive neutrality can be affected by ownership, institutional form or the specific objectives of entities.

The rationale for pursuing competitive neutrality is to improve the allocation of the economy's resources and to improve competitive processes. Governments compete with the private sector in a variety of markets. If governments enjoy undue advantage relative to other players, this can result in them having lower costs than private sector competitors.

Government ownership can result in undue advantage if one or more of the following apply to their business activities:

- tax exemptions or concessions (for example, relating to income tax, payroll tax, land tax or stamp duty);
- cheaper debt financing reflecting the lower credit risk of governments;
- the absence of a requirement to earn a commercial return on assets; and
- exemptions from regulatory constraints or costs.

As part of the Competition Principles Agreement (CPA), all Australian governments undertook to apply competition principles to government business activities. The objective of competitive neutrality, as expressed in the CPA is:

... the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.³⁸⁷

Competitive neutrality covers the behaviour of government businesses, not policy or other government decisions that affect markets or competition.

Each jurisdiction has developed its own competitive neutrality policy, guidelines and complaint-handling mechanism (some are handled by independent units; others by regulators or departments).³⁸⁸

Although there is some variation, the policies require government business activities to charge prices that fully reflect costs and to compete on the same footing as private sector businesses in terms of

386 OECD 2012, *Competitive Neutrality, Maintaining a level Playing Field between Public and Private Business*, OECD Publishing, page 17.

387 Council of Australian Governments 1995 (as amended to 13 April 2007), *Competition Principles Agreement*, page 3.

388 Victorian Competition and Efficiency Commission 2013, *Competitive neutrality inter-jurisdictional comparison paper*, Melbourne.

taxation, debt, regulation and earning a commercial rate of return. The principle of competitive neutrality does not extend to competitive advantages arising from factors such as business size, skills, location or customer loyalty. As the Victorian Government Competitive Neutrality Policy states:

Competitive neutrality policy measures are designed to achieve a fair market environment without interfering with the innate differences in size, assets, skills and organisational culture which are inherent in the economy. Differences in workforce skills, equipment and managerial competence, which contribute to differing efficiency across organisations, are not the concern of competitive neutrality policy.³⁸⁹

Competitive neutrality arrangements apply to significant government businesses, where the benefits from doing so outweigh the costs, and not to non-profit, non-business activities (see Box 13.1). The threshold test used for identifying 'significant' business activities varies across the jurisdictions.

Box 13.1: Significant government business activity

The Australian Government Competitive Neutrality Complaints Office asks two questions to determine whether government entities are operating a significant business activity.³⁹⁰

Question 1: Is the entity conducting a business?

- a) Does it charge for goods or services (not necessarily to the final consumer)?
- b) Is there an actual or potential competitor (either in the private or public sector), noting that purchasers are not to be restricted by law or policy from choosing alternative sources of supply?
- c) Do managers of the activity have a degree of independence in relation to the production or supply of the good or service *and* the price at which it is provided?

If the answer is yes to all these questions, then the entity is conducting a business.

Question 2: Is the business significant?

The following business activities are automatically considered significant for the purposes of competitive neutrality policy:

- all government business enterprises and their subsidiaries;
- all Australian Government companies;
- all business units;
- baseline costing for activities undertaken for market-testing purposes;
- public sector bids over \$10 million; and
- other government business activities undertaken by prescribed agencies or departments with a commercial turnover of at least \$10 million per annum.

Competitive neutrality arrangements apply to significant business activities but only to the extent that the benefits of the arrangements to the community outweigh the costs.

389 Department of Treasury and Finance, Victorian Government 2012, *Competitive neutrality policy*, Melbourne, page 2.

390 Australian Government 2004, *Australian Government Competitive Neutrality Guidelines for Managers*, Canberra, pages 9 and 13.

Applying competitive neutrality involves separating commercial from non-commercial activities of governments. As the OECD says:

An important aspect in addressing competitive neutrality is the degree of corporatisation of government business activities and the extent to which commercial and non-commercial activities are structurally separated. Separation makes it easier for the commercial activities to operate in a market-consistent way, but may not always be either feasible or economically efficient.³⁹¹

The CPA states that significant government business enterprises (classified as Public Trading Enterprises and Public Financial Enterprises under the Government Financial Statistics Classification) should adopt (where appropriate) a corporatisation model and impose similar commercial and regulatory obligations as those faced by private sector businesses.

For other significant business activities undertaken by agencies as part of a broader range of functions, the CPA suggests that the same principles should be applied or agencies should ensure that prices charged for goods and services reflect the full costs of service delivery (see Box 13.2).

Box 13.2: Corporatisation, commercialisation and full cost-reflective pricing

A range of measures have been adopted to achieve competitive neutrality, including corporatisation, commercialisation and cost-reflective pricing.³⁹²

Corporatisation — creating a separate legal business entity to provide the relevant goods and services. Such an entity is characterised by:

- clear and non-conflicting objectives;
- managerial responsibility, authority and autonomy;
- independent and objective performance monitoring; and
- performance-based rewards and sanctions.

Commercialisation — organising an activity along commercial lines without creating a separate legal business entity. This is typically achieved by introducing and applying a set of commercial practices to the business functions of the government agency. Relevant commercial practices can include separate accounting for, and funding, non-commercial activities and separating regulatory functions from commercial activities.

Full cost-reflective pricing — taking into account all the costs that can be attributed to the provision of the good or service, including cost advantages and disadvantages of government ownership.

Competitive neutrality policy does not require governments to remove community service obligations (CSOs) from their businesses but does require that CSOs be transparent, appropriately costed and directly funded by governments. The Australian Government Competitive Neutrality Guidelines for Managers states:

391 OECD 2012, *Competitive Neutrality, A Compendium of OECD Recommendations, Guidelines and Best Practice*, Paris, page 5.

392 For example, Department of Treasury and Finance, Victorian Government 2012, *Competitive neutrality policy*, Melbourne, pages 4-5.

A best practice approach would be for CSOs to be funded from the purchasing portfolio's budget, with costs negotiated as if it were part of a commercially negotiated agreement. CSOs should include similar CN [competitive neutrality] requirements as other activities. For example, CSO activities should incorporate CN adjustments (for example tax adjustments) and earn a RoR [rate of return] (just as if they had been contracted out).³⁹³

One of the benefits of competitive neutrality is improved transparency and accountability of government business activities, including greater transparency of CSOs. This in turn provides a safeguard against distorting cross-subsidisation.

The need to comply with competitive neutrality policy can also improve government business performance. As Trembath has said:

CN's [competitive neutrality] requirement for government entities to face comparable costs and regulations to the private sector (that is, to face market incentives) means that the owner governments make better informed decisions about the future of those entities. Full attribution of costs often leads governments to assess afresh whether they wish to provide a good or service directly through a subsidiary entity, to introduce tenders to allow competitive bidding for the provision of the good or service, or to vacate the area of production.³⁹⁴

The Australian Local Government Association provides examples of how competitive neutrality policy has changed the way councils operate:

Application of competitive neutrality has required a substantial overhaul of how councils operate, including full-cost reflective pricing for competitive services.

Full-cost pricing has ensured that local government does not provide subsidised services in competition with private providers. For example, Victorian local councils received complaints from private providers who accused local councils of cross-subsiding recreation services such as gyms and swimming pools. The Municipal Association of Victoria, by developing a model framework to determine the full-cost reflective pricing of these services, enabled councils to provide services in a competitive environment and fulfil its CPA obligations. (DR sub, page 3)

The Local Government Association of Tasmania, commenting on the changes councils made to comply with competitive neutrality policy in that State, notes that the changes 'have not been received well by all members of the community, particularly where consumers have to pay for a service that was previously free of charge' (DR sub, page 7).

13.2 CONCERNS RAISED ABOUT COMPETITIVE NEUTRALITY POLICY

Stakeholders overwhelmingly support the principle of competitive neutrality, with calls for Australian governments to re-commit to competitive neutrality policy.³⁹⁵

393 Australian Government 2004, *Australian Government Competitive Neutrality Guidelines for Managers*, Canberra, page 41.

394 Trembath, A 2002, *Competitive Neutrality: Scope for Enhancement*, National Competition Council Staff Discussion Paper, AusInfo, Canberra, page 7.

395 See, for example: Australian Competition and Consumer Commission, sub 1, page 69; Australian Information Industry Association sub, page 12; Australian Newsagents Federation, sub, page 8; Business Council of Australia, sub Summary Report, page 14: and QBE Insurance Australia, DR sub, page 2.

The OECD recently commented:

The most complete competitive neutrality framework implemented today is the one found in Australia. ... this framework is backed by separate implementation and complaints handling mechanisms.³⁹⁶

Capobianco and Christiansen also state:

Australia's competitive neutrality policy has apparently worked well for the following reasons: (1) it deepened the reform of public enterprises in Australia; (2) it has been implemented by large governmental businesses, which led to significant efficiency gains; and (3) it substantially eliminated the advantages of government ownership.³⁹⁷

But submissions raise concerns about the implementation of competitive neutrality policy in a wide range of activities that compete with government. These include businesses in insurance, transport, energy, telecommunications, health, commercial land development, construction, accommodation, waste collection, printing, legal services, agriculture, tourism, childcare and education.

For example:

- The Australian Information Industry Association notes, 'there are some instances, notably in the telecommunications sector, where competitive neutrality seems to not function effectively' (sub, page 12).
- The Australian Private Hospitals Association says, 'distinctions between regulatory arrangements applicable to public and private sectors not only work against competitive neutrality but also limit private sector patient access to affordable and appropriate treatment options' (sub, page 8).
- Paramedical Services Pty Ltd claims a lack of competitive neutrality in the non-emergency patient transport sector, with government ambulance services enjoying an unfair advantage due to subsidisation (sub, pages 11-12).
- The Australian Education Union says, 'competitive neutrality policy has been disastrous where it has been introduced (primarily in VET [vocational education and training])' (sub, page 2).

A number of submissions express concerns about businesses competing with local government. For example, the Small Business Development Corporation says it:

... is aware of a number of service-based activities operated by government entities (particularly at the local government level) that directly compete with the private sector. This type of competition is unfair as such entities have the significant competitive advantage of being backed by government. By way of examples, local governments often operate child care centres, aged care facilities, and gyms in sport and recreation centres in competition with private operators. (DR sub, page 10)

The Chamber of Commerce and Industry Queensland also raises the issue of councils charging for waste collection through rate payments, impeding private competitors that are able to offer lower prices, increased services and more choice for consumers. It raises concerns about local councils providing free access to showgrounds or parklands for motorhomes, which makes it difficult for local

396 OECD 2012, *Competitive Neutrality, Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, page 107.

397 Capobianco, A and Christiansen, H 2011, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options*, OECD Corporate Governance Working Papers, No. 1, OECD Publishing, page 16.

caravan park owners (who are subject to fees, licences, taxes and insurances) to compete (sub, page 5).

The Panel cannot adjudicate every competitive neutrality issue raised in submissions. However, it is possible that some of the complaints fall outside the parameters of current policy. For example, the government activity may not meet current definitions of 'significant business activity'.

However, as the Queensland Competition Authority states:

The revenue thresholds may not be met on a council by council basis, but the impact could be significant if the same problems are recurring for the same types of businesses across the state. This is particularly problematic for small businesses that compete, or would like to compete, to provide services. (sub, page 14)

Queensland Law Society also argues:

Local government protection of businesses that are not significant business activities is defeating competition. (DR sub, page 1)

Submissions raise concerns about a number of instances where governments exercise regulatory or planning approval functions while also operating businesses that compete with private sector enterprises. For example, Cement Concrete and Aggregates Australia raises concerns about local governments being both applicant and assessor within the planning and development application process (sub, page 2). The Construction Material Processors Association raises a similar concern about councils considering planning permits for an extractive operation that would be in direct competition with the Council's quarry (sub, page 11).³⁹⁸

IPART raises related concerns about State-owned Corporations having a mix of commercial and non-commercial principal objectives.

... it is important that SOCs [State-owned Corporations] are not placed at a disadvantage because they are required to pursue unfunded non-commercial objectives. We have identified some aspects of the *State Owned Corporations Act 1989* (NSW) (SOC Act) that inhibit competitive neutrality. (sub, page 23)

The structure and identity of government businesses can also affect competitive neutrality. As the OECD recently said:

It is easier to pursue neutrality when competitive activities are carried out in an entity with an independent identity, operated at arm's length from general government. To achieve this governments can incorporate government businesses according to best practices (i.e. the OECD Guidelines on Corporate Governance of State-Owned Enterprises) or to structurally separate commercial from non-commercial activities. This could also be useful in countering ad-hoc political interventions that might impede competitive neutrality.³⁹⁹

398 See also: Australian Taxi Industry Association, sub, page 10; Chamber of Commerce and Industry Queensland, sub, page 5; and Victorian Caravan Parks Association, DR sub, page 2.

399 OECD 2012, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practice*, page 12.

Calls to improve transparency

Some submissions suggest that there is a lack of community awareness about competitive neutrality and limited public disclosure of governments' compliance with competitive neutrality. The Law Council of Australia — Competition and Consumer Committee notes:

... the current system has limited visibility in the legal and business community, and lacks the machinery to enforce a complaint and incentives for ongoing compliance.

