

# PART 4 — COMPETITION LAWS

## 17 INTRODUCTION TO COMPETITION LAW ISSUES

In this Part, we examine Australia’s competition laws, which are contained in Part IV of the *Competition and Consumer Act 2010 (CCA)*, to assess whether they remain fit for purpose in light of consumer and business experience with the laws and developments in the Australian economy and abroad.

**Part 1** of this Report sets out a number of principles that guide the Panel’s review of Australia’s competition laws. An important principle is that competition policy should foster choice and increased responsiveness to consumers. This is reflected in the objective of the CCA, ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.<sup>488</sup>

The CCA (and competition policy more generally) is not designed to support a particular number of participants in a market or to protect individual competitors; instead, it is designed to prevent competitors’ behaviour from damaging the competitive process to the detriment of consumers.

The robust competitive process supported by Part IV of the CCA may inevitably lead to some market participants being damaged or leaving the market completely. Those adversely affected by competition may feel aggrieved by this damage, but the CCA is neither intended nor designed to protect individual competitors or classes of competitors from such outcomes.

Another guiding principle is that the law should be simple, predictable and reliable. Those objectives can be met if:

- the law prohibits specific categories of anti-competitive conduct, with economy-wide application;
- conduct is only prohibited per se<sup>489</sup> if it is anti-competitive in most circumstances— other conduct is only prohibited where it can be shown that it has the purpose, effect or likely effect, of substantially lessening competition;
- contraventions of the law are adjudicated by a court, with proceedings able to be initiated by a public regulatory authority or through private suit; and
- there is facility for business to seek exemption from the law in individual cases on public benefit grounds.

Furthermore, the law must balance two principles:

- that its scope not over-reach (by prohibiting pro-competitive conduct) or under-reach (by failing to prohibit anti-competitive conduct); and
- that the language of the law be clear to market participants and enforceable by regulators and the courts.

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<sup>488</sup> *Competition and Consumer Act 2010*, section 2.

<sup>489</sup> That is, regardless of the purpose or effect of the conduct.

Competition laws that under-reach or over-reach will fail to secure the welfare of Australians, especially consumers. Laws that are unclear create business and regulatory uncertainty, which imposes costs on the economy.

Our laws should also keep pace with international best practice. International best practice provides an important point of comparison to assess whether the scope of our laws is correct and whether the language and approach used are as simple as possible. [Appendix B](#) provides an overview comparison of the main areas of the law examined in this Report.

Another guiding principle is that policies and systems be adaptable to changing economic circumstances. The more complex and specific the provisions of a law, the less it is able to adapt readily to change.

## 17.1 SIMPLIFICATION

Broadly speaking, submissions to the Review support Australia's current legislative framework.<sup>490</sup> Some submissions identify improvements that could simplify drafting, improve clarity for users and better adhere to key economic underpinnings. However, submissions also note difficulties in simplifying the law, including where simpler drafting may lead to increased uncertainty (for example, ACCC, DR sub, page 29).

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

The current law also duplicates provisions unnecessarily. For example, separate prohibitions have been enacted to address contracts that substantially lessen competition (section 45) and covenants that substantially lessen competition (sections 45B and 45C); exclusive dealing provisions contained in leases and licences of land are addressed separately from exclusive dealing provisions in agreements for the acquisition or supply of all other goods or services (section 47). Such unnecessary duplication could be reduced by inserting a definition to the effect that, for the purposes of the CCA, a contract includes a covenant and a lease or licence of land or buildings.

The Panel considers that the current competition law provisions of the CCA, including the provisions regulating the granting of exemptions, are unnecessarily complex. Australia's competition laws would benefit from simplification while retaining their underlying policy intent.

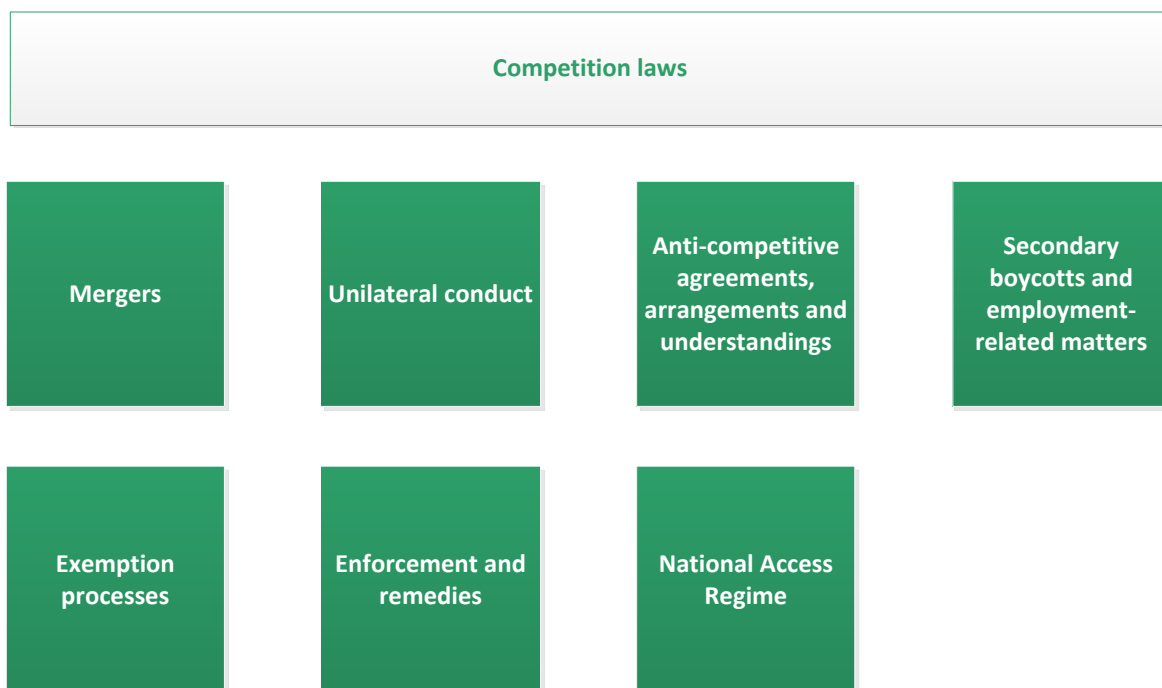
## 17.2 SPECIFIC REFORMS

Specific instances where the law could be improved are explored in the remainder of this Part. The Panel has been guided by the Review's Terms of Reference and issues brought to our attention in submissions and consultations.

The discussion is organised according to the separate topics indicated in the diagram below.

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490 See, for example: Australian Motor Industry Federation, DR sub, page 8; Australian National Retailers Association, DR sub, page 11; Australian Newsagents' Federation, DR sub, page 8; Baker & McKenzie, DR sub, page 1; BHP Billiton, DR sub, page 4; Business Council of Australia, DR sub, page 11; Retail Guild of Australia, DR sub, page 5; and South Australian Government, DR sub, page 18.



Under each topic, the Panel discusses and recommends legislative reform to improve the effectiveness of Australia’s competition laws.

### 17.3 MODEL LEGISLATIVE PROVISIONS

[Appendix A](#) to this Report contains model legislative provisions reflecting many of the CCA reforms recommended by the Panel.

The purpose of preparing the model legislative provisions is to communicate the Panel’s proposals with greater clarity and precision. The Panel hopes that the model provisions will assist governments in considering each proposal. The model provisions also reflect the Panel’s views on simplifying Part IV.

It was not practical to prepare model provisions in respect of every recommendation made by the Panel. Where model provisions illustrate particular recommendations, this is indicated in the body of the Report.

### The Panel's view

Competition laws that are fit for purpose support an adaptable economy by protecting the competitive process, so that a diversity of producers can respond to the changing needs and preferences of consumers.

The concepts, prohibitions and structure of the CCA are sound. However, some provisions are unnecessarily complex, contributing to business and regulatory uncertainty and imposing costs on business and the economy. Such provisions can also inhibit the adaptability of the CCA to changing circumstances.

The Panel considers that the competition laws could be simplified while maintaining their current policy intent. Business and consumers would benefit from simplification of the law. The Panel recommends that this task be undertaken in conjunction with the recommended reforms set out below.

The Panel specifically recommends removing unnecessary or now redundant competition law provisions including:

- subsection 45(1) concerning contracts made before 1977; and
- sections 45B and 45C concerning covenants.

## 17.4 IMPLEMENTATION

Implementing the Panel's proposed legislative reform of the CCA will require amending legislation to be prepared by the Australian Government. The Panel considers that preparing this amending legislation would benefit from the assistance of an expert legal panel comprising representatives from the Treasury, the Australian Competition and Consumer Commission (ACCC) and private sector legal experts. Simplifying Part IV could be carried out concurrently with work done to progress agreed reforms in specific areas.

Enactment of amending legislation is also subject to the requirements of the intergovernmental Conduct Code Agreement 1995, which obliges the Australian Government to consult with, and seek the approval of, the States and Territories on proposed changes to Part IV of the CCA.<sup>491</sup> Importantly, this agreement provides for the seamless coverage of the competition law provisions across all jurisdictions and its application to bodies beyond the constitutional reach of the Australian Government.

Section 29.3 sets out proposed timing for implementing the changes to the CCA. Exposure draft legislation should be prepared within 12 months of accepting the recommendations in consultation with States and Territories. Finalised amendments should be put to the States and Territories for their approval within two years.

### Recommendation 22 — Competition law concepts

The central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and projected needs of the Australian economy.

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<sup>491</sup> *Conduct Code Agreement 1995*, clauses 6 and 7.

**Recommendation 23 — Competition law simplification**

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions.

The process of simplifying the CCA should involve public consultation.

Provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977; and
- sections 45B and 45C concerning covenants.

## 18 MERGERS

Section 50 of the *Competition and Consumer Act 2010* (CCA) prohibits mergers that would, or would be likely to, substantially lessen competition in any market. The Australian Competition and Consumer Commission (ACCC) is empowered to bring proceedings in court to prevent, or break apart, a merger that contravenes the law, or to seek a penalty. Third parties may also bring proceedings in court to break apart a merger that contravenes the law, or to seek damages.

Anti-competitive mergers can cause harm to efficiency and consumers and can bring about adverse long-term changes to markets. However, most mergers do not unduly harm competition; indeed, mergers can deliver substantial economic benefits to business and consumers, including through creating economies of scale and transferring assets to more efficient managers.

Australia's merger laws make provision for a merger to be authorised (that is, exempted from the merger prohibition) if it is likely to result in public benefits that outweigh the likely harm to competition.

Parties seeking approval before they merge to avoid the risk of court action<sup>492</sup> have three separate processes available to them, as set out in the diagram below. Merger parties can choose any of the three processes, taking into account whatever factors they think relevant, such as the legal test, decision-maker, onus of proof, timing, level of transparency and certainty, and legal costs.

Parties need only obtain one clearance or authorisation from one process to proceed with a transaction, and it is open to them to pursue more than one. For example, in early 2014, AGL sought informal clearance from the ACCC for its proposed acquisition of Macquarie Generation. When this was not granted, AGL applied successfully to the Australian Competition Tribunal (the Tribunal) for merger authorisation.

Currently, it is not compulsory to notify or seek approval before proceeding with a merger. Some submissions argue that mandatory pre-notification of mergers should be required for firms with a substantial degree of market power (for example, Retail Guild, DR sub, page 10). However, despite the lack of a legal obligation to do so, firms proposing to engage in mergers that may affect competition generally choose one or more of the available processes.

Although this involves some time and expense, it can avoid the risk that the ACCC or a third party may ask a court to unwind a completed transaction (through a court-ordered divestiture) and/or impose penalties if it is found to breach the CCA.<sup>493</sup> The Panel considers that these sanctions provide sufficient incentive for parties to notify the ACCC of mergers without the need for mandatory notification.

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492 Informal clearance from the ACCC, unlike formal clearance or merger authorisation, does not provide legal protection against third-party legal action, only an indication from the ACCC that it will not take action.

493 As noted above, informal clearance from the ACCC does not provide legal protection against third party legal action.

## Merger clearance and authorisation processes

	Informal merger clearance	Formal merger clearance	Merger authorisation
<b>Process</b>			
<b>Decision maker</b>	ACCC	ACCC	Tribunal
<b>Test</b>	Substantial lessening of competition	Substantial lessening of competition	Public benefit
<b>Clearance</b>	Parties may seek confidential or public clearance	Public only	Public only
<b>Process and information gathering</b>	No set information requirements or forms. Submissions not published. May be a public Statement of Issues. May be a Public Competition Assessment.*	Set information requirements  Statutory forms All non-confidential submissions public	Set information requirements  Statutory forms All non-confidential submissions public
<b>Timing</b>	Indicative timeline only	Statutory timeline of 40 business days With possible 20 business day extension	Statutory timeline of three months with possible three month extension
<b>Nature of decision</b>	Indicative view but no formal decision. If the ACCC opposes a merger but the parties wish to proceed, the parties may seek a declaration from the Federal Court. The ACCC may seek an injunction from the Federal Court to block the merger.	Formal decision by the ACCC	Formal decision by the Tribunal
<b>Appeal body</b>	Injunction or declaration may be appealed to the Full Federal Court	Merits review by the Tribunal	Administrative review by the Federal Court
<b>Other features</b>	No immunity from third party action. The ACCC can accept undertakings to address competition concerns	Immunity from third party action. The ACCC can accept undertakings to address competition concerns	Immunity from third party action. The Tribunal can impose conditions on the transaction
<b>Fees</b>	No fees	\$25,000 fee	\$25,000 fee

\* Public documents such as Statements of Issues and Public Competition Assessments do not contain confidential information.

Past reviews of Australia's competition laws have generated debate about the appropriate legal test for mergers. In 1992, the law was altered from a 'dominance test' to a 'substantial lessening of competition' test.<sup>494</sup> Submissions offer near-universal support for the substantial lessening of competition test.

Submissions to the Issues Paper raise the following matters with respect to the merger law:

- the market definition applied in the assessment of mergers, particularly when merging firms compete in global markets;
- creeping acquisitions;
- whether merger review under the CCA should be aligned with other approval processes, such as those associated with the Foreign Investment Review Board; and
- the timeliness and transparency of merger approval processes.

Submissions to the Draft Report raise further concerns with the way the current test is applied (including whether too few mergers are being opposed by the ACCC) and the rights of third parties to be heard when they are affected by mergers. Submissions also respond to the Draft Recommendations regarding changes to the definition of 'competition', consultation by the ACCC on ways to improve its informal merger review process and changes to the formal merger clearance and authorisation processes.

### 18.1 MARKET DEFINITION AND GLOBAL COMPETITION

The Panel received submissions from a number of parties, including the Business Council of Australia (BCA) (sub, Summary Report, page 16), Australian Dairy Farmers (sub, page 4), Foxtel (sub, page 3), Woolworths (sub, page 14) and Wesfarmers (sub, page 9), on how a 'market' is defined in the CCA and/or by the ACCC, and whether market definition and merger review more broadly take full account of globalisation and competition (including the threat of competition) from overseas firms.

For example, the BCA emphasises the need for a 'commercially realistic' market definition, expressing concern that 'The administrative approach to market definition can be at times unduly narrow' (sub, Summary Report, page 16).

Some submissions argue that the Draft Report focuses on the concerns of parties who consider that too many mergers are blocked, either due to excessively narrow market definition or incorrect application of the law by the ACCC, when the greater problem is that the ACCC opposes too few mergers.<sup>495</sup>

The concept of a market is central to the application of competition law, including the merger law. It is an economic concept that focuses attention on the relevant sources of competition that constrain the parties to a merger.

The meaning of the term 'market' under Australian law has been very stable. It was explained in 1976 by the former Trade Practices Tribunal (now the Australian Competition Tribunal) in the context of a merger authorisation in the following terms:

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494 *Trade Practices Legislation Amendment Act 1992*.

495 See, for example: Australian Motor Industry Federation, DR sub, page 12; Retail Guild of Australia, DR sub, page 31; and AURL FoodWorks, DR sub, page 14.



A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.<sup>496</sup>

This explanation has stood the test of time and has been approved by the High Court. In *Queensland Wire*,<sup>497</sup> Mason CJ, Wilson J<sup>498</sup> and Toohey J<sup>499</sup> agreed with the above passage. Deane J used the same language and said “‘market’ should, in the context of the Act, be understood in the sense of an area of potential close competition in particular goods and/or services and their substitutes’.<sup>500</sup> To the same effect, Dawson J stated, ‘A market is an area in which the exchange of goods or services between buyer and seller is negotiated’.<sup>501</sup>

Similarly, in *Boral*,<sup>502</sup> McHugh J said:

... a market describes the transactions between sellers and buyers in respect of particular products that buyers see as close or reasonable substitutes for each other given the respective prices and conditions of sale of those products.<sup>503</sup>

Assessing the likely effect of a merger on competition, including identifying markets that are relevant to such an assessment, involves judgment. Differences of opinion can and do emerge. Very few mergers are opposed by the ACCC. For example, the ACCC publicly opposed six out of 277 mergers reviewed on a non-confidential basis in 2012-13, or around two per cent.<sup>504</sup> This suggests that the concerns raised with the Panel emanate from a small number of high profile, contentious cases.

It is not the Panel’s role to adjudicate whether the ACCC has been right or wrong in its interpretation of the law in individual cases. When the ACCC and merger parties differ about whether a merger breaches the CCA, it is the place of the Tribunal or the courts to decide the outcome. The Panel is directed to assess whether the legal framework within which mergers are assessed is appropriate.

Submissions raise the specific question of whether Australia’s merger laws give proper consideration to global markets within which many Australian businesses compete. Concerns have been expressed that the term ‘market’ in the CCA is defined as a market ‘in Australia’ and that this causes the competition analysis to be focussed too narrowly. Similar concerns about market definition and

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496 *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481 at 518.

497 *Queensland Wire v BHP* (1989) 167 CLR 177.

498 *Ibid.*, at 188.

499 *Ibid.*, at 210.

500 *Ibid.*, at 195.

501 *Ibid.*, at 199.

502 *Boral Besser Masonry v ACCC* (2003) 215 CLR 374.

503 *Ibid.*, at 248.

504 Australian Competition and Consumer Commission and the Australian Energy Regulator 2013, *Annual Report 2012-13*, Canberra, page 41.

global competition have arisen overseas<sup>505</sup> and also arose in submissions to the Dawson Review, which did not recommend changing the way markets are defined.<sup>506</sup>

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries. The law is intended to protect competition in Australian markets for the benefit of Australian consumers. If this aspect of the CCA were to be changed, and competition were to be assessed by reference to global markets, Australian competition law would be at risk of failing in its central objective.

However, this should not mean the CCA ignore forces of competition that arise outside Australia but which bear upon Australian markets. The objective of the CCA is to protect and promote competition in Australian markets, but frequently the sources of competition in Australian markets are global in origin, especially as increasing numbers of Australian consumers purchase goods and services online from overseas suppliers.

The CCA has been framed to take account of all sources of competition that affect markets in Australia. The term 'competition' in section 4 of the CCA is defined to include competition from imported goods and services.

The geographic boundaries of many markets extend beyond Australia. In those circumstances, a corporation that competes for the supply of goods or services in Australia does so in the broader geographic market. Any assessment of competition under the CCA must take account of those market realities. This has been recognised in decisions of the courts and the Tribunal.

In *Re Fortescue Metals Group*, the Tribunal concluded that the relevant concept of a market for the purposes of the competition law:

... consists of groups of buyers and groups of sellers in a geographic region who seek each other out as a source of supply of, or as customers for, products. The interaction of the buyers and sellers determines the price for the products.<sup>507</sup>

The Tribunal described the process of defining the relevant market as 'the identification of the participating firms, a description of the products exchanged and the borders within which the exchange occurs'.<sup>508</sup>

Although the CCA is concerned with the wellbeing of Australian consumers, it takes account of all sellers that compete to supply products in Australia, wherever they may be located.

This is also acknowledged by the ACCC, which states:

The CCA ... recognises that Australia operates in a global economy and provides a framework for such matters to be taken into account. For example when assessing the likely competitive effect of a proposed merger, the potential for competitive constraint to be provided by suppliers located outside Australia is taken into account by considering import competition. (sub 1, page 126)

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505 See, for example: Jenny, F 2000, *Competition Policy Analysis*, edited by Hope, E, Routledge, London, page 31.

506 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act (the Dawson Review)*, Canprint Communications, Canberra, pages 50 and 59.

507 *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1011].

508 *Ibid.*, at [1014].

Nevertheless, given the importance of ensuring that global sources of competition are considered where relevant, the Panel recommends strengthening the current definition of ‘competition’ in the CCA so there can be no doubt that it includes competition from *potential* imports of goods and services and not just *actual* imports.

The Panel does not intend that this change would expand market definitions in competition law to include every product and service that could conceivably be imported into Australia, only to clarify that the credible threat of import competition is a relevant component of a competition analysis.

This proposal is supported by a number of submissions to the Draft Report,<sup>509</sup> including both the SME Committee (DR sub, page 12) and the Competition and Consumer Committee (DR sub, page 8) of the Law Council of Australia. The Australian National Retailers Association also agrees that such a change would permit the CCA to consider all sources of competition that affect markets in Australia (DR sub, page 21).

However, in the ACCC’s view, the current definition of ‘competition’ in the CCA already includes competition from actual and potential imports into Australia. The ACCC does not support changing the definition given the adverse impact this would have on the simplicity of the CCA and potential implications for enforcement (DR sub, pages 33-34).

Although the BCA agrees with the Panel’s proposal concerning the definition of ‘competition’ in the CCA, it submits that ‘competitive analysis under the CCA can be characterised by the adoption of unduly narrow and static market definitions and an overreliance on existing market concentration’ (DR sub, page 11). The BCA notes that market definition is a tool in competitive analysis but should not determine the limits of competitive activity to be taken into account. The BCA also notes that, in some cases, market definition may not be required at all since competitive effects can be measured directly (DR sub, page 12).

The Panel agrees that the importance of market definition and market concentration should not be overstated. However, the Panel does not consider that legislative guidance to this effect is necessary. The courts are able to use market definition as one of a number of analytical tools to assist them in determining the likely effects of a merger on competition.

Some submissions also question whether the ACCC’s application of the CCA is constraining Australian businesses from achieving sufficient economies of scale to become globally competitive. For example:

Competition Policy [is] frustrating mergers of companies in the global traded goods sector in the name of competition in the domestic market, but in the process denies a producer the extent of the market required for an operation to be internationally competitive ... It is recommended priority be given to mergers which favour the formation of a strong group which can compete in international markets rather than having weak fragmented entities. (The Industry Group, sub, page 12)

In order to compete effectively, businesses must continuously pursue economic efficiency. In many industries, efficiency requires scale. Businesses may pursue mergers in order to achieve efficient scale to compete more effectively in global markets.

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509 See, for example: Australian Automobile Aftermarket Association, DR sub, page 3; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian Industry Group, DR sub, pages 19-20; Coles Group, DR sub, pages 7-8; Foxtel, DR sub, page 1; SA Independent Retailers, DR sub, page 3; Spier Consulting Legal, DR sub, page 8; and Woolworth Limited, DR sub, pages 31-32.

In many markets in Australia, mergers aimed at achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA.

However, in some markets, the opposite will be the case: the influence of imports may be weak and unable to constrain the resulting market power of the merged businesses. When that occurs, conflicting interests arise: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers on account of the reduction in competition.

From time to time, there are calls for competition policy to be changed to allow the formation of 'national champions' — national firms that are large enough to compete globally. Geoff Ball submits that the Draft Report leaves the impression 'that somehow the formation of 'National Champions' must disadvantage suppliers and consumers in the Australian market' (DR sub, page 1), while the National Farmers' Federation submits that, to take advantage of the numerous export opportunities available to Australian farmers and agribusinesses, scale and capacity are important to improve efficiencies, lower costs and build lasting commercial relationships (DR sub, page 13).

While the Panel agrees that the pursuit of scale efficiencies is a desirable economic objective, it is less clear whether, and in what circumstances, suspending competition laws to allow the creation of national champions is desirable from either an economic or consumer perspective. As the National Farmers' Federation submits, while the legislative approach to mergers should take the benefits of scale into consideration, it should 'equally ensure there is no negative impact on the supply chain from any imbalances in market power' (DR sub, page 13).

Porter<sup>510</sup> and others note that the best preparation for overseas competition is not insulation from domestic competition but exposure to intense domestic competition. Further, the purpose of the competition law is to enhance consumer welfare, including through ensuring that Australian consumers can access competitively priced goods and services. Allowing mergers to create a national champion may benefit the shareholders of the merged businesses but could diminish the welfare of Australian consumers.

Box 18.1 provides a discussion of recent calls to support the creation of national champions in Australian agriculture, with specific reference to New Zealand dairy co-operative, Fonterra.

### **Box 18.1: Fonterra and calls for national champions in Australian agriculture**

The Fonterra co-operative is New Zealand's dominant dairy company. It was formed from the 2001 merger of the two largest co-operatives, New Zealand Dairy Group and Kiwi Co-operative Dairies, together with the New Zealand Dairy Board. Some recent commentary suggests that Australia should seek to emulate the formation of Fonterra and our competition policy and laws should be amended to facilitate this outcome.

The Panel considers that important differences between the circumstances surrounding Fonterra's formation and those applying in Australia mean that this conclusion is not soundly based.

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510 Porter, M E 1990, *Competitive Advantage of Nations*, Harvard Business Review, New York, page 86.

**Box 18.1: Fonterra and calls for national champions in Australian agriculture (continued)**

Before Fonterra was formed, the New Zealand dairy market was highly regulated, with the New Zealand Dairy Board having a legislated export monopoly. The merger to create Fonterra was not permitted under New Zealand's competition laws but was instead facilitated through special legislation. The legislation included provisions and obligations on Fonterra designed to provide for domestic competition and prevent harm to consumers and farmers as a result of the merger.

Concerns were raised that the farm-gate price would be depressed due to Fonterra's dominance as a buyer. These were addressed through a combination of regulation and incentives. Ongoing price monitoring, as well as Fonterra's obligations to allow its farmer-shareholders open entry and exit at a 'fair' price, and to supply milk to competing processors, provide competitive pressure and an incentive for competitive pricing. To achieve domestic competition in the sale of milk products, Fonterra had to divest several brands to competitors and is obligated to supply them on competitive terms.

'Sometimes they think in Australia that we've got a monopoly and it works, but we don't and having one doesn't,' New Zealand's Deputy Prime Minister and Minister of Finance, Bill English, has observed.<sup>511</sup>

The Panel considers that issues concerning the creation of national champions can be addressed under the existing CCA authorisation framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

The merger authorisation process (as set out in Box 18.2) applies a public benefit test that covers all potential benefits and detriments of a merger, including economies of scale. In this way, the current law recognises there may be occasions where it is in the public interest to allow a particular merger to achieve efficient scale to compete globally, notwithstanding that the merger adversely affects competition in Australia.

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511 Binsted, T and Malpass, L 2014, 'Tough cheese: Australia's Dairy Conundrum', *Australian Financial Review*, 2 August, Melbourne.

**Box 18.2: Authorisation and the public benefit test**

Parties may seek authorisation for an acquisition. This process allows mergers even if they result in a substantial lessening of competition, but only if they meet a public benefit test. Applications have been rare (only two since the Tribunal became the first-instance decision-maker in 2007).

The test applied by the Tribunal in assessing applications is that authorisation must *not* be granted unless it is satisfied that the acquisition is likely to result in such benefit to the public that it should be allowed. The Tribunal *must* consider as benefits:

- a significant increase in the real value of exports;
- a significant substitution of domestic products for imported goods; and
- all other relevant matters that relate to the international competitiveness of any Australian industry.

Other factors may also be considered.<sup>512</sup>

The non-exhaustive list of factors that must be taken into account enables merger parties to argue that their proposed merger will result in public benefit through improving the business's ability to expand exports or compete against imports.

The factors that must be considered under the merger authorisation process have been criticised:

Placing emphasis on these particular indicators is very likely to lead to sub-optimal outcomes. There is no *a priori* reason why growth in exports or the substitution of domestic production for imported products increases (or decreases) public welfare ... Deeming benefit to lie with increased exports or import substitution has the potential to distort production, waste scarce resources, and ultimately reduce community incomes.<sup>513</sup>

The Panel agrees that this list provides a narrow view of public benefit. However, it is a non-exhaustive list, and the Tribunal has interpreted public benefit to have a broad meaning.<sup>514</sup> Given that the Tribunal is already able to take into account whatever factors it deems appropriate, a change in the law may have limited utility.

As noted elsewhere in this Report, the Panel recommends some procedural changes to the merger approval process (see Recommendation 35) and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC (see Recommendation 51).

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512 *Competition and Consumer Act 2010*, section 95AZH.

513 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Dairy Product Manufacturing*, Canberra, page 123.

514 *Victorian Newsagency* (1994) ATPR 41–357 at 42, 677.

### The Panel's view

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

Although the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets originate globally. The CCA has been framed to take account of all sources of competition that affect markets in Australia. However, the current definition of 'competition' in the CCA could be strengthened so there can be no doubt that it includes competition from *potential* imports of goods and services and not just *actual* imports.

In many markets in Australia, achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA.

If achieving efficient scale through a merger will also substantially lessen competition in Australia, conflicting interests arise: the gain to the businesses that wish to merge to achieve greater efficiency against the potential detriment to Australian consumers due to reduced competition.

The Panel considers that such issues can be addressed under the existing CCA framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

As noted elsewhere in this Report, the Panel recommends some procedural changes to the merger approval process and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC.

### Recommendation 25 — Definition of market and competition

The current definition of 'market' in section 4E of the CCA should be retained but the current definition of 'competition' in section 4 should be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.

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

## 18.2 CREEPING ACQUISITIONS

Concerns about 'creeping acquisitions' typically arise where a business with a substantial degree of power in a market acquires many small competitors over time.

The merger provisions of the CCA focus on the effect or likely effect on competition of a particular merger or acquisition. In 2008 and 2009 government discussion papers considered possible changes to deal with 'creeping acquisitions', which the 2008 paper described as:

... conduct that comprises the accumulated effect of a number of small individual transactions which, when considered in isolation at the time that each transaction occurred, would not breach section 50. That is, while each transaction considered at the time it occurred may have a limited impact on competition, and would therefore not fall

within the scope of section 50, over a longer period a series of such transactions may have the cumulative effect of substantially lessening competition in a market.<sup>515</sup>

Prior to the 2008 and 2009 discussion papers, creeping acquisitions had already been the subject of much consideration, including by the Parliamentary Joint Select Committee on the Retailing Sector (Baird Committee) in its 1999 report *Fair Market or Market Failure?*, the Dawson Review, and the Senate Economics References Committee in its 2004 report on *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*.

In 1999, the Baird Committee noted its concerns that section 50 was unlikely to be breached by small but repeated acquisitions of independent grocery retailers.<sup>516</sup> It also noted that there was a 'degree of equivocation' among those giving evidence as to whether legislative amendments were required in relation to creeping acquisitions.<sup>517</sup> However, concerns were raised that, in some instances, the ACCC is unaware that an acquisition has even taken place until after the fact due to the lack of notification requirements.

In 2003, the Dawson Review considered and rejected a range of measures to deal with creeping acquisitions,<sup>518</sup> including:

- market share caps — rejected on the basis that they would inefficiently restrict competition, would be unworkable in the retail sector, and would adversely affect rural consumers in particular;
- a declaration process, whereby industries declared by the government to be highly concentrated would have to notify the ACCC of any intended acquisitions — rejected because it would lead to large market participants establishing new facilities rather than buying existing stores from smaller rivals willing to sell; and
- a proposal to amend subsection 50(3) to include a reference to creeping acquisitions as a relevant concern in assessments of mergers and acquisitions under section 50 — rejected because the ACCC could consider creeping acquisitions under the existing law.

In 2004, the Senate Economics Reference Committee noted that 'as a matter of logic' creeping acquisitions in concentrated markets must over time substantially lessen competition. The Committee was of the view that section 50 was unable to deal with the issue of creeping acquisitions. It recommended that section 50 be revised to enable the ACCC to prevent creeping acquisitions that would lead to a substantial lessening of competition in an Australian market.<sup>519</sup>

Following the 2008 and 2009 discussion papers, in 2011 the CCA was amended so that it now prohibits mergers likely to result in a substantial lessening of competition in 'any' market, instead of applying only to a 'substantial' market. Despite this change, many submitters consider that creeping acquisitions remain a problem.

For example, NRMA (sub, page 3), Retail Guild of Australia (DR sub, page 70), COSBOA (sub, page 3), Friends of Hawker Village (sub, page 1), Metcash (sub, page 3) and AURL FoodWorks (sub, page 17)

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515 The Treasury 2008, *Discussion Paper — Creeping Acquisitions*, Canberra, pages 3-4.

516 Joint Select Committee on the Retailing Sector 1999, *Fair Market or Market Failure?*, Canberra, page 54.

517 *Ibid.*, page 56.

518 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act (the Dawson Review)*, Canprint Communications, Canberra, pages 66-68.

519 Senate Economics References Committee 2004, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, Canberra, page 64.



all call for changes to address creeping acquisitions. These calls are mainly in the context of concerns about the size and expansion of Woolworths and Coles in the supermarket and fuel retailing sectors.

Other submissions, including those from Woolworths (sub, page 80), Wesfarmers (sub, page 17) and the Law Council of Australia — Competition and Consumer Committee (sub, page 10) argue that no such change is warranted.

The ACCC's position in its 2008 grocery inquiry was that, although amendments to deal with creeping acquisitions would be desirable, 'such acquisitions do not appear to be a significant current concern in the supermarket retail sector'.<sup>520</sup> Rather, the expansion of Woolworths and Coles had occurred up to that time mainly via organic growth, not acquisition.

As a matter of concept, competition law should assess the overall effect of business conduct and not be narrowly focused on individual transactions. Various areas of competition law assess the anti-competitive effect of a commercial arrangement by reference to the aggregate effect of similar arrangements (specifically, section 45 that prohibits anti-competitive arrangements and section 47 that prohibits anti-competitive exclusive dealing).

A legitimate question therefore arises whether section 50, which addresses anti-competitive mergers, should be applied so that the anti-competitive effect of an individual merger is assessed by reference to the aggregate effect of other mergers undertaken by the same corporation (or group of corporations) within a stated period (for example, the prior three years).

There would be complexities in introducing a concept of 'merger aggregation' into the CCA. Mergers rarely occur at the same time; they occur over time. Therefore, it is necessary to choose an appropriate period of time over which to aggregate the competitive effect of mergers undertaken by the corporation.

The complicating factor is that market conditions may have altered materially over the period chosen, with competition having increased or decreased.

In those circumstances, assessing the aggregate effect on competition of mergers that have occurred over a period becomes a difficult exercise. The longer the period chosen, the more difficult the task becomes. Any such change to the law would affect every corporation that undertook a merger. Assessing each merger would involve considering previous mergers undertaken by the corporation over the stated time period. This would impose additional costs and potentially increase the time required for merger review.

On balance, in the absence of evidence of harmful acquisitions proceeding because of a gap in the law on creeping acquisitions, the Panel does not consider that a sufficiently strong case for change has been made.

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

### 18.3 SHOULD MERGER REVIEW UNDER THE CCA BE ALIGNED WITH OTHER APPROVAL PROCESSES?

Some submissions, including one from Australian Dairy Farmers (sub, page 4), raise concerns about co-ordination of the timing of the various merger approval processes that exist under Australian law. Beyond the CCA, various other approval processes may apply to certain mergers and acquisitions, such as foreign investment, media diversity and financial regulator approvals.

Australian Dairy Farmers' particular concern arises from the bidding process for Warrnambool Cheese and Butter Factory Company Holdings Limited in 2013. One bidder, Murray Goulburn Co-operative Co Limited, was a competitor of Warrnambool Cheese and Butter for the acquisition of milk and made its bid conditional upon obtaining ACCC or Tribunal approval. Another bidder, the Canadian firm Saputo Inc., had no activities in Australia and decided not to seek ACCC or Tribunal approval, although it did seek and obtain approval from the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975*, since it is a foreign investor.

The Treasurer provided Saputo with approval on 12 November 2013, while Murray Goulburn did not lodge its application for merger authorisation until 29 November 2013. Saputo's bid was accepted by the majority of Warrnambool Cheese and Butter shareholders before the Tribunal could rule on Murray Goulburn's application, which was then withdrawn.

Australian Dairy Farmers suggests that the Treasurer's decision on Saputo's bid should have been delayed until the merger authorisation process for Murray Goulburn's bid had concluded (DR sub, page 16). Since any given merger may be subject to numerous approval processes, the logical extension of this proposal is that all approvals for all competing bids should be delivered simultaneously.

The Panel does not support this proposal. The various approval processes are not related. Although it is desirable that decision-makers be cognisant of other processes, to require that each decision-maker delay its decision until all approval processes have been completed for all bidders would impose an unwarranted burden on bidders and sellers. Bidders and sellers are aware of the various approvals that may be required under various Australian laws and have some understanding of the time that could be taken. Sellers have incentives to maximise competition among potential bidders in any sales process.

### 18.4 ENFORCEMENT OF THE MERGER LAW

The merger law in section 50 is able to be enforced through court proceedings taken, by either the ACCC or by private parties opposed to the merger, in similar manner to all other competition provisions in Part IV.<sup>521</sup> Only the ACCC is able to seek injunctive relief from the court to prevent the merger proceeding. However, private parties can seek an order requiring the acquiring party to divest the business that was acquired or an order for damages caused to the private party by the merger.

The Retail Guild of Australia submits that it is not only merger parties who are affected by mergers; third parties can also be adversely affected. Although third parties can seek to persuade the ACCC to oppose a merger and/or to take their own private legal action, the Retail Guild submits that, in many situations, the costs and risks of private action are too great, making it impractical for private parties

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521 Criminal cartel provision in Division 1 of Part IV, are enforced by the Commonwealth Director of Public Prosecutions.

to challenge mergers. The Retail Guild calls for changes to limit the costs to which third parties may be exposed when taking private action to challenge a merger (DR sub, page 49). The Consumer Action Law Centre also submits that it is important to have merger processes that allow consumer perspectives to be taken into account (DR sub, page 24).

The Panel agrees that it is important to ensure that legal rights and remedies under the CCA are not undermined by being too costly, slow or uncertain to be of practical assistance. However, there is a balance to be struck; it is also important to ensure certainty and timeliness in merger decisions and that business is not burdened by unwarranted legal proceedings. The impediments to private enforcement of competition laws are discussed in more detail in [Section 23.2](#). However, the Panel does not support any change to the law that would immunise private parties from the risk of an adverse costs order in connection with merger proceedings.

The Panel also agrees that consumer perspectives are important to decisions about mergers and considers that the proposed new merger authorisation process (discussed below) will provide improved opportunities for third parties, including consumers and their representatives, to be heard.

## 18.5 MERGER APPROVAL PROCESSES

As noted earlier, parties wishing to seek approval before they merge to avoid the risk of court action have three separate processes available to them: informal clearance by the ACCC; formal clearance by the ACCC; and authorisation by the Tribunal. Many submissions are directed to these processes, with various proposals for change. The Panel has weighed these various proposals carefully.

### ACCC's informal merger clearance process

The informal clearance process is the most commonly used of the merger clearance options, with the ACCC considering 289 transactions on this basis in 2012-13.<sup>522</sup>

Under the informal merger clearance process, the ACCC considers information provided by the merger parties and other parties, conducts its own analysis and forms a view as to the likely competition effects of the proposed transaction. Informal clearance by the ACCC does not provide statutory protection from legal action under section 50; it provides the ACCC's view on whether an acquisition is likely to breach the CCA. Similarly, ACCC opposition to a merger does not legally prohibit the merger; only a court can do that.

The vast majority of submissions support the informal clearance process because of its flexibility and relatively low cost. The fact that the process leads to the ACCC forming a view, rather than a decision of a court, means that it is not necessary for parties to provide legally admissible evidence. This reduces the complexity and expense associated with the process.

Changes to the informal process following the Dawson Review have generally been welcomed:

These reforms include Statements of Issues, Public Competition Assessments and letters to the merger parties often referred to as 'transparency letters'. The ACCC should be commended for its efforts to improve the level of accountability and transparency in its informal merger review process. (Herbert Smith Freehills, sub, page 2)

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<sup>522</sup> Australian Competition and Consumer Commission and the Australian Energy Regulator 2013, *Annual Report 2012-13*, Canberra, page 41.

However, for more complex matters, some submissions express the view that the informal process can be slow and/or unpredictable in timing. Foxtel suggests that there should be a strict timetable for completion of merger clearances (sub, page 7) rather than the current system where the ACCC can change its indicative timetable (for example, at the request of the merger parties or to allow it to gather more information in order to form a concluded view).

The Law Council of Australia — SME Committee does not agree that timelines for merger review in Australia are too long:

The SME Committee also believes that the Harper Review would benefit from giving more detailed consideration to the processes which apply overseas, which generally have much longer timelines than exist in Australia. (DR sub, page 19)

Some submissions, such as that of the Law Council of Australia — Competition and Consumer Committee, consider that the informal process does not go far enough in providing transparency to merger parties (sub, page 67). In its view, merger parties should generally have access to third-party submissions about the merger, not just the ACCC's summary of these concerns (sometimes referred to as a 'transparency letter').

The BCA goes further, proposing that the ACCC's decision on whether or not to oppose a merger should be subject to 'an internal review' by 'a panel of Associate Commissioners with expertise in competition law and economics', with the merger parties making submissions. The BCA's suggestions include that the ACCC could allow this panel of Associate Commissioners to overturn the ACCC's original decision and make a new decision (BCA, sub, Main Report page 99).

Telstra submits that, given the risk that the Panel's proposed changes to the formal clearance and authorisation provisions may not proceed, the Panel should make some recommendations 'in the alternative' relating to concerns that the informal clearance process lacks transparency, timeliness and appropriate review mechanisms (DR sub, page 9).

The Panel agrees that, without an effective formal clearance mechanism, any problems with the informal process become more critical. However, as the Dawson Review noted, 'The strengths of the current informal clearance process [including its speed and efficiency] stem from its informal nature, as do its weaknesses.'<sup>523</sup>

Attempts to further formalise the informal merger clearance process would reduce its flexibility and inevitably have timing and resourcing implications. There do not appear to be any examples of merger regimes overseas that offer a high level of transparency without also imposing stricter information requirements and longer timelines than the Australian system.

The Panel considers that it is not sensible to attempt to regulate an informal process which, by definition, operates outside any formal legal framework. The flexibility of the informal process is widely recognised as being beneficial.

Nevertheless, the public interest is served by timely merger decisions and by transparency in the public administration of the merger law. The Panel sees scope for further consultation between the ACCC and business representatives with the objective of developing an informal review process that delivers more timely decisions.

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523 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act (the Dawson Review)*, Canprint Communications, Canberra, page 60.

The Panel considers that the identified concerns about merger clearance should also be addressed through streamlining the formal approval process.

A number of submissions call for ex-post evaluation of ACCC merger decisions and/or monitoring of market outcomes.<sup>524</sup> An evaluation process of this kind would assess the validity and effectiveness of past merger decisions; specifically, whether mergers that were allowed to proceed subsequently resulted in substantial damage to competition and whether the assessment of markets and entry barriers, on the basis of which mergers were prevented, subsequently proved to be erroneous. The object of such evaluations would be to improve future decision-making processes and decisions.

The Panel considers that such evaluations would be beneficial and could be performed by the proposed Australian Council for Competition Policy (ACCP). This is discussed in more detail in [Section 25.7](#).

### Formal merger processes — clearance and authorisation

Since 2007, following recommendations made by the Dawson Review, the ACCC has been empowered under the CCA to grant a formal clearance to merger parties if it is satisfied that the merger would not substantially lessen competition. ACCC decisions are subject to review by the Tribunal. Also since 2007, the Tribunal has been empowered to grant authorisation to merger parties if it is satisfied that the public benefits resulting from the merger outweigh the anti-competitive detriment. Prior to 2007, no formal clearance mechanism existed and the power to grant merger authorisations was vested in the ACCC, with decisions subject to review by the Tribunal.

The formal clearance process has not been used since its introduction in 2007. Submissions have indicated that, although improvements to the ACCC's informal process partly explain this, unattractive features of the formal process also deter merger parties from using it.

The availability of this alternative to the informal process, particularly in potentially contentious cases, is desirable and should be retained. However, the formal merger clearance process has not been used, in part because it is unduly complicated by strict technical formal requirements for a compliant application, including for example, the detailed and prescriptive standard form application ... which is onerous and inflexible. (BCA, sub, Main Report page 63)

Herbert Smith Freehills submits that the onus on merger parties to establish that the merger does not breach the CCA and the requirement for Tribunal review of merger clearance decisions to be 'on the record' contributes to its lack of use (sub, page 9). The Law Council of Australia — Competition and Consumer Committee and Herbert Smith Freehills both call for the formal process to be amended or repealed.

The Law Council of Australia — Competition and Consumer Committee advocates replacing it with a new formal process to be triggered at a point in the informal process (sub, page 69), while Herbert Smith Freehills prefers a new system of notification (sub, page 10). The BCA considers that the formal process should be retained and improved via a review to be conducted by the Treasury, in consultation with business, competition law practitioners and the ACCC (sub, Summary Report page 18).

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524 See, for example: BCA, DR sub, Appendix 2 page 37; Retail Guild, DR sub, page 41; and Australian Automobile Association, DR sub, page 3.

The Panel considers that the existence of a formal merger clearance option serves a useful purpose, even if it is seldom used, since it provides a time-limited, accessible alternative to the ACCC's informal clearance process. Feedback from submissions and the fact that the process has never been used support the view that the process needs reform to remove unnecessary restrictions and requirements that may have acted as a deterrent to its use. Reform should be considered in conjunction with the authorisation process, addressing the question whether two separate merger approval processes are needed in addition to the informal merger clearance process.

The merger authorisation process was not commonly used when it was administered by the ACCC (with appeal to the Tribunal). Since 2007, when administration was transferred to the Tribunal, it has been used even more rarely. The process has now been used twice: by Murray Goulburn in 2013 (whose application was withdrawn for commercial reasons) and by AGL in 2014. In AGL's case, the authorisation was obtained in three months from application. However, the application followed a period of three months in which AGL sought informal clearance from the ACCC.

The Law Council of Australia — Competition and Consumer Committee notes that its members have 'mixed views as to the efficacy of the current authorisation process contained within the Act, and the extent to which improvements could or should be made ...' (sub, page 72). In its submission to the Issues Paper, it suggests some immediate changes that could be made if the current process were retained, including the Tribunal appointing a Counsel Assisting to allow for smoother running of matters (sub, page 72).

Further, the Competition and Consumer Committee offers suggestions about how the authorisation and formal merger review processes might be combined if the Panel were to recommend such a change, including information requirements and the option for some parties to continue to apply directly to the Tribunal, bypassing the ACCC (DR sub, page 22).

The ACCC submits that, although the Tribunal is a highly regarded and experienced merits review body, it is not well suited to the role of first-instance decision-maker and nor is the ACCC's dual role under the current merger authorisation process satisfactory.

In particular, the ACCC is required both to act as an investigative body and to assist the Tribunal. The former role involves conducting market inquiries and gathering information from market participants. The latter involves: preparing a report on matters specified by the President of the Tribunal and any matter the ACCC considers relevant; calling witnesses; reporting on statements of fact; examining and cross-examining witnesses; and making submissions on issues relevant to the application. The ACCC also raises concerns about the lack of a merits review process under the present merger authorisation process, which is inconsistent with the process for all other (non-merger) authorisations (sub 1, pages 83-86).

The Panel considers that an efficient and effective formal merger approval process is important for the economy. Although the informal approval process has been shown to work effectively for the majority of mergers, parties to complex and contested mergers should have an alternative merger review process available to them that delivers transparent and timely decision making, consistent with international best practice.

The Panel considers that the current dual processes for formal merger clearance have features that are sub-optimal. It agrees with the BCA that a formal approval process should be retained and improved with the specific features settled in consultation with business, competition law practitioners and the ACCC.

Notwithstanding, the Panel considers that the general framework should contain the following elements:

- It would be preferable for the ACCC to be the first-instance decision-maker, rather than the Tribunal. Having regard to its composition and powers, the ACCC is better suited to investigation and first-instance decision making in the administration of the competition law, including mergers; while the Tribunal is better suited to an appellate or review role.
- The ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or that the merger results in public benefits that outweigh any detriments. Empowering the ACCC to apply both tests would enable merger parties to make a single application for approval that addresses both the anti-competitive effects of the merger and any public benefits that arise.
- The formal process should not be subject to prescriptive information requirements. As the merger parties will have the onus to satisfy the ACCC of the competitive consequences, or public benefits, of the merger, they will have sufficient incentive to place relevant information before the ACCC (or face the risk that the ACCC will not be so satisfied). However, the ACCC should be empowered to require the production of business and market information to test the arguments advanced by the merger parties.
- The formal process should be subject to strict timelines that cannot be extended, except with the consent of the merger parties.
- Decisions of the ACCC should be subject to merits review by the Tribunal.

The Panel notes that this change could be implemented without increasing the current maximum statutory time period of six months for the determination of a merger authorisation, by allowing the ACCC and the Tribunal each a maximum of three months to make their respective determinations.

Submissions in response to the recommendations in the Draft Report almost universally agree that the current formal merger clearance process is unsatisfactory and should be reformed. However, views differ about aspects of the Panel's proposals for reform:

- some submissions express concern about losing the ability to apply directly to the Tribunal for merger authorisation, bypassing the ACCC;
- views differ about the form of Tribunal review under the proposed merger authorisation process (full merits review or limited review based on the information that was before the ACCC); and
- the ACCC expresses concern that, if merger parties were not required to provide specified information to the ACCC, this would delay assessments, and parties would have no incentive to provide unfavourable information (DR sub, page 60).

These concerns and the Panel's views are discussed in detail below.

### Loss of ability to apply directly to the Tribunal for authorisation

A number of submissions raise concerns about the proposal that applications for merger authorisation be considered by the ACCC at first instance (with a right of merits review by the

Tribunal), rather than the present system whereby applications are made directly to the Tribunal.<sup>525</sup> For example, AGL Energy Limited submits:

It is critical to maintain the avenue of direct merger authorisation by the Tribunal so that a party challenging the ACCC's view can introduce new evidence to the Tribunal, as well as test the ACCC's evidence through cross-examination under oath. If the Tribunal became a review-only body, such as is being proposed, the Tribunal would only be able to consider those documents already created and previously submitted to the ACCC.

However, AGL's experience in merger clearances is that the ACCC does not always provide the applicant with complete information regarding the evidence it is relying upon or the issues that it considers may result in a competitive detriment. The current process does not compel the ACCC to provide such transparency. (DR sub, page 4)

Other submitters<sup>526</sup> agree with the Draft Recommendation that applications for merger authorisation be heard by the ACCC in the first instance, with a right of review by the Tribunal. For example, the Consumer Action Law Centre submits:

We support the proposal ... that the ACCC (rather than the Australian Competition Tribunal) be the decision maker at first instance regarding mergers ... [W]e consider the formality of the Tribunal process discourages consumers and consumer advocates from participating in merger decisions. (DR sub, page 16)

... we were involved in the Tribunal's consideration of the merger between AGL and Macquarie Generation. Our experience in this matter was, again, that the Tribunal is not open to consumer perspectives for two reasons:

- the tribunal received several submissions from consumer advocacy organisations, but none appeared to attract any real attention from the Tribunal; and
- despite not being bound by the rules of evidence, the Tribunal's processes are very formal and court-like, which makes it difficult for individuals or even consumer organisations to participate. (DR sub, page 24)

The Panel remains of the view that, having regard to its composition and powers, the ACCC is better suited to investigation and first-instance decision-making. The concern expressed by AGL Energy Limited, cited above, ought to be addressed through the design of the formal merger approval process.

Under a formal process, appropriate requirements regarding information transparency can be mandated, giving merger parties the opportunity to bring forward all relevant evidence to assist the ACCC in making its decision. Further, as discussed below, the Panel believes the Tribunal review process can be designed to ensure that any unfairness to a merger party arising during the ACCC's decision making can be remedied.

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525 See, for example: AGL Energy Limited, DR sub, page 4; Baker & McKenzie, DR sub, page 3; Business Council of Australia, DR sub, page 4; Energy Supply Association of Australia, DR sub, page 1; Daryl Guppy, DR sub, page 9; Law Council of Australia — Competition and Consumer Committee, DR sub, page 20; and George Raitt, DR Sub, page 2.

526 See, for example: Julie Clarke, DR sub, page 5; Consumer Action Law Centre, DR sub, page 15; and ACCC, DR sub, page 59.