A more effective system for dealing with specific complaints would need to involve formal obligations and enforceable adjudication by an independent body such as the Australian Competition Tribunal. Because most complaints would be likely to involve competing public policy objectives, any claim based on non-adherence to a competitive neutrality principle would need to be subject to an overall assessment as to whether the conduct had a net public benefit. (sub, pages 5-6)

Typical of these concerns are those expressed by the Australian Chamber of Commerce and Industry (ACCI):

... few businesses know exactly what competitive neutrality is, few complaints are filed, and for those upheld, government's response is usually slow. A fundamental issue remains regarding the inadequacy of the enforcement process. (sub, page 23)

The Australian Competition and Consumer Commission (ACCC) also notes that, since 2005, there has been no significant reporting on competitive neutrality compliance across the jurisdictions. Prior to 2005, the NCC considered competitive neutrality implementation across jurisdictions as part of its annual progress assessment of NCP. (sub 1, page 26)

The Productivity Commission (PC) recommends that governments review 'whether processes for handling competitive neutrality complaints are identifiable, independent and accessible' (sub, page 34).

The Australian Newsagents' Federation Ltd argues:

A more transparent process is important to remove any suspicion that the government agency investigating the competitive neutrality complaint may have a conflict of interest. (DR sub, page 7)

ACCI points to the small number of complaints as evidence that the system is not performing well (sub, page 24).⁴⁰⁰

In 2013, the Victorian Competition and Efficiency Commission undertook a comparison of competitive neutrality policies across Australian jurisdictions. It found that 112 competitive neutrality complaints were investigated across all jurisdictions between 1996 and 2012. During 2011-12 five complaints were investigated across all jurisdictions.⁴⁰¹

The declining number of complaints could reflect government business activities becoming familiar with their competitive neutrality responsibilities and ensuring that breaches do not occur. The Panel heard from some jurisdictions that competitive neutrality was now part of the culture, with

400 The ACCC also notes the significant decline in the number of completed competitive neutrality complaint investigations since 2006 (ACCC sub 1, page 26).

401 Victorian Competition and Efficiency Commission 2013, *Competitive Neutrality Inter-jurisdictional Comparison Paper*, page 9.

government businesses seeking advice on complying with competitive neutrality before making changes to business activities.

A recent article by competition law authors Alexandra Merrett and Rachel Trindade also noted:

The very low level of complaints could be because government businesses across the country are so compliant that there's not even a suspicion that they could be failing to fulfil their obligations. On the other hand, it just might be that private businesses have no clue that such obligations exist or they (or their advisors) have no faith in the competitive neutrality process and cannot be bothered wasting time and money in pursuit of a complaint.⁴⁰²

The PC recommends that competitive neutrality policy require self-reporting in annual reports by government businesses of the steps taken to comply with the policy. The PC argues that this would:

... both aid in the assessment of compliance and also provide some transparency to private sector competitors that the business is operating in line with government policy. (sub, page 34)

In addition, the PC recommends that the Heads of Treasuries should produce their annual competitive neutrality matrix within six months of the end of each financial year (sub, page 34).

The Northern Territory Government 'supports all governments including a statement of compliance with the competitive neutrality principles in their annual reports, provided the compliance burden of doing so is minimal' (DR sub, page 3). However, the South Australian Government suggests that such reporting duplicates current arrangements and would add to the administrative burden of States (DR sub, page 16).

The Panel considers that self-reporting by government businesses is important, not only for compliance transparency but also for instilling a culture within government businesses of complying with competitive neutrality policy.

A number of submitters raise the issue of the need for stronger obligations on governments to respond to documented breaches of competitive neutrality policy and associated recommendations for remedial action.⁴⁰³

The PC notes that there are no formal requirements for governments to do so, and that recent investigations undertaken by the Australian Government Competitive Neutrality Complaints Office have not received official responses (sub, page 34). The ACCC suggests that a review of the timeliness and transparency of complaints handling could promote more effective competitive neutrality regimes. (sub 1, page 26)

Calls to review competitive neutrality policy

Various submissions call for a review of competitive neutrality policy.⁴⁰⁴ Areas identified where competitive neutrality policy could be improved to ensure better policy outcomes include:

402 Merrett A and Trindade R 2013, 'Has competitive neutrality run its course?', *The State of Competition*, Issue 13, page 5.

403 See, for example: ACCC, sub 1, page 26; ACCI, sub, page 24; BCA, sub Summary Report, page 14; PC, sub, page 34; and Queensland Competition Authority, sub, page 13.

- clearer guidelines on the application of competitive neutrality policy during the start-up stages of new government business enterprises that are, or will be, engaged in significant business activities, including the extent to which competitive neutrality provisions should be included in business models and initial planning;
- defining the ‘longer term’ to which the policy applies — a critical component of the application of competitive neutrality policy is that government businesses earn a commercial rate of return to justify the retention of assets over the longer term but, as the PC states, ‘this term is not defined, nor is there guidance on its application to a start-up business’ (sub, page 34); and
- principles for identifying and specifying non-commercial objectives of government businesses and those activities that should be funded transparently.

The Chamber of Commerce and Industry Queensland suggests that the small business community would be better served if the policy covered all government businesses that engage in commercial operations (sub, page 5).

The New South Wales Government considers that all jurisdictions should review their competitive neutrality policies as they apply to local governments, with a view to strengthening their application to relevant business activities (DR sub, page 15).

National Seniors Australia also argues for extending competitive neutrality policies:

... to any area where government agencies may compete with private or not-for-profit bodies for the supply of services. (sub, page 6)

As discussed earlier, assessing government activities to which the current competitive neutrality policy applies is based on determining whether an activity is a ‘significant business activity’ (taking into account factors such as annual expenditure and market share) and whether the benefits of implementing the policy outweigh the costs (see Box 13.1). An important question is whether the scope of competitive neutrality policy should be extended to cover a wider set of government activities.

What competitive neutrality policies capture varies across the OECD. As the OECD recently said:

Some national authorities apply competitive neutrality policies only to the activities of ‘traditional’ state-owned enterprises (SOEs). Others apply competitive neutrality practices to all types of government activities that can be characterised as ‘commercial’ in nature (for example where they provide goods and services in a given market), regardless of their legal form or profit objectives. There is no universal definition for what constitutes government ‘business’ activities; neither is there a clear definition for the demarcation between what constitutes commercial and non-commercial activities.⁴⁰⁵

That said, commercial activities are typically characterised as a combination of: where there is a charge for the good or service; there are no restrictions on profitability; and there is actual or

404 See, for example ACCC, sub 1, page 69; ACCI, sub, page 24; BCA, sub Summary Report, page 14; NSW Government, sub, page 10; and Chamber of Commerce and Industry Queensland, sub, page 4.

405 OECD 2012, *Competitive Neutrality, Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, page 18.

potential competition.⁴⁰⁶ These characteristics are in line with the current business test the Australian Government applies under its competitive neutrality policy (see Box 13.1).

A further issue is the appropriateness of the threshold tests for identifying ‘significant business activity’. The Western Australia Local Government Association says:

Local Governments engaged in significant review activity in 1997-98 under the direction of the WA Department of Local Government. Reviews were required by Local Governments with an operating expenditure greater than \$2 million and activities with a user-pays income of over \$200,000. These thresholds are outdated and would need to be increased if competitive neutrality policy was once again actively applied to Local Governments in WA. (DR sub, page 6)

The New South Wales Government argues:

A clear and common understanding between jurisdictions on how ‘significance’ should be evaluated will be important to strengthening the application of competitive neutrality principles. (DR sub, page 14)

The Queensland Law Society also points to the need to define ‘significant business activity’ to clarify what is and what is not covered (DR sub, page 2).

Some jurisdictions have not revised their competitive neutrality policy statements in more than a decade. The Australian Government has not revised its competitive neutrality policy since 1996. The ongoing applicability of competitive neutrality requires that governments maintain up-to-date policies.⁴⁰⁷ Updating the policies can also reinvigorate governments’ commitment to competitive neutrality policy.

In addition, since each jurisdiction is able to adopt its own approach to competitive neutrality, cross-jurisdiction comparisons can help to determine ‘best practice’ as a basis for updating policies and improving current arrangements.

Trembath⁴⁰⁸ suggests that a best-practice model for determining the scope of competitive neutrality should involve all government activities that charge users and trade in goods or services being identified as ‘businesses’. Identification of significant government business activities should refer to the conditions:

- that all government business enterprises be treated as significant businesses;
- that significance of other business activities depends on their impact on the relevant market(s); and
- that activities’ status of significance or non-significance be regularly reviewed.

Also, allegations of non-compliance should be heard by a body separate from the government businesses, which could be the subject of complaint.

406 OECD 2012, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practice*, page 26.

407 The Competitive Neutrality guidelines in SA were updated in 2010 and the thresholds for significant business activities have not been indexed so less significant entities are now captured that would have been excluded in 1995 (South Australian Government, DR sub, page 15).

408 Trembath, A 2002, *Competitive Neutrality: Scope for Enhancement, National Competition Council Staff Discussion Paper*, AusInfo, Canberra, pages 1-3.

Scope of competitive neutrality principles

Current competitive neutrality policies already apply to significant business activities, but the Panel seeks to extend consumer choice and diversity into human services.

The ACCC notes the scope for greater competition in human services and suggests that mechanisms by which this could be achieved include: facilitating competitive neutrality between private and public providers; and promoting competition between 'public' providers (sub 1, page 8).

Commenting on extending competition into human services, National Seniors Australia says it will be:

... important to ensure that competitive neutrality policies extend to any area where government agencies may compete with non-government bodies. If incumbent providers enjoy competitive advantages simply by virtue of government ownership, this could prevent private firms and non-government organisations from winning contracts, even though they may be more efficient or offer services that are better tailored to consumer needs. (DR sub, page 11)

Commenting on competitive neutrality in higher education the Bond University says:

Properly implemented, competitive neutrality in the higher education sector would ensure that user choice and diversity could drive the quality of education that is essential to Australia's future social and economic well-being. This is a reform worthy of prioritisation. (DR sub, page 2)

The New South Wales Government also sees scope to increase the contestability of markets for public services:

In some areas, impediments exist that make it challenging for the private sector to effectively compete with the public sector, despite competitive neutrality requirements. There may be scope to increase contestability in public service markets, including for individual components of the service delivery chain, if community service obligations (CSOs) were transparent, explicitly priced and directly funded by the government. (sub, page 23)

The New South Wales Government notes that changes to increase contestability in the State's vocational education and training market will require TAFE Institutes to compete on a more neutral basis:

These reforms include introducing a demand-driven system through individual student entitlements to government subsidised training for identified skills (from 1 January 2015), allowing the funds to follow the student to their choice of approved training organisation and increasing the contestability of government subsidies for training. The reforms also change TAFE governance structures, increasing competitive neutrality by separating the purchaser and provider roles and ensuring TAFE Institutes compete on a more neutral basis. (sub, page 25)

The main challenges in securing competitive neutrality in human services include: structural separation; determining the operational form for government business activities, particularly when the activities sit within a broader range of government functions; and transparent costing and funding of CSOs.

Appropriate cost-allocation mechanisms for identifying joint costs, assets and liabilities are also important when these are shared across a broad range of government business and non-business activities. If costs are not correctly attributed to the business activity, a government business could

undercut its private competitors. Transparency around cost structures also ensures that CSOs are not used to cross-subsidise commercial activities.

Getting the right competitive neutrality policy settings in place in human services will be crucial to securing the benefits of a diverse range of innovative providers, including expanding choice to users. As National Seniors Australia says:

... we do not under-estimate the challenge of achieving competitive neutrality where government agencies, for-profit and not-for-profit providers are all competing to supply government funded services, since each sector is affected by somewhat different competitive advantages and disadvantages, and each has something unique but valuable to offer. (DR sub, page 11)

To ensure a consistent and evidence-based approach in all jurisdictions, National Seniors Australia suggests that consideration be given to commissioning an independent body to undertake a public inquiry to develop guidelines on how best to achieve competitive neutrality in markets for human services while maintaining scope of services and ensuring quality.

The Panel's view

The principle of competitive neutrality is an important mechanism for strengthening competition in sectors where government is a major provider of services.

Concerns about competitive neutrality policy were raised with the Panel, particularly where businesses, in many instances small businesses, compete with local government. Although the government activities may not be 'significant', as judged by relevant guidelines, the breadth of sectors where issues were raised points to this as a potential obstacle to small business competing in a range of markets.

The Panel is also concerned by the number of instances where local governments act as regulator and provider in a contested market. The operational forms through which government businesses conduct their activities can have implications for competitive neutrality.

The absence of any requirement to respond to documented breaches of competitive neutrality policy is clearly undermining its efficacy.

Competitive neutrality policies need to remain relevant and up-to-date. Specific matters that should be considered 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.

There is scope to increase the transparency and effectiveness of competitive neutrality complaints processes and compliance with competitive neutrality policy, including by:

- assigning responsibility for investigation of complaints to a body independent of government;
- requiring governments to respond publicly to the findings of complaint investigations; and
- requiring government businesses to include a statement on compliance with competitive neutrality policy in their annual reports.

Since each jurisdiction is able to adopt its own approach to competitive neutrality, cross-jurisdiction comparisons can help to determine 'best practice' as a basis for updating policies and improving current arrangements.

There is scope to extend the principles of competitive neutrality to markets where governments and other providers are supplying services, including human services.

The case for extending the principle of competitive neutrality is strongest when:

- there are different arrangements for government providers operating in the same market as alternative providers; and
- the differential treatment is not justified on net public benefit grounds.

Getting competitive neutrality settings right in human services will be crucial to facilitating choice for users and securing the benefits of a diverse range of service providers. Feedback on lessons learnt and different ways of achieving competitive neutrality in markets for human services across the jurisdictions could be incorporated into guidelines and practices.