## Merits review

Submissions differ on whether the Tribunal's review of an ACCC decision not to grant merger authorisation should be: a full rehearing with the right to adduce further evidence and information; a limited review, based only on the material before the ACCC; or a hybrid process that empowers the Tribunal to allow further evidence or information and to examine witnesses in certain circumstances.

AGL Energy Limited (DR sub, page 4) and the BCA (DR sub, page 37) both emphasise the importance of being able to introduce new evidence to the Tribunal, as well as to test the ACCC's evidence through cross-examination under oath.

The ACCC submits that the Tribunal should be limited to the information that was before the ACCC, but to ensure that 'truly new information' is available to the Tribunal, provision could be made for the Tribunal to be allowed to consider new information that was previously not available. (DR sub, page 62).

The Panel believes that a hybrid process is preferable. A full rehearing with an unfettered ability for parties to put new material before the Tribunal would likely dampen the incentive to put all relevant material to the ACCC in the first instance and may lead to delays if the Tribunal has to deal with large amounts of new evidence.

On the other hand, circumstances may arise in which it is reasonable to allow new evidence to be provided to the Tribunal: the evidence may not have been available to the ACCC or the merging parties at the time of the ACCC decision; or the relevance of the information may not have been apparent at that time. The Tribunal may also consider that it would be assisted by hearing directly from witnesses relied on by the ACCC, through questioning by the parties and/or the Tribunal.

Accordingly, the Panel considers that the Tribunal's review of the ACCC's decision should be based upon the material before the ACCC, but that the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is sufficient reason.

## Information requirements

In relation to the information requirements for formal merger approval, the ACCC submits that Australia should adopt a similar approach to that used in New Zealand, where a new, less prescriptive set of information requirements was recently introduced (DR sub, pages 60-61).

The Panel agrees the clearance application form published by the New Zealand Commerce Commission in June 2014 is a useful illustration of its proposed approach.<sup>527</sup>

The Panel maintains the view that it should not be necessary to burden merger approval processes with prescriptive information requirements. In a formal merger approval process, the burden will be upon the merging parties to satisfy the ACCC (and the Tribunal on review) that the merger would not substantially lessen competition in any market or would give rise to public benefits that outweigh any detriment. Provided the law contains penalties for providing false information to the ACCC, and the ACCC is empowered to seek additional information and documents from the merging parties, the process ought to ensure that relevant and accurate information is made available.

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527 New Zealand Commerce Commission, *Application — Notice seeking clearance*, New Zealand Commerce Commission, Wellington, viewed 5 February 2015, <[www.comcom.govt.nz/dmsdocument/11963](http://www.comcom.govt.nz/dmsdocument/11963)>.

### The Panel's view

The Panel's assessment is that overall the merger provisions of the CCA are working effectively. The Panel does not recommend any changes to the substantive law.

In relation to merger approval processes, the informal process works quickly and efficiently for a majority of mergers. Issues of transparency and timeliness arise with the informal process when dealing with more complex and contentious matters. Addressing those issues by changing the informal process could weaken it. Nevertheless, there should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal review process.

Merger review processes and analysis would also be improved by implementing a program of post-merger reviews, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the proposed Australian Council for Competition Policy (see Recommendation 44).

The formal merger approval mechanism, as an alternative to informal merger clearance, must be accessible and effective. Specifically, the Panel supports reforms to combine the two current formal merger exemption processes (that is, the formal merger clearance process and the merger authorisation process) and remove unnecessary restrictions and requirements that may have deterred their use. The Panel also considers that merger authorisation applications should not be taken directly to the Tribunal, bypassing the ACCC.

The Panel considers that the specific features of the improved formal approval process should be settled in consultation with business, competition law practitioners and the ACCC, subject to including specific elements as set out in Recommendation 35.

### Recommendation 35 — Mergers

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

The formal merger exemption processes (that is, the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use. The specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC.

However, the general framework should contain the following elements:

- The ACCC should be the decision-maker at first instance.
- The ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.
- The formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.
- Decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.
- The review by the Australian Competition Tribunal should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason.

Merger review processes and analysis would also be improved by implementing a program of post-merger evaluations, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the Australian Council for Competition Policy (see Recommendation 44).

## 19 UNILATERAL CONDUCT

Firms with a substantial degree of market power can engage in behaviour that damages the competitive process and thereby restricts the ability of other firms to compete effectively. Most industrialised countries have enacted competition laws with prohibitions against monopolisation or abuse of a dominant market position.<sup>528</sup>

Common to those laws is the principle that firms are entitled, and indeed are encouraged, to succeed through competition — by developing better products and becoming more efficient — even if they achieve a position of market dominance through their success. Those laws only prevent firms with substantial market power from engaging in conduct that damages competition.

Large firms may also enjoy strong bargaining power that can be abused in dealings with their suppliers and business customers. While imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited through imposing unreasonable obligations on suppliers and business customers. Such exploitation can traverse beyond accepted norms of commercial behaviour and damage efficiency and investment in the affected market sectors, requiring the law to respond both as a matter of commercial morality and to protect efficient market outcomes.

Many jurisdictions have enacted prohibitions against unconscionable or unfair trading conduct between businesses (see Box 19.1). Those laws must strike a balance. On the one hand, the law should not intrude excessively into the bargaining process between businesses, as the bargaining process underpins the competitive market process that serves consumers and the welfare of Australians. On the other hand, on occasions, the bargaining process can be exploited by large or powerful firms in a manner that is inconsistent with commercial morality, requiring a response.

### Box 19.1: Examples of overseas approaches to anti-competitive unilateral conduct

**US:** Prohibits monopolisation and attempted monopolisation by any firm (dominant or not) and requires an intent to monopolise and engage in predatory or anti-competitive conduct to prove a contravention (Sherman Act, section 2).

**EU:** Prohibits any abuse by an undertaking of a dominant position in a market. Abuse can include imposing unfair trading conditions, limiting production to the prejudice of consumers, or applying dissimilar conditions to equivalent transactions (Article 102, Treaty on the Functioning of the European Union (TFEU)).

**Canada:** Prohibits firms substantially or completely in control of a market from engaging in anti-competitive practices, which have the effect or likely effect of preventing or lessening competition substantially in a market (Competition Act, section 79).

**New Zealand:** Prohibits a person with a substantial degree of power in a market from taking advantage of that power, for the purpose of restricting entry into, preventing or deterring competitive conduct in, or eliminating a person from, that or any other market (Commerce Act, section 36).

In this chapter, the Panel considers the laws that regulate conduct by firms with substantial market or bargaining power, in light of the principles set out in [Chapter 1](#).

528 OECD 1996, *Abuse of Dominance and Monopolisation*, OCDE/GD(96)131, Paris, page 35.

## 19.1 MISUSE OF MARKET POWER

Section 46 of the *Competition and Consumer Act 2010* (CCA) prohibits corporations that have a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.<sup>529</sup>

Many submissions comment on section 46. As reflected in those submissions, opinions are divided on whether section 46 is framed in a manner that is effective in deterring anti-competitive behaviour by firms with substantial market power.

Those seeking reform of the law most commonly propose that the prohibition should be revised or expanded to include an ‘effects’ test — that is, a firm with substantial market power would be prohibited from taking advantage of that power if the effect is to cause anti-competitive harm. Two main arguments are advanced for the inclusion of an effects test:

- As a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect of conduct that harms consumer welfare.
- As a matter of practicality, proving the purpose of commercial conduct is difficult because it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

Those opposing reform are concerned that introducing an effects test would ‘chill’ competitive behaviour by firms in the market, which would be harmful to consumer welfare.

The debate around whether section 46 should be based solely on a ‘purpose’ test or should also (or alternatively) have an ‘effects’ test is one of the enduring controversies of competition policy in Australia. Section 46 has been the subject of a large number of independent reviews and parliamentary inquiries (see Box 19.2).

### Box 19.2: History of proposals for an effects test<sup>530</sup>

Year	Review	Recommend effects test?	Reasons
1976	Trade Practices Act Review Committee (Swanson Committee)	No	The section should only prohibit abuses by a monopolist that involve a proscribed purpose.
1979	Trade Practices Consultative Committee (Blunt Review)	No	Would give the section too wide an application, bringing within its ambit much legitimate business conduct.
1984	Green Paper, The Trade Practices Act Proposals for Change	Yes	Difficulty in proving purpose.
1989	House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee)	No	Insufficient evidence to justify the introduction of an effects test into section 46.

529 Part IV is mirrored in the Competition Code in Schedule 1 of the CCA, which applies the anti-competitive conduct laws through application legislation in the States and Territories.

530 Adapted from Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act (the Dawson Review)*, Canprint Communications, Canberra, Box 3.2 History of the effects test, page 83.

**Box 19.2: History of proposals for an effects test (continued)**

1991	Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee)	No	Might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.
1993	Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Committee)	No	It would not adequately distinguish between socially detrimental and socially beneficial conduct.
1999	Joint Select Committee on the Retailing Sector (Baird Committee)	No	Such a far-reaching change to the law may create much uncertainty in issues dealing with misuse of market power.
2001	House of Representatives Standing Committee on Economics, Finance and Public Administration (Hawker Committee)	No	Await the outcome of further cases on section 46 before considering any change to the law.
2002	Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the <i>Trade Practices Act 1974</i> .	No	Referred consideration of section 46 to the Dawson Review.
2003	Trade Practices Act Review Committee (Dawson Review)	No	The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive.
2004	Senate Economics References Committee Inquiry into the Effectiveness of the <i>Trade Practices Act 1974</i> in protecting Small Business	No	While sympathetic to some of the arguments for an effects test, the difficulties with introducing it meant that the Committee did not recommend the inclusion of an effects test.

The Panel considers that the long-running debate concerning ‘purpose’ and ‘effect’ in the context of section 46 has been somewhat unproductive. In one sense the concerns raised by both sides of the debate are correct.

Internationally, competition laws have been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct (see [Appendix B](#)). In Australia, section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition.

Equally, competition laws have been framed (and interpreted) in a manner that is designed to minimise the risk that the law might chill competitive behaviour.

The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct.

## Difficulties with the current form of section 46

Section 46 only applies to firms that have a substantial degree of power in a market. The threshold test of substantial market power enjoys broad support, and the Panel did not receive any submissions making a case for change.

Section 46 defines conduct as a misuse of market power if it satisfies two legal tests:

- First, the conduct must have involved taking advantage of the firm's market power.
- Second, the conduct must have been undertaken for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

## Take advantage

Both the courts and the legislature have wrestled with the meaning of the expression 'take advantage' over many years. Its meaning is subtle and difficult to apply in practice. The ordinary meaning of the words 'take advantage' is to use to one's advantage. But when the words are coupled with market power, it is necessary to understand how a firm might use market power to its advantage and what constitutes a use of market power.

The difficulty with the expression lies in the fact that market power is not a physical asset (such as an airport) or a commercial instrument (such as a lease), the use of which can be observed. Market power is an economic concept, describing the state or condition of a market. A firm possesses market power when it has a degree of freedom from competitive constraint. Recognising that, the High Court concluded in *Queensland Wire*<sup>531</sup> that taking advantage of market power means engaging in conduct that would not be undertaken in a competitive market (because the firm would be constrained by competition).

In the years since the decision in *Queensland Wire*, the difficulties in interpreting and applying the 'take advantage' test and determining whether specific business conduct does or does not involve taking advantage of market power have become apparent. The following cases illustrate some of the difficulties.

- In *Melway*,<sup>532</sup> trial and appellate courts differed on whether refusing to supply Melway street directories to a particular retailer involved taking advantage of market power — the High Court ultimately concluded that it did not.
- In *Boral*,<sup>533</sup> trial and appellate courts differed on the circumstances required to show that selling products at low prices involved taking advantage of market power (and constituted predatory pricing). Following *Boral*, the Parliament amended section 46 in an attempt to capture predatory pricing conduct.<sup>534</sup> However, the amendments themselves are cast in language that is difficult to interpret and apply in practice (while the amendments seek to prohibit pricing below cost, the expression 'cost' is not defined and there are circumstances in which pricing below certain measures of cost might be an ordinary business strategy in a competitive market).

531 *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

532 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

533 *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374.

534 *Competition and Consumer Act 2010*, subsections 46(1AAA) and (1AA).

- In *Rural Press*,<sup>535</sup> trial and appellate courts differed on whether a threat by one regional newspaper publisher to begin distributing its newspaper in a neighbouring region, in order to deter the neighbour from distributing its newspaper in the first publisher's region, involved taking advantage of market power — the High Court ultimately concluded that it did not. Following *Rural Press*, Parliament amended section 46 in an attempt to explain the meaning of 'take advantage'.<sup>536</sup> It is doubtful that the amendments assisted.
- Recently, in *Cement Australia*,<sup>537</sup> the meaning of the expression 'take advantage' was again a central matter of dispute in determining whether conduct, involving the acquisition of flyash (a by-product of coal-fired electricity generation, that can be used as a cementitious material in concrete), amounted to a misuse of market power. The Federal Court concluded that the conduct did not amount to a misuse of market power in contravention of section 46 but did have the likely effect of substantially lessening competition in contravention of section 45.

The important point is not whether the outcomes of those cases, on the facts before the court, were correct or incorrect from a competition policy perspective. The issue is whether the 'take advantage' limb of section 46 is sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct.

A number of submissions also draw attention to an economic problem in using the 'take advantage' test to distinguish between lawful and unlawful business conduct. The economic premise of the test is that a firm with substantial market power should be permitted to engage in particular business conduct if firms without market power also engage in that conduct. However, as observed by Katharine Kemp, US jurisprudence recognises that particular conduct might be competitively benign when undertaken by a firm without market power but competitively harmful where a firm has market power.<sup>538</sup> Similarly, Professor Stephen Corones submits:

... conduct engaged in by a firm with substantial market power will have a much greater propensity to have market-distorting foreclosure effect, than the same conduct engaged in by a firm without substantial market power. The need to examine the conduct of major business[es] more closely than those without market power has been recognised in both the United States and the EU. (DR sub, page 11)

RBB Economics submits:

Since the same conduct can have different economic effects in different circumstances, it follows that conduct can be anti-competitive when it is pursued by a firm with market power even if it is unproblematic in situations where such power is absent. If one considers most of the categories of conduct that can give rise to anti-competitive outcomes — price discrimination, exclusive dealing, loyalty rebates, bundling, refusal to deal, etc. — it is evident that these are also commonly observed phenomena in many well-functioning competitive markets. (DR sub, page 4)

In the Panel's view, the 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The test has given rise to substantial difficulties of interpretation, revealed in the decided cases, undermining confidence in the effectiveness of the law.

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535 *Rural Press Limited v ACCC* [2003] HCA 75.

536 *Competition and Consumer Act 2010*, subsection 46(6A).

537 *ACCC v Cement Australia* [2013] FCA 909.

538 See also Katherine Kemp, DR sub, pages 9-12.



Further, and perhaps more significantly, the test is not best adapted to identifying misuse of market power. Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

## Purpose

The second legal test in section 46 is the ‘purpose’ test. As noted earlier, the purpose test has been the primary focus of debate concerning section 46. Compared to the ‘take advantage’ test, the meaning of the ‘purpose’ test in section 46 is at least clear and capable of reliable application by the courts.

The debate over whether section 46 should include a subjective purpose test or an objective effects test tends to obscure a more significant issue. Presently, the purpose test in section 46 focuses on harm to individual competitors — conduct will be prohibited if it has the purpose of eliminating or substantially damaging a **competitor**, preventing the entry of a **person** into a market, or deterring or preventing a **person** from engaging in competitive conduct.

Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself — that is, the competitive process.

Given the existing focus of the purpose test in section 46, resistance to changing the word ‘purpose’ to ‘effect’ is understandable. It would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors. However, an important question arises whether section 46 ought to be directed at conduct that has the purpose of harming individual competitors (under the existing purpose test) or whether it ought to be directed at conduct that has the purpose or effect of harming the competitive process (consistent with the other main prohibitions in sections 45, 47 and 50 of the CCA).

Many submissions to the Draft Report express both strong support for<sup>539</sup> and strong opposition to<sup>540</sup> changes to the existing focus of section 46, viz, on ‘purpose’. Other submissions canvass other

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539 See, for example: Alinta Energy, DR sub, page 2; George Altman, DR sub, page 2; Australian Automotive Aftermarket Association, DR sub, pages 10-11; Australian Chamber of Commerce and Industry, DR sub, page 16; Australian Competition and Consumer Commission, DR sub, pages 48-54; Australian Dairy Farmers, DR sub, pages 5-7; Australian Food and Grocery Council, DR sub, pages 7-8; Australian Motor Industry Federation, DR sub, pages 9-10; Australian Retailers Association, DR sub, pages 5-6; AURL FoodWorks, DR sub, pages 9-11; Business SA, DR sub, page 11; Chamber of Commerce and Industry Queensland, DR sub, pages 4-5; CHOICE, DR sub, pages 26-27; Consumer Action Law Centre, DR sub, pages 15-17; Professor Stephen Corones, DR sub, pages 1-12; Growcom, DR sub, page 2; iiNet, DR sub, page 4; Minter Ellison, DR sub, page 5; National Farmers Federation, DR sub, pages 10-12; New Zealand Commerce Commission, DR sub, pages 1-9; Queensland Law Society, DR sub, pages 3-4; RBB Economics, DR sub, pages 1-5; Retail Guild, DR sub, page 19; Rykris Pty Ltd, DR sub, page 2; Santos Retail, DR sub, page 1; Small Business Development Corporation (WA), DR sub, pages 7-9; The Australian Chamber of Fruit and Vegetable Industries, DR sub, pages 3-5; and WA Independent Grocers, DR sub, page 2.

540 See, for example: AGL Energy Limited, DR sub, pages 3-4; Arnold Bloch Leibler, DR sub, pages 4-7; ASTRA Subscription Media Australia, DR sub, pages 6-7; Australian Industry Group, DR sub, pages 20-21; Australian Institute of Company Directors, DR sub, pages 1-6; Australian National Retailers Association, DR sub, pages 29-35; Baker & McKenzie, DR sub, pages 3-5; Boral Limited, DR sub, pages 3-9; Business Council of Australia, DR sub, pages 13-20; Cement Industry Federation, DR sub, page 5; Coles Group Limited, DR sub, pages 8-10; Energy Supply Association of Australia, DR sub, pages 5-6; Foxtel, DR sub, pages 9-10; Housing Industry Association, DR sub, page 2; Insurance Australia Group, DR sub, pages 1-2; Insurance Council of Australia, DR sub, pages 3-4; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 12-19; Law Council of Australia — SME Committee, DR sub, pages 14-15;

options, including retaining the existing proscribed purposes in addition to introducing a reference to ‘effect’,<sup>541</sup> duplicating existing provisions regarding the misuse of market power in the telecommunications industry<sup>542</sup> and re-framing the test in terms of the ‘rule of reason’ approach adopted in the US.<sup>543</sup>

The current purpose test in section 46 is inconsistent with the focus of equivalent prohibitions in overseas jurisdictions:

- In respect of section 2 of the US Sherman Act, which prohibits monopolisation or attempts to monopolise in trade or commerce, the American Bar Association states that ‘Modern U.S. decisions hold that it is not subjective intent but objective intent that is relevant, and that intent can be inferred from conduct and effect. The focus of the U.S. courts is on evidence of monopoly power and proof of exclusionary conduct’ (American Bar Association, sub, page 7).
- In Canada, section 79 of the Competition Act prohibits anti-competitive conduct by a dominant firm that has the effect or likely effect of substantially lessening competition.
- In respect of Article 102 of the TFEU which prohibits abuse of a dominant position, the International Bar Association states ‘... in recent years the approach of both the EU Commission and the European courts (together with many Member State authorities) to Article 102 TFEU has moved towards an approach which focuses more on whether the conduct of dominant businesses has (or would have) adverse effects on competition (in particular focussing in principle, on exclusionary conduct which forecloses equally efficient competitors)’ (International Bar Association, sub, page 17).

The Panel considers that the current form of section 46, prohibiting conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

### Re-framing section 46

An effective provision to deal with unilateral anti-competitive conduct is a necessary part of competition law. This is particularly the case in Australia where the small size of the Australian economy frequently leads to concentrated markets. The Panel considers that section 46 can be re-framed in a manner that will improve its effectiveness in targeting anti-competitive unilateral conduct.

Accordingly, the Panel proposes that the primary prohibition in section 46 be re-framed to prohibit a corporation with a substantial degree of market power from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in that or any other market.

The prohibition would make two significant amendments to the current law. First, it would remove the ‘take advantage’ element from the prohibition. Second, it would alter the ‘purpose’ test to the standard test in Australia’s competition law: purpose, effect or likely effect of substantially lessening

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MasterCard, DR sub, pages 2-4; National Seniors Australia, DR sub, page 14; Origin Energy, DR sub, page 2; QBE Insurance Australia, DR sub, pages 3-4; Spier Consulting Legal, DR sub, pages 10-15; Ian Stewart, DR sub, pages 4-8; Telstra Corporation Limited, DR sub, pages 13-16; and Wesfarmers Limited, DR sub, page 3.

541 See, for example: Australian Newsagents’ Federation, DR sub, page 13.

542 Vodafone Hutchison Australia, DR sub, page 14.

543 American Bar Association, DR sub, pages 3-6.

competition. The test of ‘substantially lessening competition’ would enable the courts to assess whether the conduct is harmful to the competitive process.

The proposed test of ‘substantial lessening of competition’ is the same as that found in section 45 (anti-competitive arrangements), section 47 (exclusive dealing) and section 50 (mergers) of the CCA, and the test is well accepted within those sections. As explained by the former Trade Practices Tribunal in *QCMA*, competition ‘expresses itself as rivalrous market behaviour’ and ‘is a process rather than a situation’.<sup>544</sup>

Section 4G of the CCA defines ‘lessening of competition’ to include ‘preventing or hindering competition’. The proper application of the ‘substantial lessening of competition’ test is to consider how the conduct in question affects the competitive process — in other words, whether the conduct prevents or hinders the process of rivalry between businesses seeking to satisfy consumer requirements.

The Panel’s proposed changes to section 46 in the Draft Report drew both support and opposition in subsequent submissions. Much of the opposition focuses on the defence proposed in the Draft Report, which is discussed below.

A number of submissions express concern about introducing the ‘substantial lessening of competition’ test into section 46. They suggest the change would increase business cost and uncertainty because a business has relatively more information about the purposes for which it engages in conduct compared to the effect of its conduct on competitors (see for example, Business Council of Australia, DR sub, page 16).

The Panel’s proposed reform to section 46 is an important change, which will (like all regulatory change) involve some transitional costs, as firms become familiar with the prohibition and as the courts develop jurisprudence on its application. In the Panel’s view, the change is justified as transitional costs should not be excessive and will be outweighed by the benefits.

The Panel agrees with the Australian Competition and Consumer Commission (ACCC) that the uncertainty ‘should not be unduly significant as the change is to an existing test with which businesses are already familiar’ (DR sub, page 53) — that is, the substantial lessening of competition test used in other provisions of the CCA. This incorporates ‘standards and concepts ... at least well enough known as to be susceptible to practically workable *ex ante* analysis’ (Minter Ellison, DR sub, page 5).

Indeed, framing the offence by reference to the impact on competition in a market enables major businesses to advance pro-competitive justifications for their conduct (Professor Stephen Corones, DR sub, page 3), in the absence of an anti-competitive purpose.

The Law Council of Australia — Competition and Consumer Committee supports retaining section 46 in its existing form. However, it also submits that, if the law were to be amended to a ‘substantial lessening of competition’ test, the purpose element should be deleted; in other words, conduct by a firm with substantial market power would be unlawful if it would have or be likely to have the effect of substantially lessening competition. This is the ‘substantial lessening of competition’ test used in section 50 of the CCA (mergers) and in the equivalent Canadian prohibition (referred to above). The Competition and Consumer Committee submits that a prohibition based on the competitive purpose of business conduct runs the risk of ‘prohibiting statements of hostile (but aggressively competitive)

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544 *Re Queensland Cooperative Milling Association* (1976) 8 ALR 481 at 515 and 516.

intent rather than only anticompetitive conduct, by firms with substantial market power' (DR sub, page 15).

The Panel acknowledges the force of this submission but considers that the Committee's concern is mitigated by altering the focus of the prohibition from a purpose of harming a competitor to a purpose of substantially lessening competition.

In recommending reform of section 46, the Panel wishes to minimise the risk of inadvertently capturing pro-competitive conduct, thereby damaging the interests of consumers. To neutralise concerns about over-capture, the Panel proposed a defence in the Draft Report. The defence provided that the prohibition would not apply if the conduct in question would be both:

- a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- likely to have the effect of advancing the long-term interests of consumers.

The onus of proving that the defence applied would have fallen on the corporation engaging in the conduct.

This proposed defence is generally not supported by submissions. Many feel that the first limb leaves a number of questions unanswered, and replicates the problems with the existing 'take advantage' test:

... does it have to be a profit maximising strategy, or could a strategy aimed at increasing market share that was not profit maximising qualify? If the respondent gives reasons for the conduct and the court accepts those reasons as genuine, is the court then required to go behind the reasons, and decide whether the explanations were objectively valid in terms of economic theory or best business practice? (Professor Stephen Corones, DR sub, page 3)

This is a reformulation of the 'take advantage' requirement that exists in the current section 46. It gives rise to the same problems that flow from the 'take advantage' test. It requires the application of a counterfactual test that inverts the traditional counterfactual test applied elsewhere in the Act ... (Queensland Law Society, DR sub, page 3)

**Other submissions comment that the first limb would shift the onus of proof to the respondent:**

Effectively moving a similar concept to the 'take advantage' element to a defence would also effectively shift the burden of proof from the ACCC to the respondent, imposing considerable costs on business. (Australian National Retailers Association, DR sub, page 33)

... it is inappropriate for the onus to be on the defendant to establish such a defence. Misuse of market power is a serious allegation and a person making such an allegation should, at minimum, have a proper factual and legal basis for that person's case in relation to the types of matters referred to in any such defence. (Arnold Bloch Leibler, DR sub, page 6)

This reverse onus of proof means that, to avoid inadvertently breaching the law in developing new products and competitive strategies, businesses will have to undertake assessments of their current and proposed practices to establish how a hypothetical rational business would behave and operate ... To do this effectively would require an extensive and high level undertaking that would be both time consuming and costly. (Insurance Australia Group, DR sub, page 2)

Concerns are also raised about the second limb of the defence:

If a corporation can prove that its conduct is in fact in the long-term interests of consumers, that ought to be a sufficient defence ... one way of satisfying such a defence would be to prove that the relevant conduct is efficient, and the Society recommends rephrasing the second limb of the defence to clarify that position. (Queensland Law Society, DR sub, page 4)

The added requirement of the second limb to prove conduct in the long-term interests of consumers is too vague to serve as a defence. (Coles Group Limited, DR sub, page 9)

... the '*long-term interests of consumers*' ... is a standard which isn't properly capable of practically workable *ex ante* application. Businesses are often not well equipped to assess the long term interests of consumers. They are usually more interested in more immediate buying preferences and buyer behaviour rather than considering how consumers' interests will be served over the long term. (Minter Ellison, DR sub, page 5)

Others argue that the proposed defence is unnecessary. They posit that a prohibition of misuse of market power based on the 'substantial lessening of competition' test is sufficiently certain given the jurisprudence developed under sections 45, 47 and 50 that use the same test. The ACCC submits:

The risk of overreach, as raised in submissions to the Review Panel and in the media, reflects a misconception of the SLC [substantial lessening of competition] test and there appears to be a significant degree of misunderstanding regarding the conduct that is likely to be prohibited by an SLC test.

Damage to competitors, even to the extent of competitors being forced out of business, is not necessarily evidence of a lessening of competition. ... businesses 'competing' through offering better products or services or by undertaking a successful promotional campaign, undertaking research and development which results in better products or more efficient processes, or passing savings through to consumers will be enhancing competition, not lessening it. (DR sub, page 52)

Similarly, Minter Ellison submits:

... the concepts of 'substantial degree of power', 'purpose', 'effect', and 'substantially lessening competition' are all well understood from past cases and therefore tractable for the purposes of allowing *ex ante* guidance for business conduct. (DR sub, page 5)

The New Zealand Commerce Commission notes:

We recognise the Panel's desire to avoid capturing pro-competitive conduct. However, we consider that a defence that the conduct was pro-competitive can, and should, be captured within the main test as to whether the conduct had the effect, or likely effect of substantially lessening competition. This can occur, for example, through the recognition of actual or potential efficiency gains. (DR sub, page 5)

RBB Economics submits:

Our query would be whether it is possible that the proposed prohibition itself, which confines itself to conduct that will or is likely to have the effect of substantially lessening competition, requires any additional defences. Pro-competitive conduct that harms competitors through the superior efficiency of the firm with market power should not in our view be categorised as creating an SLC [substantial lessening of competition] in the first place. Provided that was made clear in the framing and context of the law, the need for defences against false positives should not arise. (DR sub, page 5)

In light of arguments presented in submissions, the Panel accepts that the defence proposed in the Draft Report is not the best means of addressing potential concerns that the revised prohibition may inadvertently catch pro-competitive conduct.

As a number of submissions observe, conduct undertaken by a firm with substantial market power can have both pro-competitive and anti-competitive effects. For example, a firm with substantial market power may compete vigorously in a market through lower prices. If that is sustained through cross-subsidisation from another aspect of the firm's operation, it may limit the ability of other firms in that market to compete. The issue for the court, and for firms assessing their own conduct, is to weigh the pro-competitive and anti-competitive factors to decide if the cross-subsidisation involves a substantial lessening of competition.

Further, the inclusion of a defence to section 46 would be inconsistent with the approach taken in sections 45, 47 and 50 (where there is no express defence) and runs the risk of casting doubt on the established meaning of the 'substantial lessening of competition' test.

The approach adopted in comparable overseas jurisdictions is to empower the court to take into account the pro-competitive and anti-competitive aspects of business conduct. Professor Stephen Corones submits that 'under both EU competition law and US antitrust law, firms with substantial market power are provided with the opportunity of demonstrating pro-competitive efficiency justifications for their conduct' (DR sub, pages 4-5).

In respect of section 2 of the Sherman Act, the American Bar Association observes:

In the U.S., a monopolist may rebut evidence of anticompetitive conduct by establishing that it had a valid justification for the conduct—that is, one related directly or indirectly to enhancing consumer welfare. For example, conduct may be important to preserve investment incentives or to generate cost savings that will be passed on to consumers. Or, the restraint may be necessary to bring a new product to the market. Assuming the monopolist shows it had a valid business justification, a plaintiff must then address whether the conduct is reasonably necessary to achieve those efficiencies and whether substantially the same efficiencies can be achieved by significantly less restrictive available alternatives. No legal distinction is typically made between short-term versus long-term effects. (DR sub, page 4)

The Law Council of Australia — Competition and Consumer Committee suggests that, instead of a defence, section 46 might require the court to have regard to whether the conduct is efficiency-enhancing or include a list of factors to be taken into account (such as those contained in subsection 50(3) in the context of mergers) (DR sub, pages 18 and 19).

The Panel considers that the preferable approach is to include in section 46 legislative guidance with respect to the section's intended operation. Specifically, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

These considerations would be mandatory, but non-exhaustive. The existing interpretative provisions in section 46, insofar as they are relevant to the proposed new test, would be retained (subsections 46(2) to 46(4)).

The legislative guidance would assist with the court's analysis and businesses' understanding of how the proposed prohibition should be applied. The proposed legislative factors would expressly direct the court to consider any pro-competitive aspects of the impugned conduct, in addition to the alleged anti-competitive aspects, in assessing whether the conduct has the overall purpose, effect or likely effect of substantially lessening competition.

The Panel considers that introducing this legislative guidance is preferable to the defence proposed in the Draft Report. It is consistent with the legislative approach adopted in other provisions of the CCA, notably subsection 50(3) (mergers) and Australian Consumer Law section 22 (unconscionable conduct). It also addresses concerns expressed about reversing the onus of proof in the proposed defence, while clarifying the object of the prohibition.

The proposed reform would allow section 46 to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing and amendments that attempt to explain the meaning of 'take advantage'.

Any residual concerns about business uncertainty can be further mitigated in two ways:

- first, as recommended below, authorisation should be available to exempt conduct from the prohibition in section 46; and
- second, the ACCC should issue guidelines on its approach to enforcing section 46, prepared in consultation with business stakeholders, legal experts and consumer groups, and issued in advance of the commencement of the revised prohibition.

The proposed amendment to section 46 and the availability of authorisation would also obviate the need for the telecommunications industry-specific anti-competitive conduct provisions (Division 2 of Part XIB) and exemption order regime (Subdivision B, Division 3 of Part XIB) of the CCA. Division 2 currently provides for an effects-based test in relation to the conduct of carriers or carriage service providers (within the meaning of the *Telecommunications Act 1997*) with a substantial degree of power in a telecommunications market. Division 3 allows applications to the ACCC for an order exempting specific conduct from the scope of that effects test, where the public benefit outweighs the anti-competitive detriment. In this context, the Panel notes the Australian Government has announced a review of Part XIB of the CCA during the second part of 2015,<sup>545</sup> in response to Recommendation 2 of the Statutory Review under section 152EOA of the CCA<sup>546</sup> that Part XIB should be reviewed to assess its continued utility and effectiveness.

## Divestiture remedy to address market power concerns

A court may order a broad range of remedies following a finding that a firm has engaged in misuse of market power in contravention of section 46. These remedies include declarations, injunctions,

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545 Australian Government 2014, *Telecommunications Regulatory and Structural Reform*, Commonwealth of Australia, Canberra, page 14.

546 Cost-Benefit Analysis and Review of Regulation 2014, *The Statutory Review under section 152EOA of the Competition and Consumer Act 2010*, Canberra, page 24.

damages and civil penalties.<sup>547</sup> However, neither the ACCC nor a private party is able to seek a divestiture order from the court to break up the firm found to have misused its market power.

The Panel notes that divestiture as a remedy is raised in submissions to the Agricultural Competitiveness Green Paper and in submissions to this Review. For example, Master Grocers Australia/Liquor Retailers Australia considers:

Whilst the inclusion of divestiture in a mandatory code would be a useful and powerful deterrent to misuse of market power, the additional inclusion of divestiture as a sanction in Section 46 of the CCA would be an appropriate powerful measure, including a deterrent, in overcoming conduct of the kind that is currently destroying healthy competition in the Australian supermarket industry. (DR sub, pages 20-21)

The Hilmer<sup>548</sup> and Dawson<sup>549</sup> reviews considered proposals for a specific divestiture remedy (to be used in circumstances other than mergers) to address competition concerns about businesses with significant market power. Those reviews did not recommend its adoption because of the potentially broad nature of such a remedy and difficulties in targeting the conduct of concern. The Dawson Review noted that divestiture as a remedy in the case of acquisitions leading to a substantial lessening of competition is different to divestiture as a remedy for misuse of market power. Divestiture in the context of mergers involves the court 'unwinding' a transaction rather than splitting a firm that has expanded through organic growth.<sup>550</sup>

Providing a general divestiture provision within the CCA for Part IV offences could, if exercised, see matters of market conduct dealt with through a structural remedy. Although reducing the size of a firm may limit its ability to misuse its market power, divestiture is likely to have broader impacts on the firm's general efficiency. Such changes could also have negative flow-on effects to consumer welfare. It is also possible that divested parts of a business might be unviable.<sup>551</sup> Further, it would leave the redesign of a firm or industry in the hands of the court, which is generally not well positioned to make decisions about industry policy.

In the US, divestiture is available as a remedy for violations of section 2 of the Sherman Act (the anti-monopolisation provision). However, divestiture is ordered only rarely: the last major use of the divestiture remedy was the 1982 consent decree that broke the American Telephone and Telegraph Company into a number of smaller companies:<sup>552</sup>

Structural remedies present a number of difficulties and normally are reserved for cases in which a conduct remedy is insufficient ... The least common and most complex form of structural remedy is breaking the dominant firm into competing entities. This sort of

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547 *Competition and Consumer Act 2010*, Part VI.

548 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 163.

549 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra, page 150.

550 *Ibid.*, page 162.

551 See discussion in Senate Standing Committee on Legal and Constitutional Affairs 1991 (Cooney Committee) *Mergers Monopolies and Acquisitions — Adequacy of Existing Legislative Controls*, Canberra, pages 89-93.

552 Davey, A. 2012, *The introduction of a general divestiture provision under Australian competition law*, Sapare Research Group (Report prepared for Coles), Canberra, page 21. In June 2000, the United States District Court for the District of Columbia ordered a breakup of Microsoft, a decision later reversed on appeal by the D.C. Circuit Court of Appeals. The matter was ultimately settled in November 2001, imposing behavioural rather than structural sanctions.



remedy has not been used in the United States in recent decades but was applied in the landmark *American Tobacco* and *Standard Oil* cases nearly a century ago.<sup>553</sup>

In light of the above, the Panel considers the existing range of remedies is sufficient to deter a firm from misusing its market power and to protect and compensate parties that have been harmed by such unlawful conduct. Where section 46 is breached, the court already has available to it a wide range of sanctions, including: pecuniary penalties that can greatly exceed the benefit the firm has obtained from the conduct; a range of remedial orders, such as compensation payments to parties who have suffered loss or damage; and injunctive relief.<sup>554</sup>

Ultimately, if circumstances were to arise where the public interest would be served by breaking up a firm or redesigning an industry, for competition or other policy purposes, it is open to the Parliament to legislate to bring about such reform. Such action would be expected to be rare and exceptional. Nevertheless, the Panel considers it preferable for any such action to be implemented by the Parliament rather than by the court as a remedy for breaches of competition law.

### The Panel's view

The Panel considers that section 46 is deficient in its current form. The 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The 'purpose' limb, that prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches.

The provision should be directed to conduct that has the purpose, or would have or be likely to have the effect, of substantially lessening competition, in a similar manner to the prohibitions in sections 45, 47 and 50. The provision should also include legislative guidance directing courts and firms to weigh the pro-competitive and anti-competitive impact of conduct.

As with any change to the law, amending section 46 will involve some uncertainty, but the proposal adopts the long-standing expressions 'substantial degree of power in a market' and 'substantial lessening of competition'.

Although uncertainty may lead to some cost, the Panel considers this is outweighed by the benefit of a more effective prohibition on unilateral anti-competitive conduct.

553 OECD 2006, *Remedies and Sanctions in Abuse of Dominance Cases*, US contribution to OECD Policy Roundtables, Paris, pages 175-176.

554 *Competition and Consumer Act 2010*, sections 76, 87 and 80 respectively.

### Recommendation 30 — Misuse of market power

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

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

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of ‘take advantage’ and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

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

## 19.2 MISUSE OF MARKET POWER IN A TRANS-TASMAN CONTEXT

In the context of simplifying the CCA, the Draft Report recommends removing the provision concerning misuse of market power in a trans-Tasman market, section 46A (and the accompanying section 46B).

Section 46A was enacted in 1990 (with a reciprocal provision in New Zealand’s Commerce Act) following the 1988 Australia/New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods.<sup>555</sup> Importantly, that agreement abolished anti-dumping measures between Australia and New Zealand. The object of section 46A was to use competition law as a safeguard against dumping-type conduct (that is, predatory pricing across the Tasman).

Section 46A is in substantially the same form as section 46, save that it prohibits a firm taking advantage of substantial market power in a trans-Tasman market (a market in Australia, New Zealand or both) with the purpose of harming a competitor in an Australian market (other than a market for services, reflecting the dumping origins of the section).

Insofar as a corporation takes advantage of market power in an Australian market or a market that spans both Australia and New Zealand, section 46A overlaps with section 46 in the CCA and is redundant. The principal circumstance in which the section has potential additional operation is if a

555 Ray, R (Minister for Defence) 1990, [Second reading speech: Trade Practices \(Misuse of Trans-Tasman Market Power\) Bill 1990](#), Canberra, 22 May.

firm with substantial market power in a New Zealand market (but not an Australian market) takes advantage of that power to harm a competitor in an Australian market involving the supply of goods.

The Panel questions the continued utility of the section because:

- First, since its enactment in 1990, the Panel is aware of only one case in which it has been invoked — an application for an interlocutory injunction, which was unsuccessful: *Berlaz Pty Ltd v Fine Leather Care Products Ltd* (1991) ATPR 41-118.
- Second, it is doubtful that the section is able to achieve its original aim — to prohibit predatory pricing in an Australian goods market by a firm with market power in New Zealand. This is because predatory pricing in those circumstances would typically require the predatory firm to possess market power in the Australian market, not a New Zealand market, since the predation could not be successful without market power in the Australian market.

Nevertheless, since section 46A was enacted as part of a package of reforms agreed between Australia and New Zealand relating to the trade in goods between the countries, its reconsideration should occur through consultations between both jurisdictions. Factors that might be considered during such consultations include:

- whether the reciprocal prohibitions in the CCA and New Zealand’s Commerce Act have any significant operative effect;
- if section 46 of the CCA is reformed in line with the Panel’s recommendation, whether the reciprocal prohibitions in both Acts ought to be reformed in like manner; and
- if the reciprocal provisions are retained, whether they should be extended to markets involving the supply of services.

#### The Panel’s view

Reconsideration of section 46A should formally engage both jurisdictions to determine appropriate simplifications, amendments or removal of the provisions in each jurisdiction.

## 19.3 PRICE DISCRIMINATION

Price discrimination is the practice of charging different prices for the same or similar goods or services, where the price difference does not reflect differences in the cost of supply, for example, student, seniors and family discounts, ‘early bird specials’, and discounts for bulk purchases and group buying.

The effects of price discrimination will depend on the particular circumstances of the market. Pricing according to consumer willingness to pay can result in more consumers being able to obtain the good or service than if a common price were charged. In these circumstances, price discrimination can make goods or services more accessible and can enhance consumer choice.

Price discrimination was prohibited under the former *Trade Practices Act 1974* (TPA) until 1995, when the prohibition was removed (see Box 19.3). Nonetheless, awareness of price discrimination can irritate consumers who find themselves unable to purchase goods at the same price that others can.

**Box 19.3: The former prohibition on price discrimination**

Prior to 1995, the then TPA had a specific provision against certain types of price discrimination. The Hilmer Review found that this provision was contrary to the objective of economic efficiency and had not assisted small business. Further, instances where price discrimination may have an anti-competitive effect could be adequately dealt with by other parts of the law. The Hilmer Review concluded 'that a provision such as [section] 49 should form no part of a national competition policy'<sup>556</sup> and, in 1995, the former section 49 was repealed.

The Hilmer recommendations followed those of the Swanson (1976) and Blunt (1979) Committees, which had also proposed repealing the prohibition on price discrimination.<sup>557</sup> The issue was reconsidered in the Dawson Review in 2003. The Dawson Review found that empirical evidence did not indicate the need for further regulation of price discrimination.<sup>558</sup>

Some submissions call for reinstating a specific anti-competitive price discrimination provision, particularly in relation to the supply of goods to supermarkets.<sup>559</sup> For example, AURL FoodWorks states:

The practice of suppliers selling to some customers at one price and to other comparable customers at a higher price is an on-going concern ... Independent wholesalers are not able to obtain goods or services at prices comparable to those charged by suppliers to the major chain supermarkets. This is despite having central distribution warehouses of comparable size and capable of like performance to the major chains. (sub, pages 7-8)

Supporters of a price discrimination provision often argue that it would improve the ability of small businesses to compete, allowing them to be more responsive to consumer needs because it would remove the capacity of larger firms to price their product below the level charged by local, smaller retailers.<sup>560</sup> However, restricting pricing flexibility can be harmful to competition and thereby harm consumers, a view supported by many submissions to the Draft Report.<sup>561</sup>

556 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 80.

557 The Trade Practices Act Review Committee 1976, *Report to the Minister for Business and Consumer Affairs* noted that section 49 drew more criticism in submissions than any other and found that some suppliers took the law to mean that they were required to charge similar prices to all customers, which led to price rigidity and overall price increases.

The Trade Practices Consultative Committee 1979, *Small business and the Trade Practices Act* again called for the repeal of section 49. The Committee noted that the flexibility of pricing was impaired by the operation of section 49 and certain rigidities were introduced both by the section and the uncertainties of its application.

558 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, Canprint Communications, Canberra, page 97.

559 See, for example: Australian Motor Industry Federation, DR sub, page 10; Master Grocers Australia, DR sub, pages 21-22; Bi-Rite Roma, DR sub, pages 1-2; and WA Independent Grocers Association, DR sub, pages 1-2.

560 See generally submissions to the Senate Economics Committee, *Inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices — Blacktown Amendment) Bill 2009*.

561 See, for example: Australian Information Industry Association, DR sub, pages 9-11; Alinta Energy, DR sub, page 3; Australasian Performing Right Association Limited & Australasian Mechanical Copyright Owners' Society, DR sub, page 5; Australian Automotive Aftermarket Association, DR sub, page 4; Australian Chamber of Commerce and Industry, DR sub, page 20; ACCC, DR sub, page 54; Australian Copyright Council, DR sub, pages 6-7; Communications Law Centre, UTS, DR sub, pages 3-4; Consumer Action Law Centre, DR sub, page 16; Electronic Frontiers Australia, DR sub, page 3; Daryl Guppy, DR sub, page 9; Law Council of Australia — Competition and Consumer Committee, DR sub,

Price discrimination should only be unlawful where it substantially lessens competition. The Panel agrees with the conclusions of previous reviews that anti-competitive price discrimination is best addressed under section 46. Some submissions to the Draft Report advise caution in relation to the reliance placed on section 46, and call for a more in-depth examination of the issue of price discrimination,<sup>562</sup> on the basis that some retailers are unable to buy products from their suppliers at a price that is lower than the retail prices being charged by their major competitors.

In the Panel's view, the proposal for reforming section 46 should assist in identifying and prohibiting such conduct (see Recommendation 30). That is, the reforms would catch conduct engaged in by the major competitor (a firm with a substantial degree of power in a market) with the purpose, effect or likely effect of substantially lessening competition. The court would consider whether the price differential is explained by efficiency, innovation or price competitiveness (such as that achieved through volume-based pricing from suppliers) and whether it prevents, restricts or deters competitive conduct or new entry in the market.

### International price discrimination

International price discrimination occurs when a supplier charges different prices for goods or services according to the country in which the products are sold. It is a common practice for products that enjoy intellectual property (IP) protection, such as books, digital music and videos, and software. Both IP laws and technology provide the means to segment markets by country.

The Communications Law Centre, UTS states:

... with respect to international price discrimination in relation to intellectual property products ... copyright owners are entitled to:

- segment markets by territory, and to enter into territorial licensing and distribution agreements;
- discriminate as to price in different territories; and
- use geoblocking measures to protect market segmentation. (DR sub, page 3)

The ACCC also notes:

While such practices are not new, the rise of the digital economy has increased consumers access to global marketplaces and awareness of different (higher) prices that may be charged in their home country. (sub 1, page 117)

The Panel heard concerns about international price discrimination. For example, CHOICE points to evidence of price differences for music and movies from Apple's Australian and US iTunes stores. According to CHOICE, Australians can also pay up to 60 per cent more for clothing and up to 200 per cent more for cosmetics (sub, pages 13–15).

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page 34; National Seniors Australia, DR sub, pages 14-15; Queensland Law Society, DR sub, page 4; and Woolworths, DR sub, page 32.

562 See, for example: Australian Newsagents' Federation, DR sub, page 16; Law Council of Australia — SME Committee, DR sub, page 16; and Spier Consulting Legal, DR sub, page 15.

The Issues Paper notes that the Canadian Government has announced plans to introduce legislation to address country-specific price discrimination against Canadian consumers.<sup>563</sup> The Panel received submissions calling for a similar policy in Australia. Consumers SA states that it:

... encourages the review to explore the possibility of legislation to inhibit international price discrimination ... (sub, page 3)

There are significant implementation difficulties associated with any attempt to prohibit international price discrimination. The American Bar Association notes:

Regulation of international price differences is a risky endeavor. Even if regulation is limited to ... 'unjustified' price discrimination, identifying such cases is extremely difficult given the complexity of the factors influencing pricing decisions in a given country ... It could also create incentives for foreign suppliers to abandon or choose not to enter the Australian market, resulting in less choice for consumers and less interbrand competition in Australia. Likewise, Australian companies might opt out of overseas markets, or be constrained in their ability to compete in certain countries. (sub, page 3)

While technology, including geoblocking, can contribute to instances of international price discrimination, the growth of distribution channels, both physical and technological, can help consumers and businesses overcome price discrimination. For example:

- In markets for physical goods, mail-forwarding companies allow Australian consumers to buy goods in overseas jurisdictions and then have them forwarded to Australia.
- Product review websites and price monitoring and comparison sites can help consumers find the product or service that best meets their needs and at the best price (see further discussion in [Chapter 16](#)).

Some Australian consumers reportedly use virtual private networks to access digital content in overseas jurisdictions at the prices available in those jurisdictions.<sup>564</sup> These prices may be lower than those charged in Australia, or the content may not be available in Australia. The legality of these mechanisms is the subject of some debate and is likely to depend on the specific circumstances and the terms and conditions relating to the transaction. The Panel notes that the Australian Government has issued guidance pointing out that 'The Copyright Act does not make it illegal to use a [virtual private network] to access overseas content'.<sup>565</sup>

In its evidence to the House of Representatives Standing Committee Inquiry into IT pricing, the ACCC noted that mechanisms to circumvent international price discrimination can help to put competitive pressure on prices:

If the methods start to become a big enough way in which consumers are circumventing the limitations ... those methods can start to have ... an impact in the market ... An illustration of that is the response of some of the television networks to bring forward

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563 On 9 December 2014 the Canadian Government tabled the Price Transparency Act, intended to give Canada's Commissioner of Competition the power to 'seek court orders to compel the production of evidence to expose discriminatory pricing practices that are not justified by higher costs in Canada and to publicly report to consumers on the findings'. See: <<http://news.gc.ca/web/article-en.do?nid=913079>>.

564 See, for example: Lobarto, R and Ewing, S 2014, *Australians embrace VPNs*, Swinburne University of Technology, 3 October, Melbourne, which notes that of 1,000 people surveyed about various aspects of their internet use, twenty per cent of respondents indicated they used a virtual private network, or web proxy, or both, to access the internet and download files at home.

565 Turnbull, M (Minister for Communications) 2014, *New Measures to tackle online copyright infringement*, media release, 10 December, Canberra.

their broadcast of some of the popular overseas programming that would otherwise be made available through some of the illegal downloading sites.<sup>566</sup>

However, some submissions to the Draft Report strongly oppose actions that circumvent international price discrimination:

Foxtel believes that the Panel's apparent desire to assist consumers to circumvent geo-blocks is misguided and dangerous ... Furthermore, what the Panel does not appear to have appreciated is that any attempt to assist Australians to circumvent geo-blocks will have a real impact on the Australian businesses that invest in Australian content, create Australian jobs and pay tax in Australia. (Foxtel, DR sub, pages 11-12)

... geo-blocking exists as an important and internationally applied, if imperfect, tool for writers and publishers to trade and manage the supply of their electronic-format copyright works into other markets. (Australian Society of Authors, DR sub, page 7)

The Panel favours encouraging the use of market-based mechanisms to address international price discrimination rather than attempting to introduce a legislative solution.

The Panel notes the recommendations of the House of Representatives Standing Committee on Infrastructure and Communications in its July 2013 report into IT pricing in Australia.<sup>567</sup> The Committee recommends removing restrictions on parallel imports, consistent with Recommendation 13.

In addition, the Committee makes a number of recommendations (set out in Box 19.4) that the Panel endorses in principle as a means of encouraging market-based, consumer-driven solutions to concerns about international price discrimination. The Committee also makes a number of recommendations that could form part of the overarching review of IP the Panel proposes in Recommendation 6.

#### **Box 19.4: Relevant recommendations of House of Representatives Standing Committee Report on IT pricing in Australia**

**House of Representatives Committee Recommendations that the Panel supports in principle include:**

##### *Recommendation 5*

The Australian Government amend the Copyright Act's section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.

<sup>566</sup> Bezzi, M (Executive General Manager ACCC) 2012, *Official Committee Hansard, House of Representatives Standing Committee on Infrastructure and Communications, Information Technology Pricing*, ACCC, 31 October, Canberra.

<sup>567</sup> House of Representatives Standing Committee on Infrastructure and Communications 2013, *At what cost? IT pricing and the Australia tax*, Canberra.

**Box 19.4: Relevant recommendations of House of Representatives Standing Committee Report on IT pricing in Australia (continued)**

*Recommendation 6*

The Australian Government investigate options to educate Australian consumers and businesses as to:

- the extent to which they may circumvent geoblocking mechanisms in order to access cheaper legitimate goods;
- the tools and techniques which they may use to do so; and

the way in which their rights under the Australian Consumer Law may be affected should they choose to do so.