Implementation

Competitive neutrality reforms require action by each government. Reviews of competitive neutrality policies and complaints processes should commence within six months of jurisdictions accepting the

recommendation. Government businesses should include a statement on competitive neutrality compliance in their next annual reports.

An independent body, such as the proposed Australian Council for Competition Policy, should subsequently review progress in each jurisdiction in reviewing competitive neutrality policies, improving the transparency and effectiveness of complaints processes and reporting on compliance with competitive neutrality principles in annual reports.

Recommendation 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).

Recommendation 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.

Recommendation 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.

14 GOVERNMENT PROCUREMENT AND OTHER COMMERCIAL ARRANGEMENTS

The commercial arrangements of government businesses are subject to competitive neutrality policy, as discussed in [Chapter 13](#). But governments engage in a range of other commercial arrangements with the private sector and non-government organisations (NGOs). These include:

- purchasing goods and services from external sources for their direct use (covering a range of purchase contracts, such as cleaning and maintenance of government buildings and special one-off financial advice relating to the sale of a government asset);
- public-private partnerships (PPPs), which are long-term arrangements involving private sector delivery of large infrastructure and related services projects on behalf of governments (covering, for example, toll roads, hospitals and water supply facilities);
- commissioning for the direct provision of human services, such as out-of-home care, as part of the commissioning cycle (see [Section 12.4](#)); and
- fully exiting some activities through asset privatisations.

14.1 GOVERNMENT PROCUREMENT

Government procurement often involves significant spending and large-value projects. Procurement decisions can affect the range of goods and services offered to consumers and to government. Procurement can therefore shape the structure and functioning of competition in markets.

Public procurement is about securing the best value for taxpayers' money.⁴⁰⁹ This can only occur when businesses genuinely compete on price and quality, and there is scope for businesses to innovate. Both the design of the competitive bidding process and how the process is carried out can influence outcomes. For example, the number of potential bidders could be smaller than desirable where a tender is highly specific or where the time scheduled for responses is short.

As the Productivity Commission (PC) states:

Government funding arrangements and procurement processes for service delivery can [also] distort competition if they preclude more efficient providers from entering the market, or can reduce the frequency of entry (and exit) through the lack of regular market testing. In some instances, government failure to create efficient market structures for the delivery of publicly funded services can also distort competition. (sub, page 8)

Procurement processes therefore need to be designed in such a way that they do not unintentionally limit the number of potential bidders or the quality of services they offer.

Tyro Payments Limited argues, 'the Government itself has the key to promote innovation and competition through its procurement' (DR sub, page 7).

⁴⁰⁹ Achieving value for money is the core rule of the Commonwealth Procurement Rules. Department of Finance 2014, [Commonwealth Procurement Rules](#), Canberra, page 13.

The PC report on Public Infrastructure also states:

... procurement practices that engender competition can improve efficiency by pushing firms to find cost savings or quality improvements but, in addition, may cause firms to trim the return they would expect to get, and this can improve value for money even further.⁴¹⁰

A number of submissions raise issues about procurement, including complexity, risk, accessibility (particularly for small businesses trying to win government contracts) and competition. For example, the Chamber of Commerce and Industry Queensland says:

Queensland businesses have raised significant and ongoing issues with the pre-existing procurement framework in Queensland, namely that they are not able to easily assess, access or participate in procurement opportunities.

The following aspects of the procurement process need improvement: support and assistance provided by the agency or project tender manager, fairness and equity of the tender selection process, delivery of project and procurement and reporting requirements; and the application process and documentation required. (sub, page 10)

As discussed in [Chapter 12](#) on human services, government procurement processes have often been risk-averse and prescriptive. A submission from Kevin Beck states that tender documents are 'prescriptively written to place the entire onus on the respondent with risk and accountability deflected away from the agency' (sub, page 3). Catherine Collins notes 'tender documents for government contracts are unnecessarily large and complex' (sub, page 1), which can make it particularly difficult for smaller businesses to compete.

The Chamber of Commerce and Industry Queensland also observes:

... the tender process itself is highly onerous and often small businesses do not have the time and resources that large businesses do to effectively compete for local tenders. (sub, page 9)

In cases where governments require specific goods or services, governments can play a role in helping a range of businesses understand and bid for tenders. For example, the Western Australian Government hosts seminars for businesses wanting information on the government quote and tender process.⁴¹¹ Governments can also take steps to ensure that contracts are written in a way that is easy for businesses to understand and which allows for a range of innovative solutions to be considered.

The Panel favours a focus on outcomes rather than outputs in government procurement. A focus on outcomes allows bidders to suggest different approaches that achieve the government's desired result rather than having to demonstrate specific activities, tasks or assets. It allows potential bidders to offer new and innovative ways to meet government demands and helps to encourage a diverse range of potential providers.

An example of outcomes-based procurement can be as simple as a tender for building maintenance specifying that floors must be clean and have a uniformly glossy finish (outcome

410 Productivity Commission 2014, *Public Infrastructure*, Report No. 71, Canberra, page 70.

411 See [Small Business Development Corporation 2015, Tender Process, Government of Western Australia, Perth, viewed 9 February 2015 www.smallbusiness.wa.gov.au/tender-process/](#).

focus) rather than specifying that a contractor must strip and re-wax the floors weekly (output focus).⁴¹²

In moving to PPP models that include service delivery, contract design takes on a new importance, with a need to ensure procurement is outcomes based. An outcomes focus allows providers to develop innovative ways of achieving the government's desired result. Outcomes-based PPP examples in the hospital sector are reported in [Section 12.1](#).

Moving to outcomes-based procurement is not without challenges. Governments need to find ways to define desired outcomes and measure performance. The Panel notes the steps governments are already taking, including the New South Wales Government's Procurement Roadmap for 2013 and 2014, which includes a commitment to move away from 'one-size-fits-all' tenders and use more flexible and less complex procurement strategies.⁴¹³

The balance in ensuring that procurement processes meet community needs, while allowing new innovative firms to compete, is captured in the New South Wales Government comment:

Where reform involves contracting with non-government service providers, contracts should be structured to ensure competitive tension is maintained. For example, contract durations should be short enough to maintain competitive pressures on incumbent service providers, but of sufficient length to ensure service providers obtain a satisfactory return. (sub, page 27)

In considering ways to encourage innovation, choice and responsiveness in service provision, governments are using trials or pilots of different types of tenders. Feedback and lessons learned from pilot tenders can then be incorporated into future guidelines and practices.

Submitters also highlight the importance of adequate competition in procurement decisions. This relates both to governments looking to offer more, rather than fewer, procurement opportunities in the same market and to competition among suppliers once government procurement processes are put in place. For example, Australian Industry Group says:

It is vital that Government procurement policy is directed at enhancing private sector access to the Government business market to ensure that there is an adequate level of competition among suppliers when a procurement strategy is executed. (sub, page 49)

Australian Industry Group also says that government agencies should implement an approach that shows their commitment to five procurement principles:

- value for money (looking beyond 'least cost' to also consider quality, after sales servicing and maintenance and ongoing supplier relationships);
- clarity, transparency and improvement of processes;
- full and fair access;
- full opportunities for local suppliers; and
- supporting industry through effective planning and communication (sub, pages 49-50).

412 Example taken from North, J and Keane B, 2014, [Australia: Outcome-based contracting is on the up: Who's doing it, why, and what you need to know about it](#), Corrs Chambers Westgarth, 13 May.

413 NSW Government 2012, [Procurement Roadmap](#), Sydney.

The National Commission of Audit also considered that the Australian Government's procurement policies could be improved in terms of value for money:

While value for money is the core principle underpinning government procurement policy, significant opportunities exist to improve efficiency and effectiveness and to take a more strategic approach. ...The interpretation of value for money should reflect a more rigorous and sophisticated approach that looks beyond simple cost per day or cost per unit. A better approach would take into account outcomes, benefit and importantly risk relative to price.

Associated with this reform is a need to build the skills and capabilities of the public sector to enhance competencies around good contracting.⁴¹⁴

Tyro Payments Limited recommends a review of Australian public procurement policies and procedures with a view to promoting competition and innovation through open panel tendering of available government services (DR sub, page 7).

The New South Wales Government points to recent reforms to the State's procurement policies that include an objective of promoting competition:

... reforms are designed to encourage better value for money and improve outcomes through changes to procurement practices, and reducing the cost and complexity of doing business with the NSW Government. NSW agencies are required to encourage new entrants to apply for government business and expand the number of prospective suppliers where possible. The NSW Procurement Board is also required to take into account competition impacts in forming procurement category management plans. Reforms to the NSW procurement model supports testing the benefits of strategic commissioning approaches, such as outcomes-based contracting, which are designed to increase competition and contestability in government service delivery. (DR sub, pages 10-11)

The New South Wales Government provides examples of different delivery models, including introducing contestability in road maintenance and non-emergency patient transport services, a franchise model for Sydney Ferries and a Northern Beaches hospital public-private partnership. It notes:

As these examples demonstrate, there is considerable scope for governments to promote increased competition in the delivery and procurement of government services.
(sub, page 7)

Similarly, the South Australian Government states that it has a State Procurement Board⁴¹⁵ that acts to encourage competition in state procurement for regular requirements of state government, including the health and education systems. Procurement for infrastructure projects in South Australia is undertaken by the Department of Planning, Transport and Infrastructure, which oversees a competitive tender process for building and construction and maintenance services (DR sub, page 18).

414 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, page 228.

415 Government of South Australia, *State Procurement Board, Procurement Policy Framework*, Adelaide.

In the context of public infrastructure, the PC commented, ‘State and Territory governments have shown a strong interest in further improving their procurement practices and in promoting a more competitive environment’, but also noted scope to improve public sector procurement practices.⁴¹⁶

The PC identified ‘smart procurement strategies’ that governments can adopt to enable competition, such as:

- packaging major projects into smaller parts to increase the number of potential bidders, where the benefits outweigh the costs;
- taking into account that project scheduling can make a large difference to the number of potential bidders for a big project and therefore the prospects for genuine competition; and
- penalising market participants that engage in ‘sweetheart’ deals with unions, which raises costs and may limit competition.⁴¹⁷

The competition principles set out in Recommendation 1 are aimed at encouraging governments to promote competition, choice and a diversity of providers in markets. These principles should guide procurement policies and decisions.

The Australian Government’s Procurement Rules currently state that procurement should ‘encourage competition and be non-discriminatory’.⁴¹⁸ The New South Wales Government ProcurePoint Statement on the Promotion of Competition also states that, competition, in the context of government procurement:

Encourages new entrants to apply for government work and expands the number of prospective suppliers where possible;

Improves whole of government procurement outcomes while encouraging competitive markets for good or service;

Ensures government can be flexible, agile and adaptive as service delivery priorities change; and

Promotes innovative market solutions to government service delivery objectives.

As such, all agencies must act in a manner which promotes these principles. Promotion of competition includes price, product quality and service.⁴¹⁹

The Panel also sees an opportunity to compare procurement policies across jurisdictions to determine ‘best practice’ as a basis for further updating procurement policies and improving procurement practices.

Privatisation

From the perspective of competition policy, privatisation can be thought of as a form of procurement: the transfer of assets from the public to the private sector rather than a transfer of activities — in effect, procurement that is not repeated.

416 Productivity Commission 2014, *Public Infrastructure, Inquiry Report, Volume 2*, Report No. 71, Canberra, page 435 and page 2.

417 Productivity Commission 2014, *Public Infrastructure, Inquiry Report, Volume 1*, Report No. 71, Canberra, page 30.

418 Department of Finance 2014, *Commonwealth Procurement Rules: Achieving value for money*, Canberra, page 13.

419 NSW Government, *Direction 2013-02: Statement on the Promotion of Competition*, Sydney.

The PC states:

Where the objective of reform is to achieve the most efficient management of assets, privatisation of utilities will often be the preferred policy option.

Also, that:

- for electricity network businesses, state-owned businesses, on average, have lower productivity than their private peers;⁴²⁰
- in some sectors, such as airports, privatisation has been consistent with the objective of achieving more efficient investment;⁴²¹
- privatised entities will generally have a greater incentive for good project selection and efficient delivery of infrastructure than government-owned businesses as they are subject to capital market disciplines.⁴²² (sub, page 33)

However, submissions raise particular concerns about governments privatising assets without first putting in place appropriate regulatory settings, including for competition.⁴²³ The Business Council of Australia (BCA), for example, says:

Some government businesses that have been identified for sale will have monopoly power, or perform regulatory functions that create an actual or perceive conflict. It is important that prior to the sale of any such business that the structural issues are addressed, and measures put in place to enhance competition where appropriate. ...Section 4 of COAG's Competition Principles Agreement (1995) addressed structural reform of public monopolies, including the need to review the scope for pro-competitive reforms prior to the sale of public monopolies. The agreement did not require that these reviews were public, and so it is not clear whether and how such analysis has been undertaken prior to recent sales/long-term lease of assets such as the NSW and Queensland ports. (sub, page 44)

The Australian Competition and Consumer Commission (ACCC) also expresses concern about governments privatising assets with a view to maximising proceeds of sale at the expense of competition. The ACCC provides the example of the Sydney airport — where the Australian Government-leased Sydney Airport with the right of first refusal to operate a second Sydney airport (recently announced to be located at Badgery's Creek).

The ACCC states, 'the right of first refusal confers on Sydney Airport a monopoly over the supply of aeronautical services for international and most domestic flights in the Sydney Basin, and forecloses the potential for competition between Sydney Airport and an independent operator of a second airport' (sub 1, page 36).

The ACCC is also concerned about the nature of the regulatory settings that apply to monopoly assets when privatised by governments:

... at times, governments are not establishing appropriate access mechanisms prior to the sale of such assets, instead relying on contractual arrangements with the new owner. (sub 1, page 36)

420 Productivity Commission 2013, *Electricity Network Regulatory Frameworks*, Report no. 62, Canberra.

421 Productivity Commission 2012, *Economic Regulation of Airport Services*, Report no. 57, Canberra.

422 Productivity Commission 2014, *Public Infrastructure*, Report no. 71, Canberra.

423 See also PC, sub, page 33.

The ACCC states that where the sale would otherwise be likely to result in a substantial lessening of competition in breach of section 50 of the CCA, the ACCC may be able to deal with infrastructure issues via undertakings accepted from infrastructure buyers to address those competition concerns. However, the ACCC considers that relying on the merger process is generally an inadequate way of dealing with complex issues of access to significant monopoly infrastructure.

Section 50 remedies can only address competition concerns arising from an acquisition and therefore cannot extend to addressing competition issues arising from the monopoly characteristics of the infrastructure. In other words, where privatisation represents a bare transfer of the monopoly asset from the government to the private sector, the sale is unlikely to lead to a substantial lessening of competition in a market, and therefore merger remedies would not be available. (sub 1, page 37)

That said, in asset privatisation cases where the identity of a potential purchaser raises competition concerns because it holds an interest in competing assets (horizontal aggregation) and/or businesses at other levels in the supply chain (vertical integration), undertakings may be a mechanism to deal with merger concerns. But, as the ACCC notes, ‘even in such cases it is not clear that section 50 remedies represent the most effective mechanism for ensuring appropriate terms and conditions of access to monopoly infrastructure’ (sub 1, page 37).

There are calls for a framework and best practice guidelines for privatising assets. For example, the Queensland Competition Authority says:

A framework is required to ensure that economic efficiency is the goal when privatising.

Contestability and privatisation decisions should be made within a framework that requires both a preference for solutions that allow for more competition and a requirement to carefully consider the efficiency implications of the contracts that are signed with suppliers.

Decisions with regard to privatisation and contestability need to be made transparently, with opportunity for informed debate. (sub, page 11)

The BCA comments that an adequate regulatory framework is a prerequisite for government asset sales to generate the greatest community benefit. Also, that:

The regulatory frameworks — the rules, and the institutions that will administer them — must provide sufficient certainty to attract investors prepared to pay the full value of the assets, while encouraging competition and innovation in upstream and downstream industries. (sub, page 41)

The PC also notes that privatisation may need to be accompanied by complementary policies to ensure that outcomes are efficient and certain community goals are met, including: structural separation of potentially contestable elements from natural monopoly network infrastructure; the creation of a sound regulatory environment prior to privatisation, including third-party access arrangements; clearly specified hardship policies and community service obligations; and a well-planned process of privatisation (sub, page 33).

Undertaking regulatory reforms prior to privatisation is particularly important. As the OECD notes:

Good practice calls for exposing as much as possible of an SOE’s [state-owned enterprises] activities to competition no later than at the time of privatisation. If monopoly activities necessarily remain the government faces a choice:

1. Break up the company, sell the competitive parts and make specific regulatory arrangements for the rest;

2. If the company is to remain vertically integrated during and after privatisation then the need for independent and well-resourced regulation is further exacerbated.⁴²⁴

The ACCC points to the PC's government ownership framework for ensuring that governments make coherent choices about ownership. The PC states:

The strongest (sound) rationale for government ownership is where governments find it difficult to write good contracts with private businesses or to regulate them effectively and where those contractual problems can be effectively overcome through government ownership.⁴²⁵

Drawing on best-practice guidance developed by the OECD⁴²⁶ and experiences with privatisation in Australia and the UK, the PC recommends that governments should:

- be guided by the overarching objective of maximising the net benefit to the community, with clear identification and prioritisation of any subsidiary goals;
- undertake key regulatory reforms prior to sale;
- avoid the unjustified transfer to the new owner of liabilities, obligations or restrictions that may inhibit the future efficiency of the business;
- establish an expert unit within the relevant treasury to oversee the process, develop clear milestones and a timetable;
- undertake genuine consultation with the public and key affected groups, including likely beneficiaries, accompanied by effective communication of the benefits of privatisation; and
- ensure adequate accountability through independent auditing of the privatisation process.⁴²⁷

The first two guiding principles align with the competition principles set out in Recommendation 1. They are a critical feature of best practice guidelines and practices for privatisation. Public transparency of adherence to principles, as noted by the BCA,⁴²⁸ is also important.

All Australian governments should have best-practice privatisation guidelines and processes. As the Panel recommends in the case of infrastructure markets ([Chapter 11](#)), where monopoly infrastructure is privatised, it should be done in a way that promotes competition. Maximising sale proceeds at the expense of competition effectively places a long-term tax on consumers. An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with ensuring an adequate focus on competition in privatisation guidelines and processes.

424 OECD 2010, *Privatisation in the 21st Century, Summary of Recent Experiences*, Paris, page 15.

425 Productivity Commission 2013, *Electricity Network Regulatory Frameworks*, Report no. 62, Canberra, page 265.

426 OECD 2010, *Privatisation in the 21st Century, Summary of Recent Experiences*, Paris, page 15.

427 Productivity Commission 2013, *Electricity Network Regulatory Frameworks*, Report no. 62, Canberra, page 293.

428 BCA sub, page 44.

The Panel's view

Government procurement guidelines and decisions can have a big impact on the range of goods and services ultimately available to consumers. Procurement can also affect the structure and functioning of competition in markets.

Tender documents have traditionally been written in a prescriptive fashion and with an overarching focus on value for money. Although risk management and value for money are both important considerations, too narrow a focus on these factors can constrain diversity, choice and innovation in government-commissioned provision of goods and services.

Governments can take steps to encourage diversity, choice and innovation in procurement arrangements. Tendering with a focus on outcomes, rather than outputs, and trials of less-prescriptive tender documents could encourage bidders to suggest new and innovative methods for achieving the governments' desired result. Education and information sessions can help a broad range of businesses understand the procurement process.

Competition principles, particularly those promoting choice and a diversity of providers, should be incorporated into procurement, commissioning, public-private partnerships and privatisation policies and practices.

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.

Implementation

Reviews of procurement, commissioning, PPPs and privatisation policies and guidelines should be undertaken by all Australian governments, and commence within 12 months of accepting the recommendation. An independent body, such as the proposed Australian Council for Competition Policy, should report on progress in reviewing procurement and privatisation policies.

Recommendation 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.

14.2 THE CCA AND GOVERNMENT ACTIVITY

Under the National Competition Policy (NCP), governments agreed to extend the *Competition and Consumer Act 2010* (CCA, section 2B) so that it applied to the Crown insofar as it carried on a business, either directly or through an authority. The CCA states that the definition of a 'business' includes a business not carried on for profit.

While the CCA does not define what the term 'carrying on a business' means, section 2C sets out some activities that are *excluded* (or do not amount to carrying on a business):

- imposing or collecting taxes, levies or licence fees;
- granting or varying licences; and
- a transaction involving only the Crown and/or non-commercial authorities.

There is also considerable case law on the question of what constitutes 'carrying on a business'.

Further, section 51 in Part IV sets out a process by which governments (the Australian Government and state and territory governments) may, by legislation, authorise conduct (other than mergers) that would otherwise contravene Part IV.

There are many circumstances in which the Crown (whether as a department or an authority) participates in markets, sometimes with a substantial presence, but may not necessarily carry on a business for the purposes of the CCA. This is particularly true in the area of procurement —whether for the delivery of large infrastructure projects, or the regular requirements of the health or education systems.

The BCA says:

... more than 20 years after the Hilmer Report, it remains the case that a great deal of economic and potentially competitive activity remains beyond the reach of competition law in the hands of local, state and territory, and Commonwealth governments. Extending the competition law to these areas could be partly achieved by expanding the definition of 'carrying on a business', but would also require positive reform of legislation and regulations by the various levels of government.

There are real opportunities to expose government activities to greater market disciplines so as to generate better outcomes for consumers, users of subsidised services, and for taxpayers. (sub, Main Report, page 40)

The ACCC argues that, although the NCP reforms extended the CCA to apply to the Crown insofar as the Crown 'carries on a business', the reform 'was intended to ensure that the public sector, where it acts as an ordinary economic player in a market, is subject to the same competition law provisions as the private sector' (DR sub, page 31). Also, since the 1990s, Australian governments have increasingly participated in markets in ways that do not amount to 'carrying on a business' for the purpose of the competition law.

Market-based mechanisms are used by governments to finance, manage and provide government goods and services (described as 'contractualised governance' for the delivery of public services). Such mechanisms have the potential to significantly improve efficiency but also have the potential to harm competition — for example, by incorporating, in the contract, provisions that are likely to have the purpose or effect of restricting competition. (DR sub, page 31)

The NCP reforms could be taken a step further, so the Crown is subject to competition law insofar as it undertakes activity in trade or commerce. Extending the application of the CCA would place government bodies engaging in commercial activities on the same footing as private parties.

In both New Zealand and the UK, government commercial activities are subject to competition law (See Box 14.1). The New Zealand Commerce Act 1986 covers the Crown 'insofar as it engages in trade'. In the UK, the Competition Act 1998 applies to government activities where the body is an 'undertaking' for the purposes of the law and where its activities are commercial in nature.

The ACCC argues that ensuring that a government body, when it enters into a commercial transaction, is subject to the competition law:

... is a logical extension of the NCP reforms. It:

- places the government body in the same position as the private party entering into the contract (as the private party is subject to Part IV of the CCA, whereas the government body is currently immune unless it is carrying on a business);
- treats government acquisitions of goods or services in the same way as private sector acquisitions of goods or services — provisions in Part IV explicitly acknowledge that anti-competitive conduct can arise in both supply and acquisition situations; and
- is consistent with the principles developed for UNCTAD [United Nations Conference on Trade and Development] on the application of the CCA to government ... (DR sub, page 32)

A number of other submitters also support extending the competition provisions of the CCA to the Crown insofar as it undertakes activities in trade or commerce.⁴²⁹ For example, Law Council of Australia — SME Committee says:

The current tests for determining jurisdiction in relation to government activities are too complex. This recommendation will reduce this complexity. (DR sub, page 12)

Box 14.1 Applying competition law to government activities in other jurisdictions

New Zealand

The New Zealand Commerce Act 1986 has a broader application to the Crown than the Australian law. If the Crown is engaged in trade, it is subject to the Commerce Act in relation to those activities. The Crown is regarded as including all government and quasi-government bodies.

The New Zealand Commerce Act defines 'trade' as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services, or to the disposition or acquisition of any interest in land. The courts have interpreted the phrase 'engaged in trade' to have the meaning 'carrying on trade'. This means the Crown must be doing more than just carrying out activities that affect trade to invoke the application of the New Zealand Commerce Act.

429 See, for example: Australian Chamber of Commerce and Industry, DR sub, page 18; Australia Industry Group, DR sub, page 19; Business Council of Australia, DR sub, page 45; Business SA, DR sub, page 3; Independent Contractors Australia, DR sub, page 10; Master Builders Association, DR sub, page 14; and Spier Consulting Legal, DR sub, page 8.

Box 14.1 Applying competition law to government activities in other jurisdictions (continued)

The trading functions of the Crown are subject to the New Zealand Commerce Act, but its administrative and regulatory functions are not. Often Crown Corporations carry out the trading activities of the Crown. Unlike the Crown itself, when a Crown Corporation is engaged in trade, its whole sphere of activity becomes subject to the Commerce Act, not just its trading activities.

The Crown is subject to almost all the same penalties as private sector organisations, including third-party damages actions and other court orders. The only penalty to which the Crown is not subject is a pecuniary penalty payable to itself.

Interconnected bodies corporate are not subject to the prohibition against anti-competitive mergers or agreements, where arrangements are solely between subsidiaries and/or the parent company. Amendments in New Zealand have:

- following the electricity reforms, ensured agreements between bodies corporate owned by the Crown are subject to the Commerce Act as if they were arrangements between independent companies; and
- subsequently reversed this for Crown-owned health trading enterprises, with the result that a public hospital merger is treated as a re-organisation within an interconnected body corporate rather than as a merger between two independent entities.

United Kingdom

The *Competition Act 1998* (UK) applies to government activities where the body is an ‘undertaking’ for the purposes of the law and where its activities are commercial in nature.

In determining whether a public body is acting as an undertaking in relation to the purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end use to which the public body puts the goods or services bought.

A public body is likely to be engaging in economic activity if it is supplying a good or service and that supply is of a commercial nature. Conduct will not amount to economic activity if it is of a wholly social nature.

In 2012, the UK Parliament passed the *Health and Social Care Act 2012* (UK), which specifically applies the competition law merger controls in the *Enterprise Act 2002* (UK) to NHS Foundation Trust hospital mergers.