*Recommendation 8*

The Committee recommends the repeal of section 51(3) of the *Competition and Consumer Act 2010*.

**House of Representatives Committee Recommendations that the Panel considers should form part of a review of IP laws:**

*Recommendation 7*

The Committee recommends that the Australian Government, in conjunction with relevant agencies, consider the creation of a 'right of resale' in relation to digitally distributed content, and clarification of 'fair use' rights for consumers, businesses, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem.

*Recommendation 9*

The Committee recommends that the Australian Government consider enacting a ban on geoblocking as an option of last resort, should persistent market failure exist in spite of the changes to the Competition and Consumer Act and the Copyright Act recommended in this report.

*Recommendation 10*

That the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.

**The Panel's view**

Price discrimination can be beneficial to consumers. Accordingly, re-introducing specific provisions to the CCA that prohibit anti-competitive price discrimination could ultimately reduce consumer choice by discouraging flexible and innovative pricing.

Anti-competitive price discrimination can be adequately dealt with by the existing provisions of the law, particularly section 46 (and especially if amended as proposed in Recommendation 30).

Attempting to legislate against international price discrimination could result in significant implementation and enforcement difficulties and risks negative unintended consequences.

Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports and ensuring that consumers are able to take legal steps to circumvent attempts to block their access to cheaper legitimate goods.



### Recommendation 31 — Price discrimination

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the Panel's recommended revisions to section 46 (see Recommendation 30)).

Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports (see Recommendation 13) and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.

## 19.4 UNFAIR AND UNCONSCIONABLE CONDUCT IN BUSINESS TRANSACTIONS

The Terms of Reference task the Review with examining provisions of the Australian Consumer Law (ACL) that deal with unfair and unconscionable conduct, but only insofar as they relate to small business.

As noted earlier in this section, a firm that enjoys a strong bargaining position because of its size and importance in a market has the potential to abuse that strength in dealings with suppliers and business customers. Such conduct may not contravene section 46 — it may not materially harm a competitor. However, it may so offend accepted standards of business behaviour that it is unconscionable.

Statutory protection against unconscionable conduct, which recognises the disparity in bargaining power between buyers and sellers,<sup>568</sup> was first introduced into the law in 1986 as a consumer protection measure.<sup>569</sup> Since then, the effectiveness of the CCA's unconscionable conduct provisions has been reviewed a number of times, leading to an expansion of their scope to cover certain business transactions,<sup>570</sup> the unification of consumer and business unconscionable conduct provisions,<sup>571</sup> and the introduction of interpretive guidance for the provisions.<sup>572</sup> The introduction of

568 Trade Practices Act Review Committee 1976, *Report to the Minister for Business and Consumer Affairs*, at 9.56-9.62.

569 *Trade Practices Revision Act 1986*.

570 For example, former section 51AA of the then *Trade Practices Act 1974*, inserted by the *Trade Practices Legislation Amendment Act 1992*; and section 51AC of the then *Trade Practices Act 1974*, inserted by the *Trade Practices Amendment (Fair Trading) Act 1998*. For background see Report to the Hon Dr Craig Emerson MP Minister for Small Business, Independent Contractors and the Service Economy, Minister for Competition Policy and Consumer Affairs 2010, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*.

571 *Competition and Consumer Legislation Amendment Act 2011*.

572 *Ibid.* See section 22 of the Australian Consumer Law (ACL) and Part 2-2 of the ACL more generally.

the business unconscionable conduct provision was intended to ‘improve business conduct in the Australian economy and provide a more efficient and equitable basis upon which the forces of competition can operate’.<sup>573</sup>

As discussed in [Part 1](#), the CCA is not directed at protecting competitors but rather competition. This requires competition law to balance preventing anti-competitive behaviour that undermines competition against not inhibiting behaviour that is part of normal vigorous competition.

A separate but parallel principle is that the business and wider community expect business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards within the law. Because it is difficult to prescribe such minimum standards, the law prohibits unconscionable conduct, leaving it to the courts to determine in a given case whether the conduct fails to conform to the dictates of good conscience. Unconscionable conduct is assessed by reference to the particular circumstances in which the conduct occurs and often (but not always) includes a pattern of behaviour which, when taken together, constitutes unconscionability.

A number of submissions, particularly from agricultural producers, raise concerns that the unconscionable conduct provisions are deficient because of the lack of specific definition or the difficulty in proving that the conduct meets the standard of judicially-defined unconscionable conduct.<sup>574</sup>

The Panel notes that, in December 2014, the Federal Court by consent made declarations that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers. The Court also ordered Coles to pay combined pecuniary penalties of \$10 million, and Coles agreed to enter a court enforceable undertaking with the ACCC to provide redress to more than 200 of its suppliers referred to in the proceedings.<sup>575</sup>

This successful conclusion to a case of business-to-business unconscionable conduct indicates that the current unconscionable conduct provisions appear to be working as intended. However, active and ongoing review of these provisions should occur as other matters arise.

Issues relating to whether small business, in particular, can access justice in a time-efficient and low-cost way are addressed in [Chapter 23](#).

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573 See Reith, P (Minister for Workplace Relations and Small Business) 1997, Second reading speech: Trade Practices Amendment (Fair Trading) Bill 1997, Canberra, 30 September. Prohibitions against unfair contract terms are also aimed at addressing unequal bargaining power. These provisions were introduced as part of the ACL reforms in 2010 to protect consumers from unfair terms in standard form contracts and reflect concerns that consumers have little or no opportunity to negotiate with businesses about such contracts — see Emerson, C (Minister for Competition and Consumer Affairs) 2009, Second reading speech: Trade Practices Amendment (Australian Consumer Law) Bill 2010, Canberra, 24 June. The Australian Government announced prior to the 2013 election that it would seek to extend the ACL protections dealing with unfair contract terms to small business. — see [www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms](http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms).

574 See, for example: AgForce Queensland, sub, page 2; Australian Chicken Growers’ Council Limited, sub, pages 7-8; Australian Dairy Farmers Limited, sub, pages 9-10; Australian Newsagents’ Federation, sub, page 11; and National Farmers’ Federation, sub, page 7.

575 See 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.

### The Panel's view

The Panel has heard concerns expressed by small businesses and suppliers in respect of behaviours of larger businesses in their supply chains. The business unconscionable conduct provisions were introduced specifically to address such concerns.

The Panel believes that the current unconscionable conduct provisions are working as intended to meet their policy goals.

Enforcing business-to-business unconscionable conduct provisions is an important function of the ACCC. The Panel notes the ACCC's recent actions in the supermarket sector against unconscionable conduct in dealings with suppliers.

Active and ongoing review of these provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. If deficiencies become evident, they should be remedied promptly.

## 19.5 CODES OF CONDUCT

An industry code is 'a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry'.<sup>576</sup> Codes are intended to influence or control commercial behaviour within a particular industry. Codes may also contain a dispute resolution framework for those covered by the code.

In the context of the CCA, there are two types of codes: mandatory prescribed codes and voluntary opt-in prescribed codes. Outside the CCA, industries can also develop their own voluntary codes.<sup>577</sup> Most submissions referring to codes of conduct support their use,<sup>578</sup> with the Australian Automotive Aftermarket Association noting that industry codes are often seen as a substitute for government regulation (DR sub, page 5). The Central Markets of Australia Association states, that when developing industry codes, they:

... should be to promote good commercial practice, and/or prohibit other specific practices unique to an industry sector. Codes should not, however, exist to restrict competition, reduce commercial feasibility and/or establish an unintended commercial bias against one part of an industry (when justified). (DR Sub, page 3)

A number of the parties who have sought to rely on the protection of prescribed or voluntary codes express concerns about their coverage and/or the effectiveness of dispute resolution processes.<sup>579</sup>

<sup>576</sup> *Competition and Consumer Act 2010*, subsection 51ACA(1).

<sup>577</sup> The language used in the CCA is confusing, as voluntary codes may be created by legislation or ministerial order. The paradox of this is noted by Freiberg who states 'There are thousands of voluntary codes of conduct or practice that operate independently of government. However, and possibly oxymoronically 'voluntary codes' may be recognised or created by legislation or ministerial order.' Freiberg, A 2010, *The Tools of Regulation*, The Federation Press, Sydney, page 192.

<sup>578</sup> See, for example: Australian Newsagent's Federation, sub, pages 12-13; Coles Group Limited, sub, page 12; Insurance Australia Group, sub, pages 15-16; Office of the Australian Small Business Commissioner, sub, pages 5-6; Master Grocers Australia, sub, page 53; Metcash, sub, page 9; and Woolworths Limited, sub, pages 78-79.

<sup>579</sup> See, for example: AgForce Queensland, sub, page 2; Australian Automotive Dealer Association, sub, pages 7-8; Australian Dairy Farmers Limited, sub, page 12; Australian Food and Grocery Council, sub, pages 29-30; Australian Forest Products Association, sub, page 2; Australian National Retailers Association, sub, pages 48-49; CHOICE, sub, pages 36-43; Consumer Action Law Centre, sub, pages 21-24; Insurance Australia Group, sub, page 16; Master Grocers Australia, sub, pages 53-57; and National Farmers' Federation, sub, pages 10-11.

Submissions also support improving the effectiveness of the Horticulture Code of Conduct<sup>580</sup> and the Grocery Industry (Unit Pricing) Code of Conduct.<sup>581</sup>

A number of submissions also call for a supermarket code. These are discussed further in [Chapter 15](#).

The Panel notes that, on 24 September 2014, the CCA was amended to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes.<sup>582</sup> These new powers, which apply from 1 January 2015, also allow the court to impose penalties on businesses that breach prescribed industry codes incorporating these new penalties.

The first code to incorporate the new civil penalties is the Franchising Code of Conduct, which took effect on 1 January 2015. A breach of the Franchising Code exposes a franchisor or franchisee to an infringement notice penalty of \$8,500 issued by the ACCC or a pecuniary penalty of up to \$51,000 imposed by the court.

The new remedies and powers are a significant development. However, experience with administering the new provisions is needed before determining whether they should apply more broadly.

### The Panel's view

Codes of conduct play an important role under the CCA by providing a flexible regulatory framework to set norms of behaviour that generally apply to relationships between businesses within a particular industry.

The Panel has heard from parties who believe that particular codes lack meaningful enforcement sanctions and the capacity for public enforcement.

Introducing civil penalties and infringement notices for breaches of codes strengthens the CCA enforcement options.

Having these options available for CCA codes is a significant development. Proponents of new CCA codes could consider whether penalties should be included for non-compliance.

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580 Central Markets of Australia Association, DR sub, page 3.

581 Queensland Consumers Association, DR sub, page 1.

582 By the *Competition and Consumer Amendment (Industry Code Penalties) Act 2014*.

## 20 ANTI-COMPETITIVE AGREEMENTS, ARRANGEMENTS AND UNDERSTANDINGS

The *Competition and Consumer Act 2010* (CCA) prohibits certain types of provisions within agreements, arrangements and understandings between competitors. These types of arrangements are commonly called horizontal arrangements because they occur between competitors trading at the **same** level of the supply chain. Cartel provisions and exclusionary provisions (where competitors agree not to supply or acquire from particular persons or classes of persons) are prohibited per se. Other provisions are prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

The CCA also prohibits certain types of conditions that are imposed as part of trading arrangements between suppliers and their customers. These types of arrangements are commonly called vertical arrangements because they occur between firms that trade at **different** levels of the supply chain. Resale price maintenance (where a supplier requires a retailer to price its products at no less than a minimum retail price specified by the supplier) is prohibited per se. Third-line forcing (where a supplier requires its customer to acquire another product from another supplier) is also prohibited per se. Exclusive dealing (where suppliers restrict the freedom of their customers to deal with other suppliers or within particular geographic areas, and likewise for acquirers) and other conditions are prohibited if the condition has the purpose, effect or likely effect of substantially lessening competition.

### 20.1 CARTEL CONDUCT

Prior to 2009, price fixing provisions and exclusionary provisions were prohibited per se and were subject to civil penalty sanctions.

The Dawson Review recommended introducing criminal sanctions for cartel conduct.<sup>583</sup> That recommendation was implemented in 2009 by the enactment of Division 1 of Part IV of the CCA, which introduced criminal and civil prohibitions of cartel conduct. In line with overseas practice and Organisation for Economic Co-operation and Development (OECD) recommendations,<sup>584</sup> the CCA now prohibits arrangements between competitors that fix prices, restrict outputs in production and supply chains, divide markets by allocating customers, suppliers or territories, or rig bids.

Despite the introduction of the cartel prohibitions, the prohibition of exclusionary provisions remains in the CCA.

Submissions express broad support for serious cartel conduct being prohibited per se and for imposing criminal sanctions for that conduct.<sup>585</sup> However, a range of submissions criticise the form and scope of the cartel prohibitions. Two principal concerns are raised:<sup>586</sup>

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583 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra.

584 OECD 1998, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, Paris.

585 See, for example: BHP Billiton, sub, page 41; and Ian Stewart, sub, page 13.

586 See, for example: Arnold Bloch Leibler, sub, page 2; Baker & McKenzie, sub, page 1; Caron Beaton-Wells and Brent Fisse, sub, page 9; and Law Council of Australia — Competition and Consumer Committee, sub, pages 50-52.

- The provisions are unnecessarily complex, making the law difficult to understand and comply with.
- The provisions have been framed too broadly and criminalise commercial conduct that ought not be characterised as cartel conduct, including joint venture activity and vertical arrangements between suppliers and their customers.

## Complex drafting

The Panel agrees that the cartel provisions are complex. One explanation for their complexity is that laws that impose criminal sanctions must take account of the requirements of the Commonwealth *Criminal Code Act 1995*. The Criminal Code provides that criminal offences consist of physical elements and fault elements. The Australian Competition and Consumer Commission (ACCC) notes:

The process of prescribing the cartel offences with the necessary degree of specificity required of a criminal offence has resulted in drafting that is complex and which may not provide adequate certainty. (sub 1, page 93)

Since serious cartel conduct can cause significant damage to the competitive process, the Panel supports using criminal sanctions to punish and deter cartel behaviour. While drafting criminal conduct provisions must necessarily involve a degree of specificity, the Panel considers that the cartel provisions in their current form are overly complex and do not provide businesses with sufficient clarity and certainty.

The New Zealand Parliament is considering amendments to that country's competition laws to introduce criminal sanctions for cartel conduct. The proposed amendments are contained in the Commerce (Cartels and Other Matters) Amendments Bill 2014. The proposed cartel provisions are similar in many respects to the Australian cartel law, but are in a shorter and simpler form. The Panel considers that the proposed approach in New Zealand provides a useful illustration of how the law might be simplified in Australia. Simplification of the cartel provisions is broadly supported in submissions.<sup>587</sup>

However, both the ACCC and the Commonwealth Director of Public Prosecutions (CDPP) raise concerns about moves to simplify the cartel offences. The ACCC considers that the suggested changes would go beyond mere simplification, reducing the scope of the cartel provisions (DR sub, pages 36-40). The CDPP notes 'the almost inevitable tension between the laudable goals of clarity and flexibility in ... legislative drafting' and questions the justification for amending the legislation before it has been tested in court (DR sub, page 3).

The Panel considers that the complex definitions used to describe cartel conduct can and should be simplified. The separate elements for 'purpose condition', 'purpose/effect condition' and 'competition condition' can be written more directly and simply into the definitions for the cartel provisions to be covered by the law, without giving rise to the concerns raised by the ACCC or the CDPP. The Panel's model legislative provisions in [Appendix A](#) preserve the essential elements of each

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587 See, for example: AGL Energy Limited, DR sub, page 5; Arnold Bloch Leibler, DR sub, page 1; ASTRA Subscription Media Australia, DR sub, page 7; Australian Corporate Lawyers Association, DR sub, page 3; Australian Newsagents' Federation, DR sub, page 10; Australian Recording Industry Association, DR sub, pages 3-4; BHP Billiton, DR sub, page 4; Coles Group Limited, DR sub, page 7; Consult Australia, DR sub, page 3; Julie Clarke, DR sub, page 2; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 9-10; Law Council of Australia — SME Committee, DR sub, page 13; Master Builders Association, DR sub, page 15; MasterCard, DR sub, page 2; Origin Energy, DR sub, pages 1-2; Queensland Law Society, DR sub, page 2; and Retail Guild of Australia, DR sub, page 6.

of the cartel prohibitions — price fixing, restricting output, market allocation and bid rigging — but express them in a simpler form.

The Panel also considers that the prohibition of exclusionary provisions, separately from cartel conduct, is unnecessary and increases the complexity of the law. The definition of exclusionary provisions overlaps substantially with the definition of market sharing, a form of cartel conduct. Many submissions agree, supporting the removal of section 4D of the CCA.<sup>588</sup>

The ACCC submits that, although overlap exists between the cartel provisions and the definition of exclusionary provisions, there are some gaps. The ACCC does not support removing section 4D unless its full scope is carried across to the cartel provisions (DR sub, page 42). The Panel recommends that the separate prohibition of exclusionary provisions be removed from the CCA, with adjustments made to the cartel provisions to cover any resulting gaps in the law. The Panel's recommendation is reflected in the model legislative provisions at [Appendix A](#).

## Modifying the scope of the cartel prohibitions

As noted earlier, competition laws must achieve the correct balance between prohibiting anti-competitive conduct and not prohibiting pro-competitive conduct. This is particularly important in the context of the cartel law, which prohibits conduct per se and imposes criminal sanctions.

Submissions raise concerns that the existing cartel law captures conduct that ought not to be prohibited, either because the prohibitions are too broad or the current exemptions are too narrow. Specific problems with the current law have been raised:

- The cartel law is not limited to conduct that harms competition in markets in Australia.
- The 'competition condition' for the application of the cartel law is set at a very low threshold.
- The exceptions for joint ventures and for vertical supply arrangements are each too narrow.

## Market limitation

Australia's competition laws are generally directed at conduct that harms competition in markets in Australia (see [Chapter 18](#)). This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

However, the cartel conduct prohibition is not expressly limited to arrangements affecting competition in Australian markets. In *Norcast v Bradken*,<sup>589</sup> the first and only case to consider the cartel prohibitions to date, the cartel prohibitions were found to be applicable to an arrangement concerning a tender for the sale of a Canadian corporation, which had business operations in Canada, Malaysia and Singapore, where the seller was based outside Australia and the tender was conducted outside Australia.

In the Draft Report, the Panel expresses the view that the cartel provisions should apply to conduct affecting goods or services supplied or acquired in Australian markets in a similar manner to the other competition law prohibitions. The ACCC submits that this change has the potential to create complexity in the context of criminal proceedings because, in a given case involving international

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588 See, for example: ASTRA Subscription Media Australia, DR sub, page 7; Julie Clarke, DR sub, page 2; Coles Group Limited, DR sub, page 7; Law Council of Australia — Competition and Consumer Committee, DR sub, page 6; MasterCard, DR sub, page 2; Queensland Law Society, DR sub, page 2; and Retail Guild of Australia, DR sub, page 6.

589 *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235.

trade, it would require a jury to make a determination about market boundaries, which is a somewhat abstract economic concept (DR sub, page 37).

The Panel agrees that it would be inappropriate to require a jury to make a determination that involves abstract economic concepts. However, the Panel remains of the view that, for cartel conduct to be an offence in Australia, it should have an effect on trade or commerce within, to or from Australia. This is consistent with the treatment of cartel conduct (and competition law more generally) in comparable overseas jurisdictions (see Box 20.1).

### Box 20.1: International comparisons of cartel conduct

In the **US**, the Foreign Trade Antitrust Improvements Act 1982 amended the Sherman Act so that it would not apply to conduct involving trade or commerce with foreign nations unless, relevantly, such conduct ‘has a direct, substantial and reasonably foreseeable effect on US domestic trade or commerce or on export trade ... of a person engaged in such trade or commerce in the US’.<sup>590</sup>

The effect of the Foreign Trade Antitrust Improvements Act was considered by the US Supreme Court in *F. Hoffman La Roche Ltd v Empagran SA* (2004). The Supreme Court concluded that the Sherman Act did not grant relief in respect of the foreign effects of foreign cartel conduct. Breyer J (delivering the opinion of the court) observed: ‘The [Foreign Trade Antitrust Improvements Act] seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however, anti-competitive, as long as those arrangements adversely affect only foreign markets ... It does so by removing from the Sherman Act’s reach (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.’

In **Europe**, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits ‘agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition **within the internal market**’ (being the European Economic Area).

In **New Zealand**, the proposed cartel laws contained in the Commerce (Cartels and Other Matters) Amendments Bill 2014 restrict the cartel conduct prohibition to conduct affecting the supply or acquisition of goods or services in New Zealand.

An international comparison of approaches to this issue is included at [Appendix B](#).

The Panel considers that an approach, similar to that proposed in the New Zealand Cartel Bill, should be included in Australia’s cartel law, confining the prohibition to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia. The Panel’s recommendation is reflected in the model legislative provisions at [Appendix A](#).

## Competing firms

Cartel conduct involves two or more competitors agreeing with each other not to compete. Cartels harm consumers because they usually increase prices or reduce choice.

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590 15 US Code § 6a — Conduct involving trade or commerce with foreign nations.



The cartel prohibition sets a very low threshold for its application. In *Norcast v Bradken* the Federal Court concluded that the prohibition applies to an arrangement between corporations if there is a possibility (other than a remote possibility) that they are or would be in competition with each other.<sup>591</sup>

The Panel considers this threshold is too low. Corporations that are not in competition with each other in their immediate markets commonly undertake joint or collaborative activities that produce consumer benefits. Under the current law, those activities would constitute cartel conduct and be subject to criminal sanctions if there is a possibility that they might compete in the relevant field of activity.

The Panel considers the cartel prohibition should only apply to corporations that are in competition with each other or are likely to be in competition with each other, where likelihood is assessed on the balance of probabilities (that is, more likely than not).

## Joint ventures

Joint ventures are a means by which two or more persons collaborate to undertake a commercial activity. They can be pro-competitive when they are employed as a means of developing new products or services or producing existing products or services more efficiently. However, they may also have anti-competitive effects, particularly where the participants are strong competitors in the field of activity proposed to be the subject of the joint venture.

The CCA provides exemptions from the criminal (section 44ZZRO) and civil (section 44ZZRP) cartel prohibitions for joint ventures, but the exemption is narrowly framed. It only applies where:

- the cartel provision is in a contract;
- it is for the purposes of a joint venture;
- the joint venture is for the production and/or supply of goods or services;
- in the case of an unincorporated joint venture, it is carried on jointly by the parties to the contract; and
- in the case of an incorporated joint venture, the joint venture company has been formed to enable the parties to carry on the joint venture under their joint control or ownership.

Submissions raise concerns that the narrow application of the current exemption is limiting legitimate commercial transactions. Some submissions note inconsistencies with other provisions of the CCA dealing with joint ventures.<sup>592</sup>

Exempting joint ventures from the cartel conduct prohibition does not remove them from the scope of the CCA. A joint venture that has the purpose, effect or likely effect of substantially lessening competition will be prohibited by section 45 of the CCA. Accordingly, the relevant question is whether joint ventures should be assessed under the cartel prohibition, which imposes per se liability and criminal sanctions, or assessed under the usual test of substantially lessening competition.

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591 *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at para 259.

592 See, for example: Arnold Bloch Leibler, sub, page 3; Baker & McKenzie, sub, page 3; Caron Beaton-Wells and Brent Fisse, sub, pages 13-14; Consult Australia, sub, pages 1-2; International Bar Association (Antitrust Committee), sub, pages 25-26; Law Council of Australia — Competition and Consumer Committee, sub, page 9; Minter Ellison, sub, page 5; Queensland Law Society, sub, pages 10-12; and Shopping Centre Council of Australia, sub, pages 25-27.

The ACCC expresses a concern that, in its experience, cartelists have claimed their collaboration is a joint venture and sought to disguise their activities to evade the law (DR sub, page 39).

The Panel considers that joint ventures should be assessed against a competition test and that the current joint venture defence to cartel conduct is too narrow. The various limitations in the defence are unnecessary and increase business compliance costs. In particular, the defence need not be confined to provisions within written contracts (joint ventures include less formal documentation, including operating procedures) nor confined to production and supply joint ventures.

Again, as a comparison, the New Zealand Cartel Bill contains a broader exemption in respect of collaborative activity. Although the New Zealand exemption may be too broad, the limitations in the Australian law should be broadened.

Specifically, the Panel recommends three changes to the current exemption. First, the exemption should apply to joint venture provisions whether the provisions are contained in a contract, or form part of less formal arrangements such as management or operating protocols. Second, the exemption should apply to any joint venture for the production, supply, acquisition or marketing of goods or services. Third, the exemption should apply to provisions that satisfy any of the following tests:

- the provision relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture;
- the provision is reasonably necessary for undertaking the joint venture; or
- the provision is for the purpose of the joint venture.

The Panel's recommendation is reflected in the model legislative provisions at [Appendix A](#).

## Vertical supply arrangements

Restrictions imposed in connection with the supply or acquisition of goods or services are common and may be pro-competitive or anti-competitive depending on the circumstances. For example, a franchisor may require its franchisees to confine their trading to a particular geographic region. Provided the products supplied by the franchise compete with a wide range of other products, the geographic restriction may increase competition by encouraging franchisees to invest in their designated business area. For that reason, vertical supply restrictions are usually only prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

On occasions, a business (such as a wholesaler) may supply goods or services to another business (such as a retailer) and also compete with the retailer in the retail market. The business may wish to supply its goods or services to the second business on the condition that the second business confine its retail activities to a particular geographic region. Again, such trading conditions may be pro-competitive or anti-competitive, depending upon the range of competing suppliers and products in the retail market. They should only be prohibited if they substantially lessen competition. However, without a suitable exemption, such conditions would be a per se offence under the cartel laws.

The CCA currently provides an exemption from the cartel laws for vertical supply restrictions that constitute exclusive dealing within section 47 of the CCA. Although section 47 covers various forms of exclusive dealing, it does not cover all forms of vertical supply restrictions (this is discussed below in [Section 20.3](#)). Accordingly, vertical supply restrictions not covered by section 47 are also outside the exemption to the cartel conduct prohibitions. Submissions raise concerns that the exemption for vertical restrictions, based on section 47, is too narrow and should be broadened.