However, a number of concerns are raised by state and local governments. For example, the New South Wales Government says:

- the broad application of competition laws to government commercial activities risks compromising the policy functions of government — potentially an independent regulator, such as the ACCC, or the courts could be adjudicating government policy decisions and weighing up competition and public benefit objectives (providing an example from the UK, where the Competition Commission ruled against a proposed merger of the Royal Bournemouth and Christchurch Hospitals and the Poole Hospital Trust);
- governments undertake commercial activities in markets where full competition may not be necessary, or in some cases appropriate, to achieve the greatest public benefit — while increased competition and contestability can bring service improvement, imposing the disciplines of the CCA may constrain a government’s ability to design reforms to achieve the greatest public benefit and create disproportionate regulatory costs for government;

- the broad application of the CCA to government activities is likely to create significant ambiguity around how competition laws apply to particular activities and this will inevitably impose significant costs, since:
 - : the legal test of ‘in trade or commerce’ is not necessarily easy to apply in a government context; and
 - : legal complexities arise from the Australian Federation, for example, there will be constitutional limitations on the Commonwealth’s ability to amend the CCA to purport to apply to state government activities, in the absence of referral laws by the States; and
- introducing uncertainty into current procurement processes may have unintended consequences (noting current asset recycling and infrastructure reinvestment commitments in New South Wales). (DR sub, pages 11-12)

Arguments put by local government associations are that:

- Applying competition law to commercial government activities needs to be tempered by the reality that a range of local government trading/commerce activities are delivered on a ‘provider of last resort’ basis, particularly in remote/rural areas.
- The change could create additional procurement practice compliance requirements.
- Many local governments do not have the skill sets in-house to adhere to more stringent competition policy requirements in procurement.⁴³⁰

The ACCC also acknowledges that governments balance competing considerations and that acting in ways that limit competition can sometimes be in the public interest. However, ‘including anti-competitive provisions in confidential private contracts is not the preferable way to achieve this outcome’ (DR sub, page 32).

As the ACCC notes, authorisation under Part VII of the CCA provides a specific mechanism for exempting conduct that restricts competition in order to address market failure. Exemptions have been part of national reforms; for example, derogations under the National Energy Law.

In addition, as the ACCC puts it, section 51 combined with cost-benefit analysis, ‘would make public the cost to competition from the government’s policy decision, and invite scrutiny as to whether restrictions on competition are in fact the best way to achieve the desired policy goal’ (DR sub, page 32).

A number of submitters seek greater clarity on what would be ‘in scope’ if the CCA were to be amended to apply to the Crown insofar as it undertakes activity in trade or commerce.⁴³¹

In the Panel’s view, ‘activity in trade or commerce’ is not intended to cover all government activity. Rather, the intention is that it would cover the supply of goods or services by a government business (currently covered by ‘carrying on a business’) and all other commercial transactions undertaken by government bodies (such as procurement and leasing of government-owned infrastructure). Section 2C of the CCA, which sets out activities that are excluded (taxes, levies or licence fees,

430 See, for example: Local Government Association of Queensland, DR sub, page 4; and Western Australian Local Government Association, DR sub, page 8.

431 See, for example: ACCC, DR sub, page 33; Department of Communications, DR sub, page 9; and NSW Government, DR sub, page 13.

granting or varying licences and transactions involving only the Crown and/or non-commercial authorities), would remain, clarified to define a 'licence' as meaning a licence, permission, authority or right granted under an enactment that allows the licensee to supply goods or services.

The way competition law is applied in other countries also provides some guidance. In New Zealand, as long as the Crown's decision is an exercise of the administrative or regulatory function of government, as opposed to trading, the decision is outside the jurisdiction of New Zealand's Commerce Act.

The term 'engages in trade' was examined by the courts in *Glaxo New Zealand Limited v Attorney General* [1991] 3 NZLR 129. The question in that case was whether the Minister of Health was engaging in trade in deciding, under powers conferred by law, in what circumstances sale of a certain drug should be subsidised by the Department of Health. On delivering the judgement of the Court of Appeal, Justice Casey stated:

It is clear that the Minister was not engaged in trade as such, or in any business, industry, profession, or occupation. Nor ... could her decision-making process be described as 'an activity of commerce'.⁴³²

In the Panel's discussion with the New Zealand Commerce Commission about the scope of New Zealand's Commerce Act, the example was cited of a national parks agency that restricts the number of concessions given to passengers paying for transport to offshore Nature Reserves. If the decision to restrict concessions is an administrative decision made by the Department on environmental conservation grounds, the Commerce Act does not apply. However, if concessions are restricted on the basis of maximising revenue, the Commerce Act does apply.

The Panel's view

Through its commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth or the States and Territories, including local government) has the potential to harm competition. The Panel considers that the NCP reforms should be carried a step further and that the Crown should be subject to the competition laws insofar as it undertakes activity in trade or commerce.

Implementation

Amendments to the CCA so that competition provisions apply to the Crown insofar as it undertakes activity in trade or commerce should be undertaken at the same time as the Panel's other proposed changes to the CCA.

Recommendation 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.

432 Cited in Chapman, M. 1997, 'How the Act applies to local and central government', *Compliance*, Commerce Commission, page 2.

15 KEY RETAIL MARKETS

Competition in the grocery and fuel retailing markets in Australia has been an area of considerable public, media and political interest and concern over many years, particularly because these products are frequently purchased, largely non-discretionary for most consumers and account for a significant proportion of consumer spending.

Some of these markets are also relatively concentrated, raising the possibility of competition concerns arising if certain other factors are also present, including most importantly barriers to entry.

However, the mere fact that some markets in Australia are relatively concentrated is neither surprising nor necessarily a cause for concern. In markets with high fixed costs, economies of scale are important. Australia has a relatively small population and ‘significant economies of scale tend to increase the need for the leading firms to account for a large market share and simultaneously help them achieve such shares’.⁴³³

Provided there is strong competition from rivals to ensure that a large part of these gains is passed through to consumers, consumers will also benefit, notwithstanding the fact that the market will be more concentrated than some others.

Competition policy and law have a crucial role to play in concentrated markets in ensuring that: mergers to achieve scale do not unduly harm competition; and large firms continue to face competitive constraints and are prevented from misusing their market power or engaging in unconscionable conduct. These issues are discussed in detail in [Part 4](#) of this Report.

15.1 SUPERMARKETS

A number of small businesses, supermarkets and their representatives, consumers and other stakeholders raise concerns in submissions about the major supermarket chains, Woolworths and Coles. For example, Master Grocers Australia states:

... the market dominance of two major retailers is seriously affecting the ability of smaller independent retailers to compete effectively in Australia. (sub, page 6)

Other stakeholders, including Woolworths (sub, page 7) and Coles (sub, page 4), submit to the contrary that the grocery industry is highly competitive and has become more so in recent years.

Australia’s grocery market is concentrated, but not uniquely so (see Box 15.1). Although concentration is relevant, it is not determinative of the level of competition in a market. A concentrated market with significant barriers to entry may be conducive to weak competition, but competition between supermarkets in Australia appears to have intensified in recent years following Wesfarmers’ acquisition of Coles and the expansion of ALDI and Costco. Consequently, few concerns have been raised about prices charged to consumers by supermarkets.

433 OECD 1999, *Committee on Competition Law and Policy, Roundtable on Oligopolies*, Paris, page 22.

Box 15.1: Market concentration**Choice of measure affects outcome**

Estimates of market share and international comparisons are fraught. There is no single ‘true’ measure. Each may be useful depending on the question being asked.

The ACCC’s 2008 grocery inquiry report devoted more than 20 pages to measures of market share in Australia and overseas, concluding, ‘the sector is concentrated. However, the level of concentration in the sector, and in particular the positions of Coles and Woolworths, does not represent a level which, of itself, requires market reform’; other factors must be assessed before drawing any conclusions about the degree of competition in the market.⁴³⁴

The ACCC reported a number of market share figures published by overseas supermarket investigations (generally by competition agencies). The Panel has supplemented these figures with other published estimates to produce the table below:

Estimated grocery market shares (%) by country

Largest 4 firms	Australia*	NZ*	UK*	Canada*	Ireland*	Austria*	USA^	Switzerland~
1	30+	56	27.6	29	20-25	N/A	25	32
2	≈25	44	14.1	22	15-20	N/A	17	24
3	IGA, 15-17 (a)	N/A	13.8	14	15	N/A	8	N/A
4	ALDI, 6 (a)	N/A	9.9	11	10	N/A	5	N/A
Top 4 total	75-80	100	65.4	76	60-70	N/A	55	N/A
Top 2 total	55-60	100	41.7	51	35-45	65-70	42	56

Sources: *ACCC 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, pages 45-67, ^www.theconversation.com ‘2013 Fact check on Grocery Market Concentration’ (note this measure is ‘share of food retail sector’), ~www.euromonitor.com ‘Grocery Retailers in Switzerland’.

(a) These figures are not calculated on the same basis as those shown for the largest two firms.

By way of comparison, the Statement of Agreed Facts in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (22 December 2014) states at paragraph 9 of Appendix 1 that ‘[from about 1 April 2011 to about 31 December 2011] Coles supplied approximately 30% of the grocery products supplied for retail sale to customers in Australia. Together with Woolworths, Coles supplied approximately 60% to 70% of the grocery products supplied for retail sale to customers in Australia.’

Some submitters argue that the market share figures reported above understate the true level of concentration in Australia’s grocery market. For example, AURL FoodWorks submits, ‘with regards to Australia, the figures do not represent the supermarket industry. Rather it is a representation of the much wider food industry, and in our opinion incorrectly includes specialty retailers such as bakeries, butchers and convenience stores. This clearly diminishes and misrepresents the actual market share held by Coles and Woolworths in the supermarket industry’. (DR sub, page 5)

Although the Panel accepts that there are different ways of calculating market shares in grocery markets and that some produce higher estimates of market concentration (and higher market shares for Woolworths and Coles in particular), these figures were drawn from the ACCC’s 2008 grocery

434 Australian Competition and Consumer Commission 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Canberra, page 49.

inquiry and were the ACCC's best estimate of market share for 'retail grocery sales' at that time. Notwithstanding differences over exactly which figures should be used, they show that grocery markets are relatively concentrated in Australia, as they are in a number of other developed countries.

Yet the important issue for competition is not whether the market is concentrated but whether some businesses engage in anti-competitive conduct. Other important factors include barriers to entry and the ability to switch to other suppliers, products or customers.

Stakeholders raise a number of concerns about what might broadly be categorised as competition issues (including issues concerning the competition law) in relation to supermarkets. These include:

- concerns that the pricing and other behaviour of major supermarket chains, including that 'predatory capacity', drives out independent retailers and the *Competition and Consumer Act 2010* (CCA) is powerless to prevent this;
- the prices the majors pay to suppliers are too low, disadvantaging both suppliers and other retailers;
- their treatment of suppliers is unfair; and
- their fuel discount shopper dockets unfairly disadvantage independent supermarkets and fuel retailers.

For example, Business SA submits:

Smaller, independent retailers are not worried about competing with the larger retailers, but are concerned about being pushed out of the market with tactics which will eventually result in a duopoly or monopoly market. This is not only at a supermarket level, but also at an individual brand level. (sub, page 6)

Another category of concern is that increasing use of private brands is reducing shelf-space for branded products. Lynden Griggs and Jane Nielsen comment on the rise of supermarket private labels, noting:

In the short term they may well see reduced prices, but long term, potentially, a reduction in choice and a reduction in innovation as small suppliers to the supermarket giants are removed from the market. (sub, page 1)

The CCA has a range of provisions designed to address anti-competitive conduct, in particular provisions that relate to the misuse of market power and unconscionable conduct. The Panel cannot adjudicate whether a breach of the CCA has occurred in particular cases.

However, the Panel reaffirms that these provisions should only prohibit conduct that harms competition, not individual competitors. In particular, the CCA does not, and should not, seek to restrain a competitor because it is big or because its scale or scope of operations enables it to innovate and thus provide benefits for consumers. The Panel recommends strengthening the misuse of market power provisions (see Recommendation 30).

The Panel notes that, in December 2014 the Federal Court, by consent, made declarations that Coles engaged in unconscionable conduct in 2011 in its dealings with certain suppliers in contravention of

the Australian Consumer Law.⁴³⁵ The Court ordered Coles to pay combined pecuniary penalties of \$10 million and costs. Coles also gave a court enforceable undertaking to the ACCC to establish a formal process to provide options for redress for more than 200 suppliers referred to in the proceedings.⁴³⁶

Introducing a properly designed and effective industry code should assist in ensuring that suppliers are able to contract fairly and efficiently. However, any such code should not lead to agreements that benefit retailers and suppliers at the expense of consumers.

The Panel notes that consultation on a draft Food and Grocery Code of Conduct took place in 2014.⁴³⁷ The Panel received a number of submissions from independent supermarkets and their representatives emphasising the importance of ensuring that any such code is enforceable. The Australian Government has announced that the Code was prescribed on 26 February 2015, covering grocery suppliers and binding those retailers and wholesalers that agree to sign on to the Code.⁴³⁸

A number of submissions comment on the Draft Recommendation for further deregulation of trading hours. These are discussed in detail in [Section 10.5](#). Other submissions argue for and against the proposition that supermarkets should be permitted to sell alcohol. This is currently permitted in some jurisdictions but not others. See Liquor and Gambling in [Section 10.4](#) for further discussion on this issue.

The Panel considers that, in general, consumers and small businesses operating in the retail sector can benefit from introducing more competition through eliminating barriers to entry. This can include lifting restrictions on trading hours and on the types of goods that can be sold in supermarkets and service stations.

The Panel recommendation on planning and zoning regulation is in Recommendation 9. The ACCC's 2008 grocery inquiry noted that planning and zoning laws act as a barrier to establishing new supermarkets. It noted that independent supermarkets were particularly concerned with impediments to new developments given the difficulties they have in obtaining access to existing sites.⁴³⁹ ALDI also indicates that these laws are a barrier to expansion (sub, page 1).

Submissions also raise concerns about the range of retail outlets now operated as part of the corporate structures of Woolworths and Wesfarmers. For example, Vito Alfio Palermo notes that one or both of Woolworths or Wesfarmers are involved in '... groceries, liquor, hotels, hardware, electronics, apparel and homeware, office supplies ...' (sub, page 1). Such expansion may generate some efficiencies for these firms, and competition is generally unlikely to be harmed by the expansion of a firm from one sector to another; indeed, in some instances it is likely to be increased. However, the Panel notes that concerns may arise if market power were to be leveraged from one sector into another. As noted above, the Panel's recommendations to strengthen the misuse of market power provisions of the CCA are set out in Recommendation 30.

435 [Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd \[2014\] FCA 1405](#) (22 December 2014).

436 Australian Competition and Consumer Commission 2014, [Court finds Coles engaged in unconscionable conduct and orders Coles pay \\$10 million penalties](#), media release 22 December, Canberra.

437 Treasury, August 2014, [Improving Commercial Relationships in the Food and Grocery Sector](#), Consultation Paper, Canberra.

438 Billson, B (Minister for Small Business) 2015, [Grocery Code to improve relationships between retailers, wholesalers and suppliers](#), media release 2 March, Canberra.

439 Australian Competition and Consumer Commission 2008, [Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries](#), Canberra, page xix.

The move of the large supermarket chains into regional areas has also raised concerns about a loss of amenity and changes to the community. For example, Drakes Supermarkets submits:

It is my view that [Coles and Woolworths] are land banking in many parts of [SA] where ... competition already exists. They are applying for re-zoning of industrial and or commercial land usually outside existing shopping zones with the intent to shift the market away from existing zones. They have created major problems in the Riverland, South East and Adelaide Hills by locating outside traditional main streets. (sub, page 2)

Structural changes such as these raise reasonable concerns for individuals about how their amenity will be affected. Changes that affect the level of activity occurring on the main street or in other traditional retail modes, or that result in some small, long-term or family-run businesses closing, can have real impacts on the local community.

These issues, raised in numerous submissions, are clearly of concern to consumers and small business. The Panel is grateful to the small businesses and individuals who have been prepared to share their views. However, the Panel has also heard of small businesses opening up in new retail centres to take advantage of the customers attracted by the introduction of Coles or Woolworths. The Panel has also heard members of local communities who intend to continue to patronise the small, family-run businesses they have traditionally supported. In this context, the Panel notes the 2015 Westpac Australia Day report, which found that '9 in 10 Australians (92 per cent) feel loyal to at least one small business in their community'.⁴⁴⁰

The Panel considers that these concerns are not matters to be addressed by the competition law. They reflect broader economic and social changes that are often the outcome of competition. Undoubtedly these changes have the potential to damage individual businesses. However, consumer preferences and choice should be the ultimate determinants of which businesses succeed and prosper in a market.

440 Westpac 2015, *Aussies support Australian by shopping local*, media release 23 January.

The Panel's view

Australia's grocery market is concentrated, but not uniquely so. Competition appears to have intensified in recent years, with Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco; consequently, few concerns have been raised about prices.

Small supermarkets allege that the major supermarkets misuse their market power, including through 'predatory capacity' and targeting particular retailers. Suppliers raise concerns about misuse of market power and unconscionable conduct by the major supermarket chains.

The Panel cannot adjudicate whether a breach of the CCA has occurred in particular cases but reaffirms that the competition laws should only prohibit conduct that harms competition, not individual competitors. The Panel recommends strengthening the misuse of market power provisions at Recommendation 30 of this Report.

The Panel notes the recent Federal Court ruling that Coles engaged in unconscionable conduct in its dealings with certain suppliers in 2011. The Panel also notes that a code was prescribed on 26 February 2015 covering grocery suppliers and binding those retailers and wholesalers that agree to sign on to the Code.

Removing regulatory barriers to entry would strengthen competition in the supermarket sector. Planning and zoning restrictions are limiting the growth of ALDI and, as the ACCC has identified, more broadly affect the ability of independent supermarkets to compete.

Trading hours' restrictions and restrictions preventing supermarkets from selling liquor also impede competition.

Supermarket operation has undergone a number of structural changes, including: greater vertical integration and use of private labels; an increase in the range and categories of goods sold within supermarkets; and greater participation by supermarket operators in other sectors. Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of others.

The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community. While the Panel is sensitive to these concerns, they do not of themselves raise competition policy or law issues.

15.2 FUEL RETAILING

The fuel retailing sector has been the subject of numerous reviews. Most notably, in 2007 the ACCC conducted an inquiry into the price of unleaded petrol.⁴⁴¹ It found that wholesaling was dominated by four large players (Shell, BP, Caltex and Mobil) and identified options to improve competition but did not identify serious market failures warranting government intervention.

In particular, the ACCC identified a need to ensure that access to fuel terminals did not act as an impediment to independent wholesalers importing fuel. The ACCC's 2013 fuel monitoring work shows that independent imports have increased in recent years.⁴⁴²

441 Australian Competition and Consumer Commission 2007, *Report of the ACCC inquiry into the price of unleaded petrol*, Canberra, Foreword.

442 Australian Competition and Consumer Commission 2013, *Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia*, Canberra, page xiii.

Fuel retailing was found to have far more competitors, and the petrol operations of the supermarkets were an important presence alongside the operations of independent retailers.

NRMA raises concerns about concentration in Australia's fuel market (sub, page 2). It commends the ACCC for having opposed some acquisitions in the fuel retail sector but considers that prices are still higher than they should be, particularly in regional areas where competition is more limited (sub, pages 2-3). More specifically, Colac Otway Shire (DR sub, page 1) is concerned that fuel prices in Colac are higher than in nearby Geelong.

On the information before it, the Panel does not consider that differences in pricing between regions are explained by any clear shortcoming in the competition law or policy. The Panel notes the Direction from the Minister for Small Business to the ACCC issued under the prices surveillance provisions of the CCA to monitor 'prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia for three years', with effect from 17 December 2014.⁴⁴³ This will provide further information to assist in assessing the weight of any competition concerns in the sector.

Three academics submit that there is a case to reconsider whether to introduce a national version of Western Australia's Fuelwatch scheme, under which fuel retailers must set their prices for the next day in advance and cannot change them for a 24-hour period (Byrne, De Roos, Beaton Wells, DR sub, page 7). They report their findings that, before Fuelwatch, prices rose more quickly than they fell, but that Fuelwatch has reduced this asymmetry and consumers are better able (and more likely) to make purchases on days where market-wide prices tend to be lower.

The Panel welcomes this research but also notes the concerns raised when a national Fuelwatch scheme was proposed in 2008, including that 'the scheme will reduce competition and market flexibility, increase compliance costs, and has more potential to increase prices.'⁴⁴⁴ Accordingly, the Panel considers that further evidence, both of a problem needing to be addressed and of the benefits and cost of Fuelwatch in WA, would be needed before any decision on introducing a national scheme.

Some submitters raise concerns that discount fuel shopper docketts constitute a misuse of market power.⁴⁴⁵ Following an investigation, the ACCC accepted court-enforceable undertakings from Woolworths and Coles limiting the extent of fuel discounts to four cents per litre.⁴⁴⁶ This appears to have addressed the concerns of these submitters for the time being. The Panel notes reports suggesting that funds supermarkets previously spent on fuel discounts have been redirected to discount items sold in supermarkets.⁴⁴⁷

Woolworths submits that there is no clear evidence to support the limiting of these discounts (DR sub, page 6). The Panel notes that, although Woolworths did not accept that its conduct had

443 Direction under section 95ZE, *Competition and Consumer Act 2010 — Monitoring of the Prices, Costs and Profits Relating to the Supply of Unleaded Petroleum Products in the Petroleum Industry in Australia*, 9 December 2014.

444 ABC television Lateline 2008, 'Four departments advised Govt against Fuelwatch scheme', broadcast 28 May.

445 See, for example: Australian Automobile Association, sub, pages 5-6; and Drakes Supermarkets, sub, page 2.

446 Australian Competition and Consumer Commission 2013, *Coles and Woolworths undertake to cease supermarket subsidised fuel discounts*, media release 6 December, Canberra.

447 Jander, M 2014, 'Supermarkets shift discount war from fuel to groceries', 28 January, ABC News citing a report by Commonwealth Bank analyst Andrew McLennan.

adversely affected competition, it offered the undertaking voluntarily to address the ACCC's concerns about funding certain fuel discounts.⁴⁴⁸

Should larger discounts reappear once the undertakings expire, the ACCC could pursue court action under the CCA if it formed the view that such conduct constituted a breach of the CCA. In this context, the Panel notes its proposed changes to the misuse of market power provisions of the CCA in Recommendation 30.

The Panel is not persuaded that consumers are made worse off by the availability of fuel discounts at their current levels. However, shopper dockets can constitute a form of third-line forcing and loss-leader pricing, which has the potential to damage competition if sustained at high levels.

The Australian Automobile Association (sub, pages 4-5) raises the issue of petrol price boards and proposes a national standard be developed. Presently, in most of Australia, price boards are permitted to show the discounted 'shopper docket' price, but the Australian Automobile Association is concerned that this may mislead consumers and unfairly advantage firms offering such discounts. New South Wales, South Australia and parts of Western Australia have regulations in place preventing this practice. NRMA supports the New South Wales regulation (DR sub, page 4), but Woolworths submits that such regulation is unnecessary (DR sub, page 8).

The ACCC has not taken court action in response to such conduct to date, but the Panel notes that the CCA contains provisions dealing with misleading and deceptive conduct. Ministers for consumer affairs have indicated their intention to revisit this issue in future.⁴⁴⁹ The Panel notes that the differences in regulations between jurisdictions creates a 'natural experiment' that will provide evidence to assist Ministers in determining whether these regulations have had any effect on competition and whether they are in the public interest.

National Seniors Australia draws attention to the relevance of price signalling provisions, which presently apply only to banking, to the fuel retailing market:

National Seniors questions whether competition law is working effectively to ensure genuine price competition in automotive fuel retailing, where weekly price movements posted by the major distribution companies appear to move in tandem. The Review should consider whether price signalling provisions ... should be extended to fuel suppliers and other sectors. (sub, page 8)

The Panel's views on the CCA's price signalling provisions are set out in [Section 20.2](#). The Panel also notes the current litigation in which the ACCC alleges that the Informed Sources service, which shares pricing information between fuel retailers, and participating petrol retailers have breached section 45 of the CCA, which prohibits contracts, arrangements and understandings that have the purpose, effect or likely effect of substantially lessening competition.

The Australasian Convenience and Petroleum Marketers Association has made public comments emphasising the importance of terminal access to facilitate wholesaling competition.⁴⁵⁰

The availability of a timely and effective scheme to allow access, where appropriate, to natural monopoly infrastructure provides a possible avenue should independent wholesalers be frustrated in

448 [Undertaking to the ACCC given for the purposes of section 87B by Woolworths Limited](#), page 1.

449 Legislative and Governance Forum on Consumer Affairs 2014, [Joint Communiqué](#), Meeting of Ministers for Consumer Affairs, 13 June.

450 Moulis, N (ACAPMA CEO) 2014, 'Fuel industry: Not drowning, waving', media release 9 April.

their attempts to gain access through commercial negotiations. The Panel's views on the access regime under the CCA are set out in [Chapter 24](#). The Panel has not seen evidence that would justify industry-specific intervention to facilitate such access for fuel terminals.

As noted in relation to other sectors, the Panel notes the importance of planning and zoning regulations being required to take competition issues into account. To the extent that they allow only one service station serving a given area and discourage multiple service stations from opening in close proximity, such restrictions may reduce the likelihood of close competition that allows and encourages price comparison by consumers.

The ACCC submits that the New South Wales government mandate requiring that a certain proportion of petrol sold in the State should contain ethanol is an example of regulation that limits competition and imposes costs on society (sub 1, page 40). The ACCC submits that the mandate has not only failed to achieve its industry assistance goals, but also diminished consumer choice and leading to consumers paying higher prices as they switch to premium fuels to avoid ethanol.

Woolworths also submits that the New South Wales ethanol mandate should be repealed. In addition to its general concern with the mandate, Woolworths is particularly concerned that exempting retailers operating 20 or fewer service stations in New South Wales from the mandate is highly anti-competitive and inappropriate (DR sub, pages 7-8).

The Panel considers that this mandate should be reviewed as part of the proposed new round of regulation review (see Recommendation 8) and repealed, 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 policy can only be achieved by restricting competition.

The Panel's view

Shopper docketing was a source of considerable concern, particularly for small competitors. These were up to 45 cents per litre but are now limited to 4 cents per litre through undertakings to the ACCC.

The Panel is not persuaded that consumers are made worse off by the availability of discounts at their current levels. The Panel notes the undertakings accepted by the ACCC and the availability of the CCA's misuse of market power provisions should future competition concerns emerge in this context.

Stakeholders express concerns that prices are higher in certain regional areas, but the Panel does not consider that this is explained by any clear shortcoming in the law or policy. The Panel notes the 17 December 2014 Direction from the Minister for Small Business to the ACCC issued under the prices surveillance provisions of the CCA to monitor 'prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia for three years'. This will provide further information to assist in assessing the weight of any competition concerns in the sector.

The Panel expresses no view as to the effect the Informed Sources pricing information sharing service has on competition. The Panel's views on the CCA's price signalling provisions are set out in [Section 20.2](#).

The New South Wales ethanol mandate should be reviewed, as part of a new round of regulatory reviews against the public interest test set out in Recommendation 8, and repealed, 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 policy can only be achieved by restricting competition.