The ACCC cautions against a broader carve-out from the cartel laws for vertical restrictions (DR sub, page 40) and disagrees with the relevant amendments to section 47 proposed in the Draft Report:

The ACCC does not support the proposed amendments to section 47 as proposed by Draft Recommendation 28. The ACCC considers that these amendments will inappropriately broaden the scope of the prohibition which, due to the anti-overlap provisions, will consequently narrow the application of the cartel and exclusionary dealing provisions. (DR sub, page 56)

The Panel considers that a broader exemption should be included in the cartel laws to ensure that vertical supply restrictions are assessed under a substantial lessening of competition test rather than a per se prohibition. While the ACCC's concerns are noted, the Panel does not believe that the current exemption, which is formulated by reference to section 47, is adequate to protect legitimate trading conduct from the cartel laws.

It is possible to formulate a clearer exemption that defines vertical trading restrictions that should be exempt from the per se cartel prohibitions and assessed under a substantial lessening of competition test. Again, as a comparison, the New Zealand Cartel Bill contains a broader exemption in respect of vertical supply restrictions. The Panel's recommendation is reflected in the model legislative provisions at [Appendix A](#).

### The Panel's view

The Panel supports a specific set of per se prohibitions in the CCA, with criminal sanctions aimed at serious cartel conduct. However, the current drafting of those provisions has given rise to concerns about their scope and whether they only target harmful anti-competitive conduct.

The prohibitions against cartel conduct should be simplified and the following specific changes made:

- The provisions should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia.
- The provisions should be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility.
- A broader exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.
- An exemption should be included for trading restrictions imposed by one firm on another in connection with the supply or acquisition of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

The CCA should also be amended to remove the prohibition on exclusionary provisions, with an amendment to the definition of cartel conduct to address any resulting gap in the law.

## Immunity policy

The cartel conduct legislation was accompanied by administrative arrangements to support a joint CDPP/ACCC leniency program to be available for criminal cartel offences and the corresponding civil prohibitions. Owing to their secretive nature, detecting the existence, activities and impact of cartels can be difficult. An immunity policy can encourage businesses and individuals to disclose cartel behaviour and be a powerful disincentive to the formation of cartels.<sup>593</sup>

Submissions support the existence of the ACCC's immunity policy, which applies to cartel conduct and provides protection against civil proceedings instituted by the ACCC. Immunity from criminal prosecution is determined by the CDPP in accordance with the same principles that determine immunity under the ACCC's immunity policy.<sup>594</sup>

Where the ACCC is of the view that the applicant satisfies the conditions for immunity under the immunity policy, it will recommend that the CDPP grant the applicant immunity from prosecution. The CDPP will exercise an independent discretion when considering such a recommendation by the ACCC. Where the CDPP is satisfied that the applicant meets the ACCC's conditions for immunity, the CDPP will grant immunity, pursuant to subsection 9(6D) of the *Director of Public Prosecutions Act 1983*.

In its published guidance on its immunity policy, the ACCC has stated that it 'regularly reviews the effectiveness of its immunity policy'.<sup>595</sup> An attempt to legislate the immunity policy could limit its success by reducing its flexibility.

An important consideration for immunity applicants, and those suffering loss or damage as a result of the activities of cartels, is whether the outcome of an immunity application has an impact on the liability of the immunity applicant to compensate cartel victims. Submissions note the availability of 'bar orders' in some jurisdictions to deal with the interface between cartel prosecutions and compensation litigation.<sup>596</sup>

Bar orders have advantages and disadvantages. On the one hand, they may increase the incentive for cartel participants to disclose cartel conduct, thereby bringing the cartel to an end. On the other hand, bar orders prevent those who have been harmed by cartel conduct from recovering compensation from the immunity applicant, although they may still be able to recover compensation from other cartel participants who have not received immunity.

The Panel considers there is no evidence showing that current arrangements are failing to achieve their objective of bringing about the deterrence and disclosure of cartel conduct. Accordingly, the Panel does not recommend introducing bar orders.

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593 Australian Competition and Consumer Commission 2014, *Immunity & cooperation policy for cartel conduct*, Canberra, page 1.

594 *Ibid.*, page 6.

595 Australian Competition and Consumer Commission 2014, *Updated Immunity Policy to uncover cartel conduct*, media release MR 225/14, 10 September, Canberra.

596 See, for example: Caron Beaton-Wells and Brent Fisse, sub, page 31; and Law Council of Australia — Competition and Consumer Committee, sub, page 56.

**The Panel's view**

The immunity policy is an important component of the detection and successful prosecution of cartel conduct. The immunity arrangements provide an adequate level of certainty and fit within the broader regime of the scheme for immunity for accomplices administered by the Commonwealth Director of Public Prosecutions.

**Recommendation 27 — Cartel conduct prohibition**

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

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

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

**Recommendation 28 — Exclusionary provisions**

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

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

**20.2 ANTI-COMPETITIVE DISCLOSURE OF INFORMATION**

Since June 2012, the CCA has prohibited: the private disclosure of pricing information to a competitor on a per se basis; and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market (Part IV, Division 1A of the CCA). These prohibitions have become known as the 'price signalling' provisions.

At present, by regulation, the provisions only apply to banking services and both have a number of exceptions.<sup>597</sup> To date no cases have been brought under either provision.

<sup>597</sup> *Competition and Consumer Regulations 2010*, regulation 48.

The provisions stem from the 2007 ACCC report on unleaded petrol prices.<sup>598</sup> That report identified conduct (the exchange of retail petrol prices among competitors) considered to be anti-competitive, but that did not amount to a ‘price-fixing understanding’ within the current judicial interpretation of section 45 of the CCA.

The ACCC recommended amending the law to broaden and clarify the meaning of the term ‘understanding’. In particular, it recommended the law provide that an understanding may be found to have been arrived at, notwithstanding that it was ascertainable only by inference from surrounding circumstances.<sup>599</sup>

In October 2010, the then ACCC Chair, Graeme Samuel, expressed concerns about price signalling in the banking sector.<sup>600</sup> Subsequently, in December 2010, the then Australian Government, as part of its Competitive and Sustainable Banking System reforms, legislated to prohibit anti-competitive price signalling, initially in the banking sector.

Price signalling has the potential to harm the competitive process. Competitors may be able to use the disclosure of price information as a means of co-ordinating their pricing decisions. Depending on the form of price signalling and the market circumstances, price signalling may reduce the commercial risks for competing firms to engage in co-ordinated behaviour and thereby increase the likelihood of anti-competitive pricing outcomes. Box 20.2 outlines the laws in other jurisdictions that address anti-competitive disclosure of information.

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598 Australian Competition and Consumer Commission 2007, [Petrol Prices and Australian Consumers — Report of the ACCC Inquiry into the price of unleaded petrol](#), Canberra.

599 See in particular, Australian Competition and Consumer Commission 2007, [Petrol Prices and Australian Consumers — Report of the ACCC Inquiry into the price of unleaded petrol](#), Canberra, Appendix R — Legal Advice on section 45 of the *Trade Practices Act 1974* from Julian Burnside QC 6 December 2007, page 368.

600 ABC RN Breakfast 2010, [ACCC warns banks about price signalling](#), 25 October.

**Box 20.2: International comparisons of anti-competitive disclosure of information**

Anti-competitive price signalling and information exchanges (or ‘concerted practices’ as they are known in some jurisdictions) are subject to different laws in the US, Canada, the UK, and the EU.

In the **US**, the general provisions in section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act have been used to bring actions involving price signalling conduct (for example, the *Ethyl* case<sup>601</sup> and the *Petroleum Products*<sup>602</sup> case).

In **Canada**, the general provisions in subsection 45(1) of the Competition Act dealing with cartel conduct and section 90.1 dealing with agreements that prevent or lessen competition substantially in the market are relied upon. The Competition Bureau has noted that an agreement may be inferred in circumstances where there is unilateral information exchange together with parallel conduct.

In the **UK**, the general Chapter I prohibition in the Competition Act, which includes the concept of concerted practice, can be relied on to capture price signalling conduct.

Similarly, the **EU**’s general Article 101 prohibition, which includes the concept of ‘concerted practice’, can be relied on to capture price signalling conduct.

For further information on international approaches to this issue, see [Appendix B](#).

Submissions contain a range of views that generally reflect those previously expressed in the debates leading up to the introduction of the legislation. It is fair to say that no-one seems happy with the provisions in their current form — submissions either argue for modification,<sup>603</sup> or repeal<sup>604</sup> or extension of the provisions to all sectors of the economy.<sup>605</sup>

Public disclosure of prices is a common business practice by which businesses communicate with a broad customer base and help consumers make informed choices. For this reason, the current public disclosure price signalling laws may over-capture pro-competitive or benign conduct.

Private disclosure of price information between competitors will generally have greater potential to harm competition. Private disclosure enables competitors to communicate their pricing intentions with each other without consumers observing the communication, thereby reducing the risk of adverse consumer reaction before a new pricing level becomes settled.

However, in some circumstances, competitors disclose pricing information in the ordinary course of business. As discussed in the context of cartel conduct, price disclosure may occur in connection with joint ventures and similar collaborative arrangements (for example, a bank lending syndicate or insurance layers offered by numerous insurers). Price disclosure may also occur in connection with a supply arrangement, but where the supplier also competes with its business customer in a downstream market.

The difficulties of defining the circumstances in which disclosure of price information is pro-competitive or benign, and the circumstances in which it is likely to be harmful to competition,

601 *E I Du Pont De Nemours & Co v FTC*, 729 F.2d 128.

602 *Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation State of Arizona v Standard Oil Co of California* 906 F.2d 432 (1990).

603 Australian Automobile Association, sub, page 12.

604 See, for example: American Bar Association, sub, pages 11-15; and Queensland Law Society, sub, page 9.

605 See, for example: ACCC, sub 1, page 9; and Law Council of Australia — SME Committee, sub, page 11.

have resulted in a complex set of provisions now contained in Division 1A of Part IV. The provisions endeavour to craft suitable exemptions from the prohibitions. However, the difficulty in catering for all circumstances has resulted in a general exemption for disclosure in the ordinary course of business.

The fact that the provisions were, from their enactment, confined to the banking sector indicates an understandable concern about their application to all parts of the economy. The Panel considers that competition laws ought to be capable of general application to all parts of the economy.

Unlike most parts of the competition law, the price signalling provisions do not enjoy wide support: they are complex and create an additional compliance burden for business.

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

The concern originally raised by the ACCC was that a practice of exchanging price information between competitors may not constitute an ‘understanding’ within the meaning of section 45 and thereby not be regulated by section 45. Whether that concern is realistic might be debated — it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis.

Nevertheless, the concern can be readily addressed by expanding section 45 so it applies to contracts, arrangements, understandings and concerted practices, where a concerted practice is a regular and deliberate activity undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange.

Ensuring that section 45 of the CCA can apply to instances of concerted practice that substantially lessen competition will meet the policy intent of the price signalling provisions. This would remove the need for a separate division on price signalling within the CCA, and is consistent with simplifying the CCA and ensuring that its provisions apply generally throughout the economy.

None of the submissions to the Draft Report support the existing price signalling provisions, even those that oppose an amendment to introduce concerted practices into the CCA.<sup>606</sup> Among supporters of extending section 45 to cover concerted practices,<sup>607</sup> concerns are raised about the description of activity to be covered. RBB Economics notes that, while agreeing there is no rationale for price signalling laws to apply only to the banking sector, expanding the scope of section 45 to

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606 See, for example: AGL Energy Limited, DR sub, pages 5-6; Arnold Bloch Leibler, DR sub, pages 3-4; ASTRA Subscription Media Australia, DR sub, page 7; Australian National Retailers Association, DR sub, page 22; Business Council of Australia, DR sub, page 20; Cement Industry Federation, DR sub, page 5; Foxtel, DR sub, page 4; Minter Ellison, DR sub, page 4; Origin Energy Limited, DR sub, page 2; and Woolworths Limited, DR sub, pages 40-42.

607 See, for example: Australian Aftermarket Automotive Association, DR sub, page 3; Australian Motor Industries Federation, DR sub, page 9; AURL FoodWorks, DR sub, page 12; BHP Billiton, DR sub, pages 4-5; CHOICE, DR sub, page 25; Julie Clarke, DR sub, page 2; Professor Philip Clarke, DR sub, page 3; Consumer Action Law Centre, DR sub, page 15; Customer Owned Banking Association, DR sub, page 3; Daryl Guppy, DR sub, page 7; National Seniors Australia, DR sub, pages 13-14; and Queensland Law Society, DR sub, pages 2-3.



cover concerted practices could provide ‘exceptionally wide’ discretion to the competition authority to intervene in markets (DR sub, page 5).

The ACCC considers that the prohibition should be broader, that consideration should be given to prohibiting certain types of concerted practice on a per se basis, and that a concerted practices concept should be included in civil cartel prohibitions (DR sub, pages 43-48). Caron Beaton-Wells and Brent Fisse consider the definition presented in the Draft Report ‘both under-inclusive and over-inclusive: under-reach arising due to the definition mentioning regularity of conduct; over-reach because the definition fails to specify that the activity must be co-ordinated conduct geared to avoiding competition’ (DR sub, pages 2-3).

Caron Beaton-Wells and Brent Fisse also submit that a concerted practices concept be included in civil cartel prohibitions (DR sub, pages 6-9). The Law Council of Australia — Competition and Consumer Committee seeks further consultation on the circumstances in which price signalling should be prohibited (DR sub, page 10).

The Panel considers that the issue of anti-competitive disclosure of information (particularly price information) requires only a modest refinement to Australia’s competition laws. For the reasons expressed earlier, the Panel considers that the price signalling provisions contained in Division 1A of Part IV are not fit for purpose and should be repealed. Even without those specific provisions, many instances of anti-competitive disclosure of price information will contravene the existing competition laws:

- The disclosure may constitute evidence of an understanding about the prices to be charged by one of the parties to the disclosure in competition with another party, in contravention of the cartel laws.
- The regular disclosure of price information may constitute evidence of an understanding to disclose such information between the parties, and that understanding may have the purpose, effect or likely effect of substantially lessening competition in contravention of section 45.

The gap in Australia’s competition laws, in comparison to comparable overseas jurisdictions (particularly Europe), is that anti-competitive disclosure of information between competitors will only contravene the law if the court is able to conclude that the parties to the disclosure had either reached an understanding about the prices to be charged (price fixing within the cartel laws), or reached an understanding about the disclosure of information with an anti-competitive purpose or effect. Australia’s competition laws do not apply where two or more competitors engage in a co-ordinated practice, such as disclosure of price information, which practice can be shown to be likely to cause a substantial lessening of competition, unless the parties had reached an understanding about the practice.

The Panel considers that section 45 of the CCA should be expanded to include engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition. As noted above, some submissions express concern about the meaning to be given to the expression concerted practice, as it has not previously been used within Australia’s competition laws.

The word ‘concerted’ means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants. The expression ‘concerted practice with one or more other persons’ conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (for example, suppliers selling products at the same price).

The Panel's proposal is that such conduct would only be prohibited if it can be shown that the concerted practice has the purpose, effect or likely effect of substantially lessening competition. The Panel considers that the word 'concerted' has a clear and practical meaning and no further definition is required for the purposes of a legal enactment.

The Panel does not consider that the cartel conduct prohibitions should be expanded to include concerted practices. The Panel considers that imposing criminal sanctions for cartel conduct should require proof of a contract, arrangement or understanding between competitors.

### The Panel's view

Competition laws should apply generally across the economy, not to particular sectors. There is no policy rationale for price signalling laws to apply only to the banking sector.

Public disclosure of pricing information is a common business practice by which suppliers communicate to their customers. It can help consumers to make informed choices and is therefore unlikely to raise significant competition concerns in most instances.

Private disclosure of pricing information has the potential to harm consumer interests since it can facilitate collusion or co-ordination between competitors. However, in many business circumstances, such disclosure is necessary and usual.

Section 45 of the CCA should be able to address instances of anti-competitive price disclosure. That can be achieved by expanding the section to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

### Recommendation 29 — Price signalling

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

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

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

## 20.3 VERTICAL RESTRICTIONS (OTHER THAN RESALE PRICE MAINTENANCE)

As products are supplied down through a supply chain, it is not uncommon for suppliers (whether manufacturers, importers or wholesalers) and acquirers (whether wholesale distributors or retailers) to impose and agree trading restrictions. For example:

- A manufacturer of sporting equipment may supply its products to a retailer on condition that the retailer not purchase similar products from a competing manufacturer (full-line forcing).
- A food franchisor may supply a franchise to a company on condition that the franchisee only operate within a specified geographic region.
- A retail chain may acquire whitegoods from an importer on condition that the importer not supply its products to a competing retail chain (exclusive dealing).
- A retailer may sell a particular mobile telephony plan on condition that the customer also acquire a particular mobile phone (second-line forcing or bundling).

- A franchisor may supply a franchise on condition that the franchisee purchase products for sale from third-party suppliers approved by the franchisor (third-line forcing).

Usually, vertical trading restrictions are unlikely to cause any significant competitive harm. Most markets have many manufacturers and importers of competing goods and many competing wholesalers and retailers. A vertical restriction agreed between one manufacturer and one retailer would be unlikely to cause any significant harm to competition. Vertical restrictions can also be commercially advantageous both to the parties to the agreement and to consumers. The restrictions are a means by which independent traders can align their commercial interests and objectives to the benefit of each and can, as a result, offer consumers a better quality product.

However, in some circumstances, vertical trading restrictions can damage competition and are prohibited by the exclusive dealing provisions in section 47 of the CCA. The effect of vertical restrictions can be to restrict or exclude other traders from reasonable access to the market, reducing consumer choice. This is likely to occur when a significant proportion of the market for a particular product becomes subject to such restrictions.

For example, this might occur if a particular manufacturer enjoys a position of market dominance for its product and supplies the product to retailers on condition that they not acquire any competing products. It may then become difficult for a competing manufacturer to gain access to the retail market.

For these reasons, section 47 prohibits most vertical restrictions only if they have the purpose, or have or are likely to have the effect, of substantially lessening competition. The one exception is third-line forcing. Under the CCA, third-line forcing is prohibited per se.

Submissions raise two main concerns in relation to section 47:

- whether third-line forcing should be prohibited per se; and
- whether the complexity in the language of section 47 can be reduced.

### Third-line forcing

Broadly, third-line forcing involves the supply of goods or services on condition that the purchaser acquire goods or services from another person, or a refusal to supply because the purchaser will not agree to that condition.

Third-line forcing is similar in character to second-line forcing. Second-line forcing occurs where a corporation supplies a product on condition that the purchaser acquire another product from that corporation (or a related company); that is, the corporation bundles products together as a package.

Under the CCA, third-line forcing is prohibited per se; whereas, second-line forcing is only prohibited if it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Australia is the only comparable jurisdiction that prohibits third-line forcing per se. The US, Canada, the EU and New Zealand all leave the conduct to be dealt with by their general prohibitions against anti-competitive agreements or unilateral conduct — which are all assessed under a competition-based test. Further information on international approaches to this issue is included at [Appendix B](#).

There has been significant debate for many years about whether the per se nature of Australia's prohibitions is appropriate. Both the Hilmer and Dawson Reviews recommended introducing a competition test to third-line forcing. The Hilmer Review noted, 'There is a broad spectrum of tying

arrangements, with many having a positive implication for economic welfare' and concluded that third-line forcing should only be prohibited if it substantially lessens competition.<sup>608</sup>

Submissions support the view that third-line forcing should no longer be a per se prohibition.<sup>609</sup> The vast majority of submissions to the Draft Report also support the Panel's call for a change from a per se prohibition to a substantial lessening of competition test.<sup>610</sup> Some submissions raise concerns about a lessening of freedom of contract through increased product bundling and tying;<sup>611</sup> however, the Panel's proposal is that the prohibition on conduct that substantially lessens competition would remain, and, in any case, the current per se prohibition could equally be seen to restrict suppliers' freedom.

Third-line forcing conduct can be exempted from the CCA by filing a notification with the ACCC. The ACCC is empowered to remove the exemption if it considers that the anti-competitive detriment outweighs any public benefit from the conduct. In practice, the vast majority of third-line forcing conduct notified to the ACCC is permitted, which strongly supports the view that the conduct is not overwhelmingly anti-competitive. The ACCC states that, in 2012-13, it received more than 750 third-line forcing notifications and that, in the vast majority of cases, no further action was taken (sub 1, page 87).

The Panel considers that third-line forcing can be beneficial for traders and consumers and that firms should be free to package products in a manner they believe consumers will want, provided the conduct does not substantially lessen competition. From an economic standpoint, there appears to be no justification for treating third-line forcing differently from other vertical restrictions or any basis for the view that such conduct will be overwhelmingly anti-competitive in the current Australian marketplace. Although exemption can be gained through the notification process, this imposes a regulatory cost on business.

Accordingly, the Panel considers that third-line forcing conduct should be prohibited only where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

## Complexity of the provisions

Section 47 attempts to describe many of the common forms of vertical trading restrictions. Given that restrictions can take many forms, section 47 takes a detailed form.

The Panel considers that the present form of section 47 suffers from two deficiencies. First, because it attempts to describe a considerable number of categories of (non-price) vertical restriction, it is difficult for a business person to read and understand. The complexity might be tolerated if it constituted a comprehensive code of prohibited trading conduct. But it does not: the types of

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608 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, pages 50 and 54.

609 See, for example: Baker & McKenzie, sub, page 3; Business Council of Australia, Summary Report, sub, page 19; Arlen Duke and Rhonda Smith, sub, page 28; EnergyAustralia, sub, page 12; Federal Chamber of Automotive Industries, sub, page 7; Foxtel, sub, page 2; Law Council of Australia — Competition and Consumer Committee, sub, page 9; Metcash Limited, sub, page 5; Queensland Law Society, sub, page 13; George Raitt, sub, page 2; and Woodward, L & Rubinstein, M, sub, page 4.

610 See, for example: Australian Chamber of Commerce & Industry, DR sub, page 18; ACCC, DR sub, page 55; Australian National Retailers Association, DR sub, page 12; Coles Group Limited, DR sub, page 7; iiNet, DR sub, page 4; and Woolworths Limited, DR sub, page 33.

611 See, for example: Australian Newsagents' Federation, DR sub, page 17; and Law Council of Australia — SME Committee, DR sub, page 16.

vertical restrictions described in section 47 are not exhaustive. Vertical restrictions not addressed by section 47 are covered by section 45, which is expressed in more general terms.

Hence, the second deficiency is that, despite its complexity, section 47 is not comprehensive, since it does not address every form of (non-price) vertical restriction.

Submissions criticise the complexity of section 47 and the vast majority support revision along the lines proposed in the Draft Report.<sup>612</sup> Some submissions suggest that section 47 could be deleted altogether, leaving vertical restrictions (including third-line forcing) to be addressed by section 45.<sup>613</sup> This is a reasonable proposal save for one matter. Section 47 prohibits both the contractual imposition of a trading restriction in connection with the supply or acquisition of goods and services, as well as a refusal to supply or acquire goods and services because the acquirer or supplier, respectively, will not agree to the trading restriction. However, section 45 only addresses the imposition of a trading restriction within a supply agreement — it does not address a refusal to supply or acquire.<sup>614</sup>

The amendments to section 46 recommended in this Report (see Recommendation 30) would address such refusals to supply or acquire. The test for illegality under an amended section 46 and under section 47 would be the same: whether the conduct (the refusal to deal because another person would not agree to a vertical restriction) had the purpose, effect or likely effect of substantially lessening competition.

Section 46 has an additional limitation not expressed in section 47, namely, the prohibition only applies to a corporation that has substantial market power. However, this will not limit the effectiveness of the law. It is well accepted that vertical restrictions will not substantially lessen competition unless they are imposed by a corporation with substantial market power.

The Panel considers that vertical trading restrictions, and associated refusals to supply, can be addressed by a combination of section 45 and an amended section 46. In effect, section 47 would become a redundant provision. The Panel favours simplifying the CCA by removing unnecessary provisions.

Removing section 47 would be consistent with a number of comparable jurisdictions:

- Despite the New Zealand Commerce Act 1986 containing very similar competition law provisions to Australia's provisions, the Commerce Act contains no equivalent of section 47. Vertical restrictions are addressed by the New Zealand equivalents of sections 45 and 46.
- Likewise, there is no equivalent to section 47 in the EU's competition laws. The two primary competition law provisions in Europe, Articles 101 and 102 of the TFEU, are equivalent to sections 45 and 46 of the CCA.

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612 See, for example: ASTRA, DR sub, page 6; Australian Automobile Aftermarket Association, DR sub, page 4; Australian Corporate Lawyers Association, DR sub, page 3; Australian Motor Industry Federation, DR sub, page 11; Baker & McKenzie, DR sub, page 1; Coles Group Limited, DR sub, page 7; Julie Clarke, DR sub, page 4; Professor Philip Clarke, DR sub, page 4; Law Council of Australia BLS Competition & Consumer Committee, DR sub, page 34; MasterCard, DR sub, page 2; Queensland Law Society, DR sub, page 5; Retail Guild of Australia, DR sub, page 6; Virgin Australia, DR sub, page 4; and Wesfarmers Limited, DR sub, page 3.

613 See, for example: Arlen Duke and Rhonda Smith, sub, page 28; and Professor Alan Fels, sub, page 11.

614 Julie Clarke, DR sub, page 4.

If section 46 were not amended as recommended, the Panel considers that section 47 should be simplified along the lines proposed in the Draft Report. The Panel has included a simplified form of section 47 in the model legislative provisions in [Appendix A](#). The model form takes account of submissions received in response to the Draft Report.

### The Panel's view

The Panel has heard no economic or practical reason to retain the per se prohibition on third-line forcing. Retaining the per se prohibition imposes unnecessary costs on business because business must either refrain from preferred trading arrangements or file a notification with the ACCC.

The provisions on third-line forcing (subsections 47(6) and (7) of the CCA) should be brought into line with the rest of section 47 and only prohibited where conduct has the purpose, effect or likely effect of substantially lessening competition.

Section 47 is also unnecessarily complex. Given the Panel's recommendations to amend section 46 (see Recommendation 30), anti-competitive vertical restrictions (including third-line forcing) and associated refusals to supply or acquire can be addressed by sections 45 and 46, enabling section 47 to be repealed.