In relation to the regulation of petrol price display boards, the Panel considers that the case for wider regulation to require only the undiscounted price to be displayed has not been made out. The Panel notes that differences in regulations across jurisdictions create a 'natural experiment' that will provide evidence to assist Ministers in determining whether these regulations have any effect on competition and whether they are in the public interest.

In relation to proposals to introduce a national scheme based on Fuelwatch in Western Australia, the Panel considers that further evidence, both of a problem needing to be addressed and of the benefits and cost of addressing it in this way, would be necessary before any decision to proceed.

16 INFORMED CHOICE

Globalisation, competition and technological innovation have expanded the range of businesses from which Australian consumers can choose to purchase goods and services. Just over 20 years ago Australian consumers did not have a choice of electricity, gas or telecommunications provider; today, because of competition reforms, most can choose among several competing providers. The Panel also recommends that user choice be placed at the heart of human services delivery, and that governments further their efforts to encourage a diversity of providers (Chapter 12).

Although these developments have improved, and will continue to improve, choice for consumers, greater choice can also mean greater complexity. Consumers' ability to navigate growing complexity potentially compromises the improvement in their wellbeing that wider diversity and choice offer.

16.1 THE 'RIGHT' INFORMATION IS VITAL

Greater choice can act as a powerful force to drive innovation in markets for goods and services, but it also means that consumers need to know more about market offerings if they are to secure the best deals.

In human services, such as publicly funded hospital, disability and aged care, because users do not always pay directly for the services they receive, choice is often based on other factors, such as reputation, quality difference and convenience —not price. As such, an important prerequisite for introducing choice in human services markets is ensuring that consumers have access to relevant information about alternative providers to enable them to make informed choices.

The Panel believes that markets work best when consumers are informed and engaged, empowering them to make good purchasing decisions. Empowering consumers requires that they have access to accurate, easily understood information about products and services on offer.

However, just providing information is not enough to guarantee good choices by consumers. It is also important that:

- the 'right' type of information be provided and is accessible;
- consumers can assess the available offers; and
- consumers can (and want to) act on the available information and analysis to purchase the goods and services that offer the best value.⁴⁵¹

As noted by the UK Office of Fair Trading (now part of the Competition and Markets Authority), 'when any of these three elements of the consumer decision-making process breaks down, consumers' ability to drive effective competition can be harmed'.⁴⁵²

On providing the 'right' information, CHOICE provides the following examples:

Many of us are familiar with the range of factors that we take into consideration when contemplating the purchase of a new car. Although we may give different weight to fuel efficiency, acceleration speed, passenger capacity and boot-space, they are all

⁴⁵¹ Office of Fair Trading 2010, *What does Behavioural Economics mean for Competition Policy?*, pages 10-11.

⁴⁵² *Ibid.*, page 11.

meaningful, comparable, and comprehensible. However, few of us are equally familiar with, or confident in our judgement of, the factors which we might take into consideration when choosing an educational institution, or a brain surgeon. Data on class sizes in the case of the former, or mortality rates in the case of the latter, certainly constitute information, but information which might lead to very different conclusions depending on other factors, such as the number of auxiliary and support staff, or the relative severity of the surgeon's cases ...

The more complex, and less tangible, that the service provided is, the more difficult it is for consumers to evaluate the choices available to them. (sub, page 26)

KPMG notes that information released by governments is not always useful:

In an effort to demonstrate openness and accountability, governments can often deluge the public with information that is not always particularly useful. This can create information overload or lead to a focus on information that is not crucial. The release of hospital waiting list data is a good example. While data is now becoming increasingly available to the public, it is not presented in a user friendly way and there is no evidence to suggest that consumers are using the data to inform their choice of hospital or doctor. (DR sub, page 13)

A UK report on *Better Choices: Better Deals* also comments:

The challenge for consumers is often in knowing what is relevant information and what is not; knowing what is accurate and what is not; and what can be trusted and what cannot.⁴⁵³

The internet has increased the amount of information available to consumers and created new ways to compare deals. As Google Australia says:

The Internet empowers consumers by putting essential information at their fingertips, which encourages businesses of all types to be more consumer-centric. Ultimately, this helps consumers make more informed choices, between a greater variety of goods and services, at lower prices. (sub, page 1)

However, too much information can also affect consumers' decisions. For example, consumers can find it difficult to compare differently structured offers.

Review websites can help consumers decide what products and services represent best value; for example, TripAdvisor, Urbanspoon (people provide comments on hotels and restaurants) and eBay's Feedback System (registered buyers and sellers leave feedback about transactions).

Standardised performance measures and comparator websites can also save consumers time and help them make more informed choices about competing deals.⁴⁵⁴ As Byrne, de Roos and Beaton-Wells say:

453 UK Department for Business Innovations & Skills and Cabinet Office Behavioural Insights Team 2011, *Better Choices: Better Deals, Consumers Powering Growth*, page 10.

454 Nielsen Australia 2013 Research found that respondents that used online comparison services said the services had saved them time, money and effort and helped them find a product that better suited their needs compared with shopping around, either online or through traditional offline methods, such as 'bricks and mortar' branches or retail stores. Cited in *iSelect Limited 2013*, page 29.

Internet-based price comparison websites, which have become increasingly popular in recent years, represent a technological innovation that reduces search costs. Indeed, websites that present retail price distributions and identify lowest-cost retailers to consumers correspond closely to the *clearinghouses* in theoretical models of consumer search. (DR sub, page 8)

A wide range of comparator websites are available in Australia, including:

- the Australian Energy Regulator’s energymadeeasy.gov.au, which allows customers to compare electricity and gas offers in a common format;⁴⁵⁵
- myschool.edu.au, which enables parents and carers to search profiles of Australian schools (see Box 12.6); and
- iSelect.com.au, which compares price and product features of private health insurance and car insurance products, and household utilities and financial products.

A recent Australian Competition and Consumer Commission (ACCC) report found that use of comparator websites in Australia is growing (in most cases), with a range of benefits for consumers. Comparator websites can:

- assist consumers by simplifying complex information and helping them to make informed choices in situations where they would otherwise experience information overload and make no decision (or poor decisions);
- assist consumers to break down complex plans by attempting to standardise retail plans that make it difficult to compare like-for-like;
- place downward pressure on prices and foster product innovation; and
- reduce search costs, thereby potentially making the process of researching and choosing products easier.⁴⁵⁶

The ACCC also found that comparator websites can benefit competition by effectively reducing barriers to entry and making it easier for new entrants to enter the market.

However, it is important that comparator websites serve as accurate decision-making tools and that consumers trust their operation. A number of submissions raise concerns about comparator websites (see Box 16.1).

455 The National Energy Retail Law requires that the Australian Energy Regulator maintain a website price comparator, as well as legislating certain requirements for the provision of information in standard format by retailers to energy consumers.

456 Australian Competition and Consumer Commission 2014, *The comparator website industry in Australia, An Australian Competition and Consumer Commission report*, Canberra, page 2.

Box 16.1: Submitters report that comparing deal offerings can be ‘tricky’**CHOICE**

CHOICE’s research has shown for the last two years running, rising electricity costs were the number one cost of living concern for Australian households. Despite this high level of anxiety, our 2012 nationally representative survey of electricity consumers found that:⁴⁵⁷

- One third of respondents who recently joined their electricity retailer said they had tried to compare providers but had found it was too hard to work out the best choice;
- Only about half of those who recently joined their electricity retailer were confident they had made the best choice; and
- 29 per cent said they didn’t bother comparing providers as they are all about the same in terms of what they offer. (sub, page 23)

Australian Dental Association Inc

PHIs [Private Health Insurers] deliberately pitch advertising and various levels of cover to make it difficult for policy holders to compare the levels of cover on offer. It is not possible to make direct comparison of levels of cover on offer by the 34 PHI funds in Australia. The larger PHI funds engage in massive advertising campaigns using minor aspects of their business such as gym memberships or ‘join now claim now’ campaigns to make them attractive but give sparse details about the fine print of eligible services or full cost of premiums. Rather the cheap option is used as ‘bait advertising’ with the aim of having the consumer make direct contact in order to ‘up sell’ the level of cover.

In an ideal market for dental care, choice of provider would be simple and effective. It would enhance competition. (sub, page 13)

Medibank Private

Internet aggregators allow consumers to compare participating private health insurance policies across pre-determined criteria, such as price and excess levels. This gives consumers easy access to certain information on competing products, and has reduced barriers to entry by reducing the power of existing brands.

Aggregators now account for almost 20 per cent of all sales, and over 60 per cent of consumers consult aggregators prior to making a purchasing decision. On the one hand this drives greater competition, but on the other hand this largely unregulated segment of the industry presents issues for consumers.

When they convert searches into a sale, aggregators receive commissions of between 30-50 per cent of the annual premium. Because commissions received by aggregators vary across insurers, there is an incentive to promote policies that will generate higher revenue rather than meet the needs of consumers. (sub, page 15)

The ACCC notes that some industry participants can undermine the benefits of comparator websites and mislead consumers. The ACCC’s concerns centre on a lack of transparency in respect of the:

- nature or extent of the comparison service, including market coverage;

457 CHOICE 2013, ‘Energy retailers’ marketing tactics, Sydney.

- savings achieved by using the comparison service;
- comparison services being unbiased, impartial or independent;
- value rankings;
- undisclosed commercial relationships affecting recommendations to consumers; and
- content and quality assurance of product information.⁴⁵⁸

In early 2015, the ACCC plans to release best-practice guidelines to assist comparator website operators and businesses to comply with Australia's competition and consumer protection laws.⁴⁵⁹

Other technological innovations, such as advances in metering technologies, also offer consumers better information about their consumption patterns, which can assist them to compare deals on offer. The ACCC says:

... advanced metering with communication capability (smart meters) are capable of recording consumption on a near real time basis, and differentiating consumption at different times of the day. This can provide consumers with better information about their consumption and more control over how they manage their use. In so doing, advanced metering can support greater consumer participation and choice in the market. Better consumption information can also help consumers weigh up competing retail price offers. (sub 1, page 21)

16.2 ACTING ON INFORMATION

Consumers often stay with current providers, despite better deals being available. The ACCC observes that this leads to sub-optimal outcomes for competition:

The ACCC's work in the energy, telecommunications and private health insurance sectors has shown the complexity of these products and the difficulties that consumers have in comparing them. As choice can appear too difficult, consumers remain with their current provider leading to sub-optimal results for competition and Australian economic welfare. (DR sub, page 27)

Even when consumers can identify the best deal for them, there can be real or perceived costs of changing providers. Switching costs include contract termination fees and the need to adjust to a new product, such as a new mobile phone. In some markets, users can also find it difficult to move between providers. For example, an aged care resident (or his or her family) may need to be extremely dissatisfied with care provided by an aged care provider to consider moving to another care facility.

Insights from psychology and behavioural economics suggest that consumers can have behavioural traits that prevent them from making good use of even well-presented information (see Box 16.2).⁴⁶⁰ For example, the way a choice is presented (or 'framed') can affect consumers' ability to make an

458 Australian Competition and Consumer Commission 2014, *The comparator website industry in Australia, An Australian Competition and Consumer Commission report*, Canberra, page 2.

459 Australian Competition and Consumer Commission 2014, *Comparing apples with apples — ACCC report on the comparator website industry in Australia*, Canberra, 28 November.

460 See also: Lunn, P 2014, *Regulatory Policy and Behavioural Economics*, OECD Publishing; and Productivity Commission 2007, *Behavioural Economics and Public Policy, Roundtable Proceedings*, Canberra.

optimal choice.⁴⁶¹ Consumers have also been shown to exhibit ‘present bias’ (preferring to maintain the status quo) and to have a tendency to focus excessively on short-term benefits and costs, with such traits often leading to poor choices and dulled competition.⁴⁶²

Other reasons why consumers may not choose to act on a better deal include:

- a lack of motivation — consumers are more likely to change providers where the consequence of not changing will have a significant impact on their lives;
- a lack of capabilities; and
- geographic or supply side constraints.⁴⁶³

The community and policymakers can harness these behavioural traits to strengthen competition and improve outcomes for consumers. However, some businesses could also take advantage of these traits in ways that may not be in the best interests of consumers, including using consumer confusion or inertia to increase sales.⁴⁶⁴

Where customers are prevented from choosing their preferred product because the right information is difficult to obtain or process, Fatas and Lyons argue that firms should be required to highlight such information up-front in a clear and transparent manner. Also:

The aim is to help consumers act more closely in line with the rational ideal that makes a competitive market attractive — consumers get the product they want and at a price that reflects cost. Remedies that require clearer provision of information to final consumers may increase costs a little, but they are unlikely to have additional consequences that are harmful.⁴⁶⁵

Education strategies can help to build consumer confidence about using products and providers that are new to a market and about switching arrangements. Insights about behavioural biases can be useful when designing and applying competition policy and law (see Box 16.2). The UK Office of Fair Trading noted:

Behavioural economics ... shows us the importance of making use of ‘smarter information’ — thinking carefully about its framing, the context in which information is read, and the ability of consumers to understand it.⁴⁶⁶

461 UK Financial Conduct Authority 2013, *Applying behavioural economics at the Financial Conduct Authority, Occasional Paper No 1*, page 6.

462 Office of Fair Trading 2010, *What does Behavioural Economics mean for Competition Policy?*

463 Office of Fair Trading 2010, *Choice and Competition in Public Services, A guide for policy makers*, page 10.

464 Gans, J 2005, Real Consumers and Telco Choice: *The Road to Confusopoly*, Australian Telecommunications Summit, Sydney.

465 Fatas E and Lyons B 2013, ‘Consumer Behaviour and Market Competition’, *Behavioural Economics in Competition and Consumer Policy*, Economic & Social Research Council Centre for Competition Policy, University of East Anglia, page 35. Fatas and Lyon note that while policy that takes into account behavioural insights has a role to play in obtaining better market outcomes, it needs very careful design because some interventions can do more harm than good, page 29.

466 Office of Fair Trading 2010, *What does Behavioural Economics mean for Competition Policy?*, page 37.

Box 16.2: Behavioural Economics

Behavioural economics, a relatively new field of economics, draws on psychology and the behavioural sciences to gain insights into how individuals make economic decisions in practice. More specifically, behavioural economics assesses how preferences and choices are affected by cognitive, social and emotional factors.⁴⁶⁷

Behavioural economists use observations of consumer behaviour, as well as repeated experiments in controlled environments, to assess how people behave in certain situations and induce principles of economic behaviour. As Lunn said:

This *inductive* approach contrasts with the traditional *deductive* approach to economics, which deduces theories based on assumptions about what constitutes rational behaviour.⁴⁶⁸

Insights from behavioural economics suggest that consumers' choices can depend on context or situation (including the way information is displayed or 'framed'). In addition, consumers can: exhibit present or status quo bias; focus excessively on short-term benefits and costs; be concerned about outcomes for others as well as themselves (i.e., they can be concerned about fairness, trust and reciprocity); and rely on 'rules of thumb' when making choices.

For example, people tend to stick with the 'default option' even when it is not their best option.

Evidence also suggests that people's decision making is adversely affected when they face multiple or complex choices. They can fail to select the best option when more than a few options are available and can be unwilling to make a choice at all when faced with a more complex decision.⁴⁶⁹

An important component of behaviourally informed policies centres on simplifying how information is presented to limit the number or complexity of options available within a choice-set.⁴⁷⁰

Governments and regulators around the world are making increasing use of behavioural economics, most notably in the UK and the US.⁴⁷¹ The UK Government, for example, has a Behavioural Insights Team that acts like an internal consultancy for UK policy makers.⁴⁷²

The New South Wales Government has set up a Behavioural Insights Unit, following the success of the UK Behavioural Insights Team. The Unit is examining factors that influence patients' decisions about whether to be admitted to hospital as a public or a private patient.⁴⁷³

467 Department of Finance and Deregulation, *Influencing Consumer Behaviour: Improving Regulatory Design*, page 15.

468 Lunn, P, 2014, *Regulatory Policy and Behavioural Economics*, OECD Publishing, page 9.

469 Ibid., page 40.

470 Ibid., page 39.

471 OECD, *Behavioural economics*, OECD viewed 4 February 2015, www.oecd.org/gov/regulatory-policy/behavioural-economics.htm.

472 Behavioural Insights Ltd 2014, *The Behavioural Insights Team*, NSW Government viewed 4 February 2015, www.behaviouralinsights.co.uk/about-us.

473 NSW Government 2014, *Understanding People, Better Outcomes, Behavioural Insights in NSW*, Sydney, pages 6-7.

The World Bank, in a report titled *World Development Report 2015: Mind, Society, and Behaviour*, also recently said:

Since every choice set is presented in one way or another, making the crucial aspects of the choice salient and making it cognitively less costly to arrive at the right decision (such as choosing the lowest-cost loan product, following a medical regimen, or investing for retirement) can help people make better decisions.⁴⁷⁴

The Panel considers that 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 research to present information and choices in ways that allow consumers to access, assess and act on it.

Less confident and vulnerable consumers

Not everyone is a confident, engaged and capable consumer. Some Australians do not have access to the internet. Personal attributes and circumstances can affect consumer vulnerability, for example, intellectual disability or living in a remote location. As the Joint Councils of Social Service Network put it:

... the work of the COSS [Councils of Social Service] network across Australia shows that people value choice if they have appropriate information about what services are available *and* power in deciding how a service is delivered and resources used. ...However, some people experiencing poverty and inequality are placed at a significant disadvantage in exercising choice in market-based mechanisms. Factors influencing this disadvantage include mental or chronic illness, unemployment, insecure housing or homelessness, and income inadequacy or insecurity. (DR sub, page 9)

The Productivity Commission (PC) suggests that greater product complexity and demographic changes may be increasing the pool of vulnerable consumers:

As a result of better education and access to the Internet, many consumers are now more confident and informed. But greater product complexity, and demographic changes — such as population ageing — may have simultaneously increased the pool of vulnerable consumers. So too may have the increasing market participation of young people.⁴⁷⁵

The Joint Research Centre of the European Commission, looking at the socio-economic aspects of consumer empowerment, found in general terms that:

- males are more empowered than females;
- younger people are more empowered than older people;
- retired and unemployed people are less empowered;
- people with lower levels of education are less empowered; and
- internet use is associated with empowerment.⁴⁷⁶

474 World Bank Group 2015, *World Development Report 2015: Mind, Society and Behaviour*, Washington, DC, World Bank, page 38.

475 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Volume 1 — Summary, Canberra, page 6.

476 Nardo, M, Loi, M, Rosati, R and Manca, A 2011, *The Consumer Empowerment Index: measure of skills, awareness and engagement of European consumers*, European Commission, Luxembourg, pages 12-13.

But it is not only personal characteristics that can affect consumer vulnerability. An important factor influencing whether someone is able to make an informed choice is the characteristics of the market, product or transaction. Asymmetric information is an important feature of markets for human services, such as complex medical procedures and legal services. Decisions about human services may also need to be made quickly. As the PC notes:

... choosing a health care service provider to treat an acute medical condition is often made quickly in a stressful situation, and consumers may be unable to make choices that are in their best interests. (sub, page 6)

Intermediaries can play an important role in assisting to address information gaps by providing expert advice and helping users navigate complex systems, such as the health, aged care and civil justice systems. Intermediaries are particularly important when users are making one-off decisions (where they have not gained experience through repeated transactions) and where there are potentially significant consequences from making a wrong decision (for example, a decision about selecting a specialist to undertake a medical procedure).⁴⁷⁷

However, the incentives of intermediaries must be aligned with those of the user (see [Section 12.3](#)).

16.3 CALLS FOR ACCESS TO MORE INFORMATION

Businesses are collecting more and more data, notably through transaction records and customer loyalty cards, to better understand their customers. A number of submitters argue that allowing consumers access to their usage data would empower consumers and facilitate competition. The ACCC says:

... initiatives to allow consumers to effectively use their information, such as that underway in the UK and USA, have the potential to assist consumers to make better choices and drive competition. (DR sub, page 27)

Similarly, CHOICE argues:

Providing consumers with relevant, accessible information about the products they consume and the way in which they do so would improve both the individual consumer experience and the overall competitiveness of the marketplace. Coupling the release of this information with the development of user-friendly comparator tools would reduce consumer confusion and simplify the ways in which individuals engage with the market. (DR sub, page 42)

The UK's midata initiative aims to provide consumers with access to data that businesses collect about their transactions and consumption. Midata is a voluntary program between the UK Government, businesses, consumer groups, regulators and trade bodies. The UK Government points to two main benefits from midata:

Helping consumers make better choices: with access to their transaction data in an easy to use format, consumers will be able to make better informed decisions, often with the help of a third party. Being able to base decisions on their previous behaviour will mean individuals can choose products and services which better reflect their needs and offer them the best value. This in turn will reward firms offering the best value products in

477 Office of Fair Trading 2010, *Choice and Competition in Public Services, A guide for policy makers*, page 39.

particular markets, allowing them to win more customers and profits and resources. This will drive competition in the economy.

As a platform for innovation: midata will lead to the creation of new businesses which will help people to interact with their consumption data in many innovative ways.⁴⁷⁸

The applications of midata are described as ‘potentially limitless’:

They might enable you to identify which of the 12 million mobile phone contracts is the best for you (based on your past 12 months usage); to understand what the average fat content of the food you purchase from supermarkets is; or to find out whether there might be better ways of saving your money or using your credit and debit cards.⁴⁷⁹

CHOICE argues that implementing a scheme in Australia based on midata would benefit competition by:

- (a) Supporting robust demand-side competition by enabling consumers to make better informed decisions based on their personal preferences, consumption habits and needs; and
- (b) Encouraging innovation and the development of a broader range of more useful products for consumers, as third parties analyse available open data and identify possibilities for new products and services. (DR sub, page 42)

The US Government has also established a ‘Smart Disclosure’ agenda to drive the release of public and private sector data to help consumers make better choices about services in energy, healthcare and finance.⁴⁸⁰ Specific initiatives include:

- Green Button — an energy-specific program that gives customers access to their electricity data in a portable and shareable format;⁴⁸¹
- Blue Button — that gives patients access to their health data, which consumers can use to compile their personal medical history, switch health insurance companies and set health goals;⁴⁸²
- a MyStudentData Download Button — that gives students access to their financial aid data.⁴⁸³

Australian consumers already have the right, under the *Privacy Act 1988*, to request access to their personal data held by businesses. But, as the ACCC notes:

... the Privacy Act does not specify how the information is to be provided to consumers other than that it must be in a manner requested by the individual if it is reasonable and practicable to do. (DR sub, page 28)

478 UK Department for Business Innovation & Skills 2012, *Government Response to 2012 consultation*, London, page 9.

479 UK Department for Business Innovation & Skills 2011, *Better Choices: Better Deals, Consumers Powering Growth*, London, page 6.

480 US Government, Smart Disclosure Policy, Data.Gov, viewed 8 February, www.data.gov/consumer/smart-disclosure-policy.

481 US Department of Energy, Green Button, Energy.Gov, viewed 8 February, <http://energy.gov/data/green-button>.

482 US Government, Health and Human Service, 2013, About Blue Button, HealthIT.gov, viewed 8 February, www.healthit.gov/patients-families/blue-button/about-blue-button.

483 Federal Student Aid, MyStudentData Download, Federal Student Aid, viewed 8 February 2015, <https://studentaid.ed.gov/resources/mystudentdata-download>.

Also, based on the UK experience:

... further developments would need to take place in Australia for consumers to have access to their information in an electronic, portable and secure format, which might in turn support the market conditions for the creation of innovative technologies to aid consumers to easily compare prices and analyse their purchasing behaviours. (ACCC DR sub, page 28)

CHOICE recommends that governments should work with industry, consumer groups and privacy and security experts to develop a consumer data scheme similar to that in the UK. CHOICE also notes that the US ‘smart disclosure’ policy memorandum provides guidelines to ensure that data are released in a format that aids the ability of consumers to make informed decisions.

The characteristics of smart disclosure include:

- accessibility;
- machine readability;
- standardisation;
- timeliness;
- interoperability; and
- privacy protection (DR sub, pages 7 and 43).

Ensuring privacy and confidentiality and creating suitable and innovative platforms for sharing data will be key to making progress in this area.

The ACCC argues that the UK’s approach to engaging with businesses on a voluntary basis is ‘conducive to establishing the necessary market conditions for the creation of innovative technologies to help consumers analyse their data’ (DR sub, page 28).

Following public consultation on the midata program, the UK Government announced that it would use the law, if necessary, to compel businesses to release consumers’ electronic personal data if they did not do it voluntarily.⁴⁸⁴ The power to do this was approved through the *Enterprise and Regulatory Reform Act 2013*.

However, following a review of the midata voluntary program, the UK Government concluded that, for now at least, there is not a strong case for using legislative power to compel companies to release personal data.⁴⁸⁵

The Panel considers that not only businesses but also consumers should be able to benefit from information collected on individuals. Information that provides consumers with insights into their own consumption has the potential to lead to changes in behaviour with implications for competition and innovation. However, for information to be of value to consumers, it should be accessible in a useable format.

484 UK Government, Department for Business Innovation & Skills, [midata: Government response to 2012 consultation](#), London, pages 14 and 16.

485 UK Government 2015, Providing better information and protection for consumer, UK Government, viewed 30 January 2015 www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/personal-data.

Rather than developing websites themselves, another option is for governments to make available data for private businesses to develop into consumer information systems. For example, a number of apps were developed following Transport for NSW's 'Train App Hot House' competition⁴⁸⁶ to encourage developers to produce the best real-time app products.

The competition was launched in response to customer feedback showing that customers were looking for real-time information while travelling on public transport. Six app developers were selected to have access to real-time train and bus data. The new apps — Arrivo Sydney, TransitTimes+, TripGo, Triptastic and TripView — provide real-time information for trains and buses, and enable customers to view:

- the location of the train and bus in real time;
- train service updates such as cancellations and delays;
- lift and elevator status for selected train stations;
- bus stops and routes nearby using GPS; and
- estimated bus arrival times.⁴⁸⁷

The Panel's view

Markets work best when consumers are engaged, empowering them to make informed decisions. The Panel sees scope for Australian consumers to improve their access to data to better inform their decisions.

Implementation

The Panel considers that the Australian Government and state and territory governments, together with businesses, consumers groups and privacy experts, should establish an agenda for developing a partnership agreement that facilitates new markets for personal information services and allows individuals to access their own data for their own purposes.

The proposed Australian Council for Competition Policy (see Recommendation 43) should set up a working group to develop a partnership agreement and innovative platforms for data sharing. The working group should draw on experiences and lessons learnt from initiatives currently being developed in the UK and the US to enable consumers to use their information.

486 Berejiklian, G (NSW Minister for Transport) 2013, *All Aboard for Real Time Train Apps*, media release, Sydney, 1 February 2013.

487 NSW Government 5 December 2013, *Real time train apps now available*, Transport for NSW, viewed 8 February 2015, www.transport.nsw.gov.au/news/real-time-train-apps-available.

Recommendation 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.