### Recommendation 32— Third-line forcing test

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

### Recommendation 33 — Exclusive dealing coverage

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

## 20.4 RESALE PRICE MAINTENANCE

Resale price maintenance (RPM) is a form of vertical restraint concerning resale prices. RPM involves a supplier (for example, a manufacturer or importer) supplying a product to a person (for example, a retailer) on condition that the product not be advertised for sale or sold below a price specified by the supplier. Section 48 of the CCA prohibits RPM and makes it a per se offence; however, RPM may be authorised if a manufacturer can demonstrate that the imposition of RPM results in a public benefit.

The Dawson Review stated:

The rationale behind a per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.<sup>615</sup>

615 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act (the Dawson Review)*, CanPrint Communications, Canberra, page 123.

The Law Council of Australia — Competition and Consumer Committee notes this position (sub, page 61), arguing that RPM should not merit a strict prohibition since, in markets where there is sufficient inter-brand competition, RPM will have a limited effect on competition and, in some instances, RPM may even be beneficial.

### Is a per se prohibition appropriate?

The appropriateness of a per se prohibition of RPM has been debated for many years, both in Australia and overseas. In 2007, the US Supreme Court ruled that the practice of RPM should no longer be subject to a per se prohibition under US Federal law and should instead be tested under a rule of reason (competition) analysis (*Leegin Creative Leather Products Inc. v PSKS Inc.*).<sup>616</sup>

In Canada, RPM is also subject to a competition test, with conduct prohibited only when it has or is likely to have an adverse effect on competition in a market.<sup>617</sup> Other jurisdictions, such as the UK, the EU and New Zealand, maintain a per se prohibition — generally with some provision to authorise conduct.<sup>618</sup> See [Appendix B](#) for further information on international approaches to RPM.

Like other forms of vertical trading restriction, RPM will not have an effect on competition in a market if the product is subject to strong rivalry from competing products. In those circumstances, a manufacturer or importer would be unable commercially to specify a minimum price that is above the level determined by competition. The ACCC recently authorised Tooltechnic Systems (Aust) Pty Ltd to engage in RPM, noting that Tooltechnic had only a very small share of the market.<sup>619</sup>

Further, in a competitive market RPM may be beneficial to competition and consumers. For example, one purpose of imposing a minimum retail price within distribution arrangements is to create a financial incentive (through the retail margin) for a retailer to invest in retailing services (whether in the form of store fit-out or retailing staff). Otherwise, retailers that invest in their stores and staff training may be vulnerable to undercutting by ‘discounter’ retailers that do not make such investments.

Manufacturers may also wish to engage in RPM as a marketing or branding strategy, where a fixed retail price is a signal to consumers that the product is a premium product. RPM enables a manufacturer to control its products’ branding and market positioning, which can be of value to consumers.

Nevertheless, concerns remain about the likely anti-competitive effects of RPM. The primary rationale for a per se prohibition on RPM (as opposed to a competition-based test) is that RPM may facilitate manufacturer or retailer collusion. The ACCC notes that RPM can cause significant harm to the competitive process, including by:

- facilitating collusion between suppliers: RPM conduct may be used by suppliers to reduce or eliminate price competition between its customers ...
- facilitating collusion between retailers: a bottom up RPM occurs when one or more retailers compel a supplier to adopt RPM conduct to reduce or eliminate price competition at the retail level ...

616 As noted by Law Council of Australia — Competition and Consumer Committee, sub, page 61.

617 Competition Act (Canada), section 76.

618 For example, subsection 9(1) Competition Act 1998 (UK), article 101(3) Treaty on the Functioning of the European Union (EU).

619 ACCC 2014, *ACCC authorises minimum retail process on Festool power tools*, media release 5 December, Canberra.

- supplier exclusion: an incumbent supplier may use RPM conduct to guarantee margins for retailers to make them unwilling to carry the products of a rival or new entrant;
- retailer exclusion: RPM conduct can be used as a means to eliminate retail competition from discount or more efficient retailers. (sub 1, page 116)

## RPM and digital retailing

Historically, RPM has been considered in the context of ‘bricks and mortar’ retailers. Now, RPM is emerging as an issue for new models of digital-based retailing. eBay states, based on annual surveys of its sellers, that around one-quarter of sellers are instructed by their suppliers to sell at recommended retail prices. As eBay notes:

This clearly restricts the ability for eBay sellers to price their products at what they consider to be an appropriate price point and puts them at risk of adverse treatment by suppliers should they not comply with pricing instructions ... eBay remains concerned, however, about the widespread abuse of the prohibition on resale price maintenance in the context of ecommerce and the ability of small businesses in particular to maximise the opportunities available on market platforms such as eBay. (sub, page 3)

RPM in digital markets also received significant international legal attention recently when Apple was found to have breached EU and US competition laws by fixing the prices of e-books in collaboration with five publishers. Norton Rose Fulbright states that, prior to the conduct, the publishers switched their distribution arrangements from an independent distributor arrangement to an agency agreement, possibly to avoid breaching the relevant RPM provisions.<sup>620</sup>

On balance, and having regard to the potential for RPM to become more commonplace in the online economy, the Panel considers it prudent to retain the per se prohibition for the time being. Policymakers should monitor this type of conduct since per se prohibition may become unnecessary in future.

The Panel considers that allowing notification of RPM (discussed below) is an appropriate next step.

## Avoiding RPM or seeking exemption

The prohibition against RPM does not apply when a manufacturer conducts business as a vertically integrated manufacturer/retailer. Under that business structure, where goods are not resold by an independent retailer, the manufacturer is also the retailer and is free to set its own retail price. A manufacturer may also choose to sell its products through an agency network. Under a genuine agency arrangement, the manufacturer sells its products directly to consumers and is therefore permitted to specify the retail price.

A general tenet of competition law is that companies within a corporate group are treated as a single economic entity and are not considered to be competitors. For that reason, the prohibitions in sections 45 and 47 do not apply to trading arrangements entered into between related companies.<sup>621</sup>

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620 Although moving to an agency agreement could circumvent the prohibition on RPM, in this case the agreement was not merely bilaterally between each publisher and Apple as agent, but also through a degree of horizontal collusion between the publishers. See: Coleman, M, *Australia: Technology: Lessons from the ebooks case*, Norton Rose Fulbright.

621 *Competition and Consumer Act 2010*, subsections 45(8) and 47(12).



A similar principle ought to apply to RPM. Yet, currently, there is no exemption for RPM between a manufacturer and a retailer that is a subsidiary of the manufacturer.

RPM can be authorised by the ACCC where it is found to result in a net public benefit. Although the option of authorisation exists, the Law Council of Australia — Competition and Consumer Committee notes that the use of authorisation for RPM, which has been available since 1995, is ‘almost unheard of’ (sub, page 62). To the Panel’s knowledge, the authorisation granted recently to Tooltechnic, noted above, was the first ever application for authorisation in respect of RPM.

The absence of RPM authorisation applications contrasts with the number of authorisation applications lodged with the ACCC for other CCA provisions. This may be evidence that manufacturers do not believe they can demonstrate sufficient public benefit to be granted authorisation. The Law Council of Australia — Competition and Consumer Committee posits an alternative explanation, stating:

There are few circumstances where a manufacturer that wished, for example, to specify minimum retail prices in launching a new product, would be prepared to place its launch on hold while the ACCC conducted a public inquiry into whether it would enhance economic efficiency. (sub, page 62)

It is possible that the cost and delay of the authorisation process is a real deterrent to businesses seeking exemption for a retailing strategy involving RPM.

The alternative exemption process under the CCA, notification, is not available for RPM. This reflects the traditional view that RPM is anti-competitive in the majority of circumstances. As discussed above, that view has been challenged in recent years.

In contrast, notification is available for other forms of vertical restraint, including third-line forcing. Notification is a less expensive and quicker means of obtaining exemption. The ACCC may withdraw the exemption if it forms the view that the anti-competitive harm of the notified conduct outweighs any public benefit.

The Panel considers that businesses should be permitted to seek exemption from the RPM prohibition more easily. This could be achieved through allowing RPM to receive exemption through the notification process, which is quicker and less expensive than authorisation. This change would also have the advantage of allowing the ACCC to assess RPM trading strategies more frequently, thereby gathering evidence on the competitive effects of RPM in Australia.

### **The Panel’s view**

The Panel does not see a sufficient case for changing the prohibition of RPM from a per se prohibition to a competition-based test.

Nevertheless, the notification process should be extended to RPM to provide a quicker and less expensive exemption process for business. Notification offers a means of testing the evidence of the competitive effects of RPM in Australia.

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

### **Recommendation 34 — Resale price maintenance**

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

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

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

## **20.5 LINER SHIPPING EXEMPTION UNDER PART X OF THE CCA**

The Terms of Reference (3.3.5) task the Review with considering whether existing exemptions from competition law and/or historic sector-specific arrangements are still warranted. Box 20.3 outlines previous reviews of Part X of the CCA and government responses.

International liner shipping has historically enjoyed a degree of exemption from competition laws, both in Australia and overseas. This allows shipping companies to form conferences (effectively a form of cartel) to service particular trade routes.

Part X of the CCA allows liner shipping operators to enter into agreements among themselves in relation to the freight rates to be charged, and the quantity and kinds of cargo to be carried, on particular trade routes. Operators register these agreements with the Registrar of Liner Shipping (an office created under Part X). Registration confers an exemption from the cartel conduct prohibitions and sections 45 and 47.

To register an agreement, the Registrar must be satisfied that various conditions have been met. The most significant condition concerns any provision of the agreement that would otherwise contravene the cartel conduct prohibitions, or sections 45 or 47. The Registrar must be satisfied that such a provision is necessary for the agreement to operate effectively and is of overall benefit to Australian exporters (in the case of an outward conference agreement) or Australian importers (in the case of an inward conference agreement).

Subject to receiving a report from the ACCC, the Minister is empowered under Part X to direct the Registrar to cancel the registration of a conference agreement, in whole or in part. The Minister may exercise the power if he or she is satisfied of certain matters, including that provisions of the agreement are not of overall benefit to Australian exporters or Australian importers.

Part X also imposes obligations on liner shipping operators to negotiate (but not necessarily reach agreement) with peak shipper<sup>622</sup> bodies around minimum service levels and to provide sufficient notification for changes to freight rates and surcharges.

Much of the liner shipping to and from Australia is organised along conference lines, although this is becoming less common.<sup>623</sup> Conference agreements allow for co-ordinated scheduling, revenue pooling, price fixing and capacity agreements.

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622 The term shipper refers to the representative, owner or exporter of the goods being shipped.

623 See, for example: ACCC, sub 1, page 49; and Global Shippers' Forum, sub, page 3.

The historical argument for exempting liner shipping from competition law is that, without collaborative conduct among operators, the market would not deliver an efficient supply of liner cargo shipping services to Australia. The industry is characterised by lumpy investment, high fixed costs and low marginal costs. The premise underlying Part X is that, without co-operation among shipping companies, prices and service levels would be excessively volatile, owing to cycles of entry and exit creating periods of excess and under capacity.

As Shipping Australia Limited states:

The fundamental issue is that international liner shipping has a set of characteristics that require a specialised regulatory regime that, in turn, provides some limited exemption for price setting. (sub, page 10)

Peak shipper bodies have also tended to support the Part X exemptions because they oblige shipping conferences to negotiate as a condition of registering agreements.

### Box 20.3: Reviews of Part X

The most recent major review of Part X was conducted by the Productivity Commission (PC) in 2005. The PC recommended that Part X be repealed and replaced with ACCC authorisation for liner shipping agreements.<sup>624</sup> The recommendations of the 2005 inquiry report contrast with the PC's previous review of Part X in 1999, which concluded that, on balance, the regime served Australia's national interest at that time.<sup>625</sup> The recommendation to repeal Part X was repeated in the 2012 joint Australian-New Zealand PC study *Strengthening Trans-Tasman Economic Relations*.<sup>626</sup>

In response to the 2005 review, the then Australian Government did not fully accept the PC's recommendations but instead announced in mid-2006 its intention to introduce reforms to Part X.<sup>627</sup> Among other things, the reforms were intended to clarify Part X's objectives and remove discussion agreements from scope.

The reforms were not implemented. Had they been, Part X's operation would have been more closely aligned with the more pro-competitive regulatory regimes operating out of Europe and the US.

Although the test for registering a conference agreement under Part X involves assessing the 'overall benefit' to Australia of the agreement, it does not expressly require assessing its competitive effects. Also, the test is not assessed by the primary competition regulator, the ACCC, but by the Registrar of Liner Shipping.

624 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, Canberra, page xxvi.

625 Productivity Commission 1999, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*, Canberra, page xxviii.

626 Australia and New Zealand Productivity Commissions 2012, *Joint Study — Strengthening Trans-Tasman Economic Relations*, recommendation 4.14, page 16.

627 Joint Media Statement by Costello, P (Treasurer), and Truss, W (Minister for Transport and Regional Services) 2006, *Government response to Productivity Commission Report 'Review of Part X of the Trade Practices Act 1974 (International Liner Cargo Shipping)'*, Media Release 4 August, Canberra.

No other industry enjoys legislative exemption from Australia's competition laws. This is despite the fact that other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. If participants in other industries wish to make agreements that would otherwise contravene the competition law, they are required to seek authorisation from the ACCC.

The authorisation process is designed to test, in a public and transparent manner, whether agreements between competitors are in the public interest, weighing the potential anti-competitive detriment against any public benefits that the agreements may generate. An authorisation is usually granted for a specified period of time (typically five to 10 years) to enable the net effects of an agreement to be re-assessed at regular intervals.

Box 20.4 outlines examples of liner shipping regulation in other jurisdictions.

#### **Box 20.4: Approaches to liner shipping regulation in other jurisdictions**

The Panel notes that, over the last two decades, other jurisdictions have moved to more competitive regimes and this has not led to excessive instability or 'destructive competition'.

The Department of Infrastructure and Regional Development notes:

The US and EU reforms, which have stripped shipping conferences of the ability to collude to set rates, have been shown to have had few negative effects. However, they have not been found to have any positive effects in reducing freight rates either. There is evidence that the reforms have been associated with increased market concentration. (DR sub, page 6)

#### **The EU approach<sup>628</sup>**

Prior to 2006, the EU provided a form of block exemption for conference agreements modelled on the 'revised Trans-Atlantic Conference Agreement' decision. Conferences could not discriminate between ports or transport users and needed to apply a uniform or common rate for all goods carried. The block exemption only applied to agreements that did not allow individual service contracts. Agreements that did not qualify generally required individual authorisation.

The European Commission also required that conferences not include:

- a prohibition on individual service contracts;
- restrictions, either binding or non-binding, on the contents of such contracts;
- a prohibition of independent action on joint service contracts; and
- also, that the terms of individual service contracts were to remain confidential, except where the shipper consented to such disclosure.

In 2006 the EU removed the block exemption for liner shipping. The industry is now subject to the general provisions of EU law and conference agreements must seek authorisation.<sup>629</sup>

628 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, Inquiry Report*, Canberra, page 118.

629 Federal Maritime Commission 2012, Bureau of Trade Analysis, *Study of the 2008 Repeal of the Liner Conference Exemption from European Union Competition Law*, Washington DC, page 1.

**Box 20.4: Approaches to liner shipping regulation in other jurisdictions (continued)****The US approach<sup>630</sup>**

The US provides exemptions to anti-trust laws for liner shipping under the Shipping Act of 1984. This was significantly modified by the Ocean Shipping Reform Act of 1998.

The US exemptions apply to agreements between carriers that discuss, fix or regulate freight rates, cargo space accommodation and other service conditions, pool revenues, earnings or losses, or restrict or regulate other aspects of service, such as cargoes to be carried and sailing schedules. Agreements must be filed with the Federal Maritime Commission.

Importantly carrier agreements cannot:

- prohibit member carriers from engaging in negotiations for individual service contracts with shippers; or
- require members to disclose negotiations or make public terms and conditions of individual service contracts or adopt rules or requirements affecting the right of member carriers to enter into individual service contracts.

The requirements that carrier agreements cannot prohibit or limit confidential individual service contracts mean that US shipping regulation still creates competition between shipping carriers. This is because agreements on pricing are effectively non-binding and terms of individual service contracts that deviate from the conference tariff are not observable.

The 2005 PC report on liner shipping and Part X concluded that the evidence did not support continued special treatment of the liner shipping industry under Australia's competition laws. The Panel has not received any information to cast doubt on that conclusion.

Shipping Australia Limited strongly supports retention of Part X but notes:

The norm now is the Discussion Agreement which does not pool revenues as stated in the draft report nor fix prices in the way the old Conference system did. (DR sub, page 3)

Further, it argues that Part X is pro-competitive:

It minimises barriers to entry to the Australian trade and ensures a high level of contestability from both direct new entrants and transshipment operators with individual shipping lines competing fiercely for market share. (DR sub, page 3)

However, other submissions raise concerns that not all conduct is in shippers' interests and may be anti-competitive.

The Australian Peak Shippers Association Inc. considers:

The setting of prices of freight surcharges by shipping lines, consortia and alliances should no longer be exempt from scrutiny under the current legislation. These surcharges, of which there are many ... are randomly instituted or increased by shipping lines with little or no justification. They are essentially a clandestine method of increasing sea freight rates as all exporters will tell you the real sea freight rate is the total cost of moving a container through the stevedores' wharf gates to finally land with the customer across the oceans of the world. (sub, page 7)

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630 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, Inquiry Report*, Canberra, page 116.

and:

... the exemption afforded the various Discussion Agreements that allows them to discuss sea freight rates and publish recommended general rate increases (GRIs), albeit that any published GRIs are not binding on their members, should be rescinded as they amount to 'price signalling' to the market. (DR sub, page 2)

The Panel considers that the ACCC should be the body to determine whether agreements entered into and practices undertaken by international liner shippers are pro-competitive or anti-competitive. If, as Shipping Australia Limited claims, the current Discussion Agreements can be shown to be pro-competitive, they are unlikely to contravene the competition laws and the agreements would likely be authorised by the ACCC.

In comparison, in the international air freight industry, airlines reach agreements for the sale of freight capacity among themselves without contravening competition laws. To the extent that international airlines wish to discuss air freight rates or surcharges, or pool revenues or co-ordinate their operations, they must do so in accordance with the competition law and seek any necessary authorisations under it.

Internationally, the trend is to remove special competition law exemptions for international liner shipping. If Part X were repealed, the authorisation procedure under the CCA would enable the ACCC to assess conference agreements as needed on a net public benefit basis. That would induce greater focus on the competitive effects of conference agreements, while allowing full input from shippers.

Additionally, as discussed in [Section 22.3](#) the Panel recommends that the ACCC be given power to issue block exemptions: these would exempt categories of conduct defined by the ACCC. If that power were to be introduced, the ACCC should develop a block exemption or exemptions for categories of liner shipping conduct that do not raise competition concerns, such as consortia or operational agreements (vessel sharing, co-ordination of routes and schedules). The block exemption(s) should be developed in consultation with liner shipping operators and shippers.

The Australian Peak Shippers Association 'strongly recommends that all sections of Part X, which support the negotiating position of Australian exporters/shippers, should be maintained' (sub, page 7). If Part X were repealed, shippers would be able to formulate collective negotiation arrangements under the existing mechanisms in the CCA.

If Part X were repealed, existing liner shipping agreements would face the full provisions of the CCA and some may be in breach of them. Therefore, a transition would be required. The Panel considers a period of two years should be sufficient to: create a block exemption; identify shipping agreements that qualify; and either authorise or modify other agreements to ensure compliance with the CCA.

### The Panel's view

Part X should be repealed and the liner shipping industry should be subject to the normal operation of the CCA.

The ACCC should be given power to grant block exemptions (see Recommendation 39). In consultation with the shipping industry and shippers, the ACCC should develop a block exemption for conference agreements that contain a minimum standard of pro-competitive features.

For example, conference agreements that co-ordinate scheduling and the exchange of capacity, while allowing confidential individual service contracts and not involving a common conference tariff and pooling of revenues and losses, should be eligible for a block exemption. Other forms of agreement that do not qualify for the block exemption, and thereby risk contravening Part IV provisions, should be subject to individual authorisation.

If a block exemption power is not introduced, it would be preferable to require conference agreements to seek authorisation by the ACCC as needed on the basis of the normal net public benefit test. Authorisation should be straightforward, involving a minimal compliance burden where shipping agreements have been negotiated with shippers.

### Implementation

Repealing Part X would require transitional arrangements for existing agreements. The transition should be sufficiently long to allow for authorisations to be sought as needed and to identify agreements that qualify for the block exemption. The Panel considers a two-year transition should be sufficient.

The block exemption for liner shipping agreements should be designed by the ACCC, in consultation with the Department of Infrastructure and Regional Development, the Treasury, liner shipping operators and shipper bodies. Consultation on the block exemption should commence within six months of agreeing the recommendation and the details of the block exemption should be available within 12 months. This would be concurrent with the introduction of a Bill to repeal Part X to take effect 12 months later.

### Recommendation 4 — Liner shipping

Part X of the CCA should be repealed.

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

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

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

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

## 21 SECONDARY BOYCOTTS AND EMPLOYMENT-RELATED MATTERS

Negotiating employment terms and conditions has always been excluded from most of the competition law provisions of the *Competition and Consumer Act 2010* (CCA). This is achieved through paragraph 51(2)(a), which provides:

In determining whether a contravention of a provision of [Part IV], other than section 45D, 45DA, 45DB, 45E, 45EA or 48, has been committed, regard shall not be had ... to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, **to the extent that the contract, arrangement or understanding, or the provision, relates to the remuneration, conditions of employment, hours of work or working conditions of employees.** (emphasis added)

The reason for this exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009*. The policy rationale is that labour markets are not in all respects comparable to other product or service markets — a point recognised by the Productivity Commission (PC) in its Issues Papers for its inquiry into the Workplace Relations Framework:

The Commission also recognises that the ‘price’ of labour differs from the price of most other inputs into an economy. This is not only because the price (wage) offered usually affects people’s workplace performance and because of the virtual exclusion of WR [workplace relations] from competition policy (Issues Paper 5), though these are distinctive features. It is also because many people’s incomes and indeed wellbeing depend to a considerable extent on that price.<sup>631</sup>

In part, industrial law may be separated from competition law because it has ethical and social dimensions at its heart, to a greater extent potentially than the business-to-business aspects of competition law. In addition, labour markets have some characteristics different from goods markets ...<sup>632</sup>

As a general principle, the Panel concurs with the PC’s view in this regard.

However, two categories of employment-related conduct do not fall within the general exclusion:

- secondary boycotts, which are prohibited by sections 45D, 45DA and 45DB of the CCA; and
- trading restrictions in industrial agreements, which are prohibited by sections 45E and 45EA of the CCA.

The Panel received submissions to both the Issues Paper and the Draft Report that address each of these practices.

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631 Productivity Commission 2015, *Workplaces Relations Framework*, [Issues Paper 1](#), Canberra, page 15.

632 Productivity Commission 2015, *Workplaces Relations Framework*, [Issues Paper 5](#), Canberra, page 6.



## 21.1 SECONDARY BOYCOTTS

The CCA prohibits certain types of secondary boycott conduct. Generally, a secondary boycott involves two or more persons, acting in concert with each other, who engage in conduct:

- that hinders or prevents a third person supplying goods or services to, or acquiring goods or services from, a fourth person (who is not an employer of the persons acting in concert), where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person (section 45D);
- that hinders or prevents a third person supplying goods or services to, or acquiring goods and services from, a fourth person (who is not an employer of the persons acting in concert), where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person trades (section 45DA); or
- for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia (section 45DB).

The secondary boycott prohibitions generally apply to employees who are members of the same employee organisation. Under section 45DC, an employee organisation may become liable for the secondary boycott activity of its members.

Secondary boycotts are harmful to trading freedom and therefore harmful to competition. Where accompanied by effective enforcement, secondary boycott prohibitions have been shown to have a significant deterrent effect on behaviour that would otherwise compromise consumers' ability to access goods and services in a competitive market.

The Swanson Committee observed:

... no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute.<sup>633</sup>

The Panel considers this policy rationale, including its application to employee organisations, to be as relevant today as it was when first formulated. The Panel sees a strong case for effective secondary boycott provisions. The existence of such prohibitions and their enforcement by the ACCC or parties harmed by the conduct serve the public interest.

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633 Trade Practices Act Review Committee 1976, *Report to the Minister for Business and Consumer Affairs*, Canberra, page 85, paragraph 10.16.

The Panel's view is confirmed by the findings of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) concerning the Construction, Forestry, Mining and Energy Union (CFMEU) and Boral, published in Volume 2, Part 8.2 of the Royal Commission's Interim Report.<sup>634</sup>

The secondary boycott provisions of the CCA have been the subject of numerous amendments since their inception in 1977, particularly in relation to the types of conduct that should or should not be excluded from the operation of the laws.

Presently, the secondary boycott prohibitions have two general exceptions (or defences):

- The first defence applies if the dominant purpose for which a person engages in the conduct is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or a fellow employee (subsection 45DD(1)).
- The second defence applies if the dominant purpose for which a person engages in the conduct is substantially related to environmental protection or consumer protection, and engaging in the conduct does not constitute industrial action (subsection 45DD(3)).

The Panel received submissions in relation to each of these defences.

The Panel also received submissions in relation to the effectiveness of the current law in deterring secondary boycott behaviour. The submissions focus on the role of the Australian Competition and Consumer Commission (ACCC) in enforcing the secondary boycott law and the deterrent effect of the sanctions for contraventions. These issues are also discussed in the Interim Report of the Royal Commission.<sup>635</sup>

## Employment exceptions

A number of submissions argue for or against retaining the secondary boycott prohibition; some wish to broaden the scope of the employment exception. The Australian Chamber of Commerce and Industry (ACCI) supports retaining the secondary boycott provisions and separating commercial and workplace laws.<sup>636</sup> The Australian Council of Trade Unions (ACTU) seeks to either abolish the secondary boycott provisions (DR sub, page 10) or widen the employment exception applicable to secondary boycotts, arguing that it does not reflect Australia's international obligations under the International Labour Organisation's Convention 87 (sub, page 3).

However, the Panel does not consider that the case has been made to either limit the scope of the prohibitions or broaden the applicable exceptions. Either of these options would weaken the effectiveness of the secondary boycott provisions.

## Environmental and consumer protection exception

A number of submissions to the Issues Paper and the Draft Report argue for or against retaining the exception for secondary boycotts where the dominant purpose is environmental or consumer protection. Consumer and environmental organisations argue for retaining (or expanding) the

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634 Heydon AC QC, J D 2015, *Royal Commission into Trade Union Governance and Corruption*, Volume 2, Commonwealth of Australia, Canberra, pages 1011 to 1115.

635 Ibid.

636 See sub, page 25 and DR sub, page 14. See also Master Builders Australia, sub 1, page 17.

exception, while industry groups argue for its removal.<sup>637</sup> The Tasmanian Government proposes a separate inquiry into the public interest of retaining the environmental exception by an independent body (DR sub, page 1).

The Panel did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exception in the CCA. In the absence of such evidence, the Panel does not see an immediate case for amending the exception. However, if such evidence arises from future boycott activity, the exception should be reassessed.

During Panel consultations, industry representatives appeared to be primarily concerned that environmental groups may damage a supplier in a market through a public advocacy campaign based on false or misleading information.

Submissions also tended to express concerns about public advocacy campaigns or false and misleading information, rather than secondary boycott activity as such. As consumer and environmental protection issues are often the subject of public advocacy, the Panel can understand that some may regard the secondary boycott exceptions as a form of protection of public advocacy in these areas.

The Panel considers that, although a public advocacy campaign may damage a business, it does so by attempting to influence the behaviour of businesses and consumers. Businesses and consumers are free to make up their own minds about the merits of the campaign.

A public advocacy campaign is therefore distinct from a secondary boycott—the latter aims not just to influence but also to hinder or prevent the supply or acquisition of goods or services. The Australian Food and Grocery Council acknowledges this:

It is important to distinguish public advocacy (which should be permitted) from secondary boycott behaviour (which should be prohibited). (DR sub, page 11)

However, a further question arises: if an environmental or consumer organisation advocates against customers purchasing products from a trading business, should the advocacy be subject to the laws prohibiting false, misleading and deceptive conduct?<sup>638</sup> Presently, those laws only apply insofar as a person is engaged in trade or commerce.

Expanding the laws concerning false, misleading or deceptive conduct to organisations involved in public advocacy campaigns directed at trading businesses raises complex issues. Many public advocacy campaigns directed at trading businesses concern health issues (for example, tobacco, alcohol and fast food) or social issues (for example, gambling). Consideration of expanding those laws in that context is beyond the Terms of Reference of this Review. We therefore make no recommendation in this regard.

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637 See, for example: Australian Conservation Foundation, sub, pages 2-5; Australian Food and Grocery Council, sub, page 28; Australian Forest Products Association, sub, pages 3-5; Australian Lawyers for Human Rights, sub, pages 1-2; Australian Network of Environmental Defender's Offices, sub, pages 4-6; Australian Petroleum Production & Exploration Association, DR sub, page 13; Consumers Health Forum of Australia, sub, page 5; Greenpeace Australia, The Wilderness Society, OXFAM Australia, GetUp!, Voiceless, Friends of the Earth, AidWatch, sub, pages 1-3; ITS Global, sub, pages 1-5; National Farmers' Federation, sub, page 15; RSPCA Australia, sub, pages 1-2; and Voiceless, sub, page 3.

638 See, for example: National Farmers' Federation, sub, page 15.

## Enforcement and deterrence

A number of submissions raise concerns around whether or not the ACCC is taking sufficient steps to enforce the secondary boycott provisions.<sup>639</sup> ACCI's submission discusses the importance of publicly enforcing the provisions, including the availability of guidance about the laws for small business. ACCI argues that information about the ACCC's enforcement decisions in relation to secondary boycotts lacks transparency.<sup>640</sup> Submissions also support the Royal Commission into the Building and Construction Industry (the Cole Royal Commission) recommendation:

The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss 45D–45E of the *Trade Practices Act 1974* (Cth), but limited in operation to the building and construction industry.<sup>641</sup>

Submissions argue that the degree of concerns in the construction industry, and the complexity of the issues, warrant shared jurisdiction of these matters between the ACCC and any Australian Building and Construction Commission-type body, should one be re-established.<sup>642</sup>

In response to these concerns, the ACCC states that it carefully considers each and every complaint about secondary boycott conduct, noting that between 1 July 2012 and 30 June 2014 it was contacted only nine times about secondary boycott issues. Four of these cases related to employee organisations and all were investigated. The ACCC also notes that a number of features make enforcement challenging:

- difficulties in obtaining documentary evidence;
- lack of co-operation of witnesses; and
- potential overlaps between the ACCC and Fair Work Commission and Fair Work Building and Construction (sub 3, pages 6-7).

In December 2014, the Interim Report of the Royal Commission into Trade Union Governance and Corruption was tabled in Parliament. In that report, the Royal Commission states that its findings concerning the CFMEU and Boral suggest the following possible problems:

- the ineffectiveness of the current secondary boycott provisions in sections 45D and 45E of the CCA to deter illegal secondary boycotts by trade unions;
- the absence of specific provisions making it unlawful for the competitors or target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target;
- an inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions speedily;
- the absence of any speedy and effective method by which injunctions granted by a court restraining a trade union from engaging in an illegal secondary boycott can be enforced;

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639 See, for example: Australian Chamber of Commerce and Industry, sub, pages 31-42; and Australian Mines & Metals Association, sub, page 4.

640 Australian Chamber of Commerce & Industry, sub, pages 42-44.

641 Cole RFD QC, T R H 2003, *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 1, page 158 (Recommendation 181). See, for example: Australian Chamber of Commerce & Industry, sub, page 42; and Boral Limited, DR sub, page 11.

642 See, for example: Boral Limited, DR sub, page 17; and Australian Industry Group, DR sub, page 22.

- the absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions; and
- the absence of appropriate legal duties owed by the officers of trade unions to their members, and the absence of appropriate mechanisms by which such officers can be held accountable to their members.<sup>643</sup>

As with all competition laws, secondary boycotts need to be enforced consistently and effectively — and in a timely manner. The Panel reiterates its concerns expressed in the Draft Report regarding: the ability and willingness of the relevant regulatory bodies to investigate and bring legal proceedings to enforce the law; the speed with which legal proceedings can be commenced and completed; and the sanctions available for contraventions of the law.

The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. The Panel expects the ACCC will further develop its capability to enforce prohibitions on unlawful secondary boycotts in a timely way, especially in light of the Panel’s recommendation that its charter focus more clearly on competition issues (see Recommendation 49). As with all competition laws, the secondary boycott laws will only act as a deterrent to unlawful behaviour if the laws are enforced consistently and effectively.

It would be useful for the ACCC to report generally about the number of complaints it receives about different parts of the CCA, including secondary boycotts and the manner in which the complaints are resolved. However, the ACCC should not be required to report publicly on investigations where it has decided that no contravention has occurred. Persons who are the subject of any ACCC investigation are entitled to a reasonable degree of privacy concerning allegations that are investigated and the outcomes of the investigation, unless proceedings are instituted.

Currently, the Federal Court has exclusive jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA (subsection 86(4) of the CCA and subsection 4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*). Despite that, it is open to litigants to bring secondary boycott proceedings in the state Supreme Courts under the Competition Codes of the States and Territories.

As the Competition Code is a law of the States (enacted through the various 1995 Competition Policy Reform Acts of the States), each state Supreme Court has jurisdiction to hear and determine such proceedings. This is convenient to litigants because a contravention of the secondary boycott sections may arise in connection with other common law disputes between employers and employee organisations that are commonly litigated in state courts.

The Panel supports the current arrangements for access to secondary boycott remedies through both Federal and state jurisdictions.

As discussed in [Chapter 23](#) below, a corporation that contravenes the secondary boycott provisions is liable to a civil penalty not exceeding \$750,000. This can be compared with much higher penalties for contravention of other competition law provisions (\$10 million).<sup>644</sup> The Panel sees no reason why this should be the case — a view shared by Boral Limited (DR sub, page 13). Penalties listed in the CCA

<sup>643</sup> Heydon AC QC, J D 2015, *Royal Commission into Trade Union Governance and Corruption*, Volume 2, Commonwealth of Australia, Canberra, pages 1106-1108.

<sup>644</sup> Australian Mines & Metals Association (sub, page 7) notes the penalty level and supported a thorough examination of the adequacy and effectiveness of remedies and penalties for secondary boycotts.

are maximum penalties. The courts will determine penalties based on a wide range of factors, including the harm resulting from the conduct.

### The Panel's view

A strong case remains for the prohibition of secondary boycotts, which should be retained in the CCA. A sufficient case has not been made to limit the scope of the secondary boycott prohibitions, nor to broaden the scope of the exception for employment-related matters.

In the absence of compelling evidence that the exceptions for the purposes of environmental and consumer protection (as distinct from public advocacy campaigns) are harming business, the Panel does not see an immediate case for amending them. However, if such evidence arises from future boycott activity, the exceptions should be re-assessed.

Employer groups in building, construction and mining perceive inadequacies in the public enforcement of the secondary boycott provisions of the CCA. Timely and effective enforcement serves as a deterrent to boycott activity and needs to exist both in regulatory culture and capability. The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of competition laws.

The ACCC should record the number of complaints made to it in respect of different parts of the CCA in its annual report, including secondary boycott matters and the number of such matters investigated and resolved in each financial year.

Further, the Panel sees no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law.

### Recommendation 36 — Secondary boycotts

The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.

## 21.2 TRADING RESTRICTIONS IN INDUSTRIAL AGREEMENTS

Section 45E of the CCA prohibits a person from making a contract, arrangement or understanding with an organisation of employees that contains a provision that has the purpose of:

- preventing or hindering the person from supplying or continuing to supply goods or services to a second person that the first person has been accustomed, or is under an obligation, to supply, or doing so subject to conditions; or

- preventing or hindering the person from acquiring or continuing to acquire goods or services from a second person that the first person has been accustomed, or is under an obligation, to acquire, or doing so subject to conditions.

Section 45EA also prohibits a person from giving effect to such a provision.

Employer groups in the building, construction and resources industries raise concerns about industrial agreements that restrict employers in relation to acquiring services from contractors and labour hire businesses.<sup>645</sup> They argue that restrictions on the use of contractors are particularly acute in their industries because the work tends to be project-based and the requirement for labour is not constant but dependent on the stage of a construction project. Submissions also refer to terms of industrial agreements that regulate the supply of certain goods, such as uniforms,<sup>646</sup> or non-labour services, such as superannuation.<sup>647</sup>

The concern expressed by employer groups arises from a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and industrial agreements under the Fair Work Act. In this regard, the Panel notes that amendments to the Fair Work Act have expanded the scope of conduct it regulates beyond the remuneration, conditions of employment, hours of work or working conditions of employees, and that this has occurred since sections 45E and 45EA were enacted.

This issue was brought into focus by the 2012 decision of the Full Court of the Federal Court, *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108. The case considered the question of whether it was lawful for the Fair Work Commission to approve an enterprise agreement under the Fair Work Act that contained a provision requiring the employer to engage or deal only with those contractors who apply wages and conditions no less favourable than those provided for in the agreement. The Full Court concluded that it was lawful for the Fair Work Commission to approve the agreement.

Relevantly, the Full Court concluded that the enterprise agreement did not involve any contravention of section 45E because:

- it was not an agreement with an organisation of employees in the sense required by section 45E; and
- as the agreement had statutory force, it was not a contract, arrangement or understanding within the meaning of section 45E.

It appears that there may be a conflict between the purposes of the CCA, as reflected in sections 45E and 45EA, and the industrial conduct permitted under the Fair Work Act. The apparent purpose of subsection 51(2) and sections 45E and 45EA is to exempt from the CCA contracts governing the remuneration, conditions of employment, hours of work or working conditions of employees, while prohibiting contracts between employers and employee organisations that otherwise hinder the trading freedom of the employer (in respect of the supply and acquisition of goods and services, which would include contractors).

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645 See, for example: Australian Industry Group, sub, page 20; Australian Mines & Metals Association, sub, page 11; Master Builders Australia, sub, page 9; and Minerals Council of Australia, sub, page 14.

646 ACTU, DR sub, pages 12-13.

647 See, for example: Industry Super Australia, DR sub, pages 8-9; and Financial Services Council, DR sub, pages 1-2.

However, it appears to be lawful under the Fair Work Act to make awards and register industrial agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.

Although the evidence suggests that these issues are more significant in some industries than others, it is desirable that the apparent conflict between the objective of sections 45E and 45EA and the operation of the Fair Work Act be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour if they choose.

The Draft Report notes a number of possible solutions to the apparent conflict, including:

- a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements that contain potential restrictions of the kind referred to in sections 45E and 45EA;
- an amendment to sections 45E and 45EA so that they expressly include awards and industrial agreements (as proposed by employer representatives); and
- an amendment to sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act (as proposed by trade unions).

A number of submissions address these proposals.

The ACTU states that section 172 of the Fair Work Act, which defines the permitted subject matter of an enterprise agreement, encompasses matters such as ‘ensuring that contractors are engaged on conditions no less favourable [than] those the instrument prescribes for employees, the provision of leave to workers to attend union training, salary packaging and superannuation’ and argues that ‘negotiation and agreement making in relation to such matters is, and must remain, legitimate’. The ACTU submits that (absent the repeal of the trading restriction provisions) sections 45E and 45EA and paragraph 51(2)(a) should be amended to exempt the bargaining, making and approval of enterprise agreements or proposed enterprise agreements (DR sub, pages 12-13).

Industry Super Australia states:

... superannuation is not simply another financial service or product that is provided to employers. Superannuation is a key employment condition and takes the form of deferred wages’ and that it is ‘entirely appropriate that matters pertaining to superannuation be the subject of workplace collective bargaining between employers and employees (DR sub, page 9).<sup>648</sup>

Conversely, a number of employer representative groups support an amendment to sections 45E and 45EA so that they expressly apply to awards and industrial agreements to prevent interference in the freedom of companies to engage contractors.<sup>649</sup>

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648 The Financial Services Council (DR sub, page 1) notes that ‘Competition in the default superannuation market is currently under consideration by the Government through the Treasury’s ‘Better regulation and governance, enhanced transparency and improved competition in superannuation Discussion Paper’.

649 See, for example: Australian Mines & Metals Association, sub, page 12; Australian Chamber of Commerce and Industry, DR sub, page 15; Australian Industry Group, sub, page 20; Australian Petroleum Production and Exploration Association Limited, DR sub, page 11; Business Council of Australia, DR sub, page 51; and Master Builders Australia, sub 1, page 9 and DR sub, page 20.



The Panel considers that collective bargaining in respect of the remuneration, conditions of employment, hours of work or working conditions of employees should continue to be exempt from the application of the CCA, as reflected in paragraph 51(2)(a).

However, the Panel does not support expanding these categories. Collective bargaining should not intrude on the freedom of companies to acquire goods or services, including labour services, from other contractors, or their freedom to supply goods or services to others.

Accordingly, the Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent that the awards and industrial agreements deal with the remuneration, conditions of employment, hours of work or working conditions of employees.<sup>650</sup> Such an amendment would preserve the integrity of the current exception in paragraph 51(2)(a), while protecting the trading freedom of employers outside the scope of that exception.

With that change to the CCA, it would become necessary for the Fair Work Commission to consider whether a proposed award or industrial agreement may potentially fall within the scope of sections 45E and 45EA. The Panel considers that the ACCC should be given the right to intervene (that is, to be notified, appear and be heard) in proceedings before the Fair Work Commission concerning compliance with sections 45E and 45EA. From a practical standpoint, this would require a protocol to be established between the ACCC and the Fair Work Commission. This would allow the Fair Work Commission to identify potential non-employment restrictions in lodged applications and notify the ACCC accordingly.

Also, the Panel observes that sections 45E and 45EA are presently framed in narrow terms. The prohibition only applies to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. As framed, the prohibition would not apply to a restriction in relation to any contractor with whom the employer had not previously dealt.

The ACTU submits that the reason for that limitation is that sections 45E and 45EA were originally enacted as offshoots of the secondary boycott provisions — the 'provisions were clearly aimed at preventing a union from entering into an arrangement with a trader to change that trader's behaviour in support of the union's boycott' (DR sub, pages 9 and 11).

Contraventions of sections 45E and 45EA can arise in the context of secondary boycott conduct, as illustrated by the findings of the Royal Commission into Trade Union Governance and Corruption concerning the CFMEU and Boral published in its Interim Report.<sup>651</sup> However, that does not support the limitations of sections 45E and 45EA to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. The same harm can arise if the restriction relates to a contractor with whom the employer has not previously dealt, but with whom the employer wishes to deal. This restriction should be removed from the provisions.

Further, consistent with the discussion above in relation to secondary boycotts, breaches of anti-competitive trading restrictions should not be subject to a lower maximum penalty than other breaches of competition laws.

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650 To achieve this application, the exception in paragraph 51(2)(a) may need to be amended so that it applies to sections 45E and 45EA.

651 Heydon AC QC, J D 2015, *Royal Commission into Trade Union Governance and Corruption*, Volume 2, Commonwealth of Australia, pages 1011 to 1115.

### The Panel's view

There is an apparent conflict between the object of sections 45E and 45EA of the CCA and industrial conduct permitted under the Fair Work Act. The Panel considers it desirable that this apparent conflict be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, if they choose.

The Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

The Panel also considers that the ACCC should be given the right to intervene in proceedings (that is, to be notified, appear and be heard ) before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA.

The present limitation in sections 45E and 45EA, such that the prohibition only applies to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

Breaches of anti-competitive trading restrictions should not be subject to a lower maximum penalty than other breaches of the competition law.

### Recommendation 37 — Trading restrictions in industrial agreements

Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

These recommendations are reflected in the model provisions in Appendix A.

The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.

The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

## 22 EXEMPTION PROCESSES

Competition is desirable not for its own sake but because, in most circumstances, it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end. In some circumstances, arrangements that lessen competition may nonetheless produce public benefits that outweigh the detriment resulting from the lessening of competition.

The *Competition and Consumer Act 2010* (CCA) has various procedures by which businesses can apply to the Australian Competition and Consumer Commission (ACCC) for an exemption from the competition law for particular commercial arrangements on the basis that the arrangements generate a net public benefit. The CCA presently contains three separate exemption processes — authorisation, notification and clearance — that have different features.

The **authorisation** process applies to most types of business conduct. The ACCC may grant authorisation if it is satisfied that the conduct generates a net public benefit. Exemption from the competition laws does not commence until the ACCC has made a determination in respect of the application, which often takes many months.

At present, applications for merger authorisations are treated differently to other applications. Merger applications must be made to the Australian Competition Tribunal (the Tribunal) and are subject to a time limit for determination. As discussed earlier in the context of mergers, the Panel's view is that merger authorisation applications should be made instead to the ACCC in the first instance, with the Tribunal exercising a power of review (see [Chapter 18](#)).

As an alternative to authorisation, a **notification** may be given to the ACCC in respect of exclusive dealing conduct (prohibited under section 47), collective bargaining conduct (prohibited under the cartel provisions and section 45) and price signalling (prohibited under Division 1A). Notification has an advantage over authorisation in that the relevant exemption is provided upon filing the notification.<sup>652</sup> The ACCC may withdraw the exemption if it subsequently forms the view that the notified conduct does not give rise to a net public benefit. As discussed earlier in the context of resale price maintenance (RPM), the Panel considers that the notification procedure should be extended to RPM conduct (see [Section 20.4](#)).

Businesses can also apply for a formal **clearance** of a merger transaction. Like authorisation, the clearance procedure only provides exemption from the merger law after the ACCC has made a determination on the application. The ACCC may grant clearance if it is satisfied that the merger is not likely to substantially lessen competition (see [Chapter 18](#)).

A number of submissions comment on these exemption processes. In addition to issues concerning the merger approval processes (discussed in [Section 18.5](#)), submissions raise three matters for consideration:

- whether the authorisation and notification processes can be simplified;<sup>653</sup>

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652 In the case of third-line forcing, a type of exclusive dealing, and collective bargaining, the exemption commences 14 days after filing the notification.

653 Law Council of Australia — Competition and Consumer Committee, sub, pages 75-77.

- whether the notification process for collective bargaining is fulfilling its potential,<sup>654</sup> and
- whether the ACCC should be granted a general power to issue block exemptions.<sup>655</sup>

## 22.1 SIMPLIFICATION OF THE AUTHORISATION AND NOTIFICATION PROCESSES

Wherever possible, it is desirable to remove unnecessary complexity. Like much of the CCA, the authorisation and notification processes are unnecessarily complex, which imposes costs on business. Specifically:

- The authorisation process focuses on the specific provisions of the CCA that might be contravened by the proposed business conduct. As a consequence, several different applications may be required in respect of a single commercial arrangement depending upon the number of provisions of the CCA that apply to the arrangement.
- The authorisation and notification procedures do not empower the ACCC to grant exemption if the ACCC is satisfied that the proposed business conduct is unlikely to substantially lessen competition. In order to grant the exemption, the ACCC is required to assess the net public benefit of the proposed conduct. In contrast, the formal clearance process for mergers does enable the ACCC to exempt a merger if it is satisfied that the merger is unlikely to substantially lessen competition.

Significant steps can be taken to simplify the authorisation and notification processes. First, in respect of authorisation, it should be permissible to apply for authorisation of a business arrangement or conduct through a single application and without regard to the specific provisions of the CCA that might be contravened by the proposed conduct. Second, for both authorisation and notification, the ACCC should be empowered to grant the exemption if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or is likely to result in a net public benefit.

Each of these changes would assist in focusing the exemption process on the issues of substance and away from technicalities. Submissions to the Draft Report largely support this approach;<sup>656</sup> although, two submissions indicate their concern that the new arrangements could create uncertainty.<sup>657</sup>

The ACCC supports the objective of simplification. However, it expresses concern that empowering it to grant authorisation based on assessing the competitive effect of conduct may increase its workload materially. This is because a business may seek authorisation rather than rely on its own judgment about compliance with competition law. The ACCC also notes that, in the case of conduct that is subject to per se prohibition, allowing exemption on the basis that particular conduct does not substantially lessen competition represents a significant change to existing policy settings (DR sub, pages 65 and 66).

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654 See, for example: Australian Dairy Farmers, sub, page 11; and Queensland Dairyfarmers' Organisation, sub, page 8.

655 Baker & McKenzie, sub, page 6.

656 See, for example: Australian Chicken Growers' Council Ltd, DR sub, page 3, Australian National Retailers Association, DR sub, page 13; Australian Taxi Industries Association, DR sub, page 12; BHP Billiton, DR sub, page 1; Business Council of Australia, DR sub, page 51; Julie Clarke, DR sub, page 5; Coles Group Limited, DR sub, page 7; Law Council of Australia — Competition and Consumer Committee, DR sub, page 34; Law Council of Australia — SME Committee, DR sub, page 20; Master Builders Australia, DR sub, pages 20-21; Queensland Law Society, DR sub, page 6; Retail Guild of Australia, DR sub, page 7; and Telstra, DR sub, page 6.

657 See, for example: Australian Motor Industry Federation, DR sub, page 13; and Australian Newsagents' Federation, DR sub, page 18.

**The Panel's view**

Submissions broadly support the regime of exemptions under the CCA.

The authorisation and notification processes can be simplified by ensuring that only a single authorisation application is required for a single business arrangement or conduct.

It is also desirable for business to have a regulatory avenue available to demonstrate that specified conduct would not substantially lessen competition, thereby gaining exemption from the competition law.

However, allowing exemption from the per se prohibitions (such as the cartel conduct prohibitions) on the basis that specified conduct does not substantially lessen competition would involve a significant change to current law and policy. Although not all cartel conduct substantially lessens competition (occasionally cartel conduct occurs between small firms that hold an insubstantial market share), it is almost always anti-competitive in nature and usually has no countervailing public benefit.

In respect of such conduct, it is appropriate that exemption be based on demonstrating that the conduct has a net public benefit. Exemption on the basis that conduct does not substantially lessen competition should only be available in respect of sections 45, 46 (as proposed to be amended), 47 (if retained) and 50, being provisions that include the 'substantial lessening of competition' test.

**Recommendation 38 — Authorisation and notification**

The authorisation and notification provisions in Part VII of the CCA should be simplified to:

- ensure that only a single authorisation application is required for a single business transaction or arrangement; and
- empower the ACCC to grant an exemption from sections 45, 46 (as proposed to be amended), 47 (if retained) and 50 if it is satisfied that the conduct would not be likely to substantially lessen competition or that the conduct would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.

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

**22.2 COLLECTIVE BARGAINING NOTIFICATION**

Collective bargaining is an arrangement by which two or more competing businesses come together to negotiate with a supplier or a business customer over terms, conditions and prices. Collective bargaining arrangements may take various forms and have different effects upon competition. For example, two or more competing suppliers might wish to appoint a bargaining agent to act on their behalf to negotiate standard terms and conditions of trade with one or more business customers; under a different arrangement, two or more competing suppliers might wish to jointly negotiate price with a large business customer with the understanding that, if price is not agreed during the negotiation, none of the suppliers will deal with the business customer. The latter form of arrangement is often referred to as a 'collective boycott'.

Collective bargaining will usually contravene the cartel prohibitions because the underlying arrangement will usually lead to the competing businesses agreeing to pay or receive the same price for goods or services (price fixing) or agreeing not to deal with a particular supplier or business

customer (collective boycott). Therefore, in the absence of an exemption, it will usually be unlawful for competing businesses to engage in collective bargaining.

Although collective bargaining will often be harmful to competition, it can also have beneficial effects. Small businesses dealing with large businesses often face an imbalance in bargaining power. That imbalance can result in inefficient or unfair commercial outcomes. Permitting small business to bargain collectively in certain circumstances can redress the imbalance in power and result in more efficient market outcomes.

For that reason, the CCA permits businesses, particularly small businesses, to seek an exemption for collective bargaining in certain circumstances by filing a notification with the ACCC. The collective bargaining notification process has the potential to address a number of the concerns raised by small businesses that supply goods and services to larger businesses.

In consultations with small business, the Panel discovered a low level of awareness of how the collective bargaining provisions might benefit the sector. There appears to be a need to enhance small business awareness of the notification process.

Submissions broadly support the collective bargaining notification process, with a number noting the need to increase the flexibility and effectiveness of collective bargaining for small business.<sup>658</sup> Suggestions include:

- improving the timeliness and/or decreasing the costs of the notification process;<sup>659</sup> and
- increasing flexibility and simplification (for example, by broadening the range of parties covered by arrangement notification).<sup>660</sup>

The Shopping Centre Council of Australia has an alternative view, stating that many small businesses believe they can achieve a better outcome through individual negotiations with suppliers (DR sub, page 7).

Some submissions support an increased role for peak bodies in filing applications and negotiating collective bargaining arrangements on behalf of members.<sup>661</sup> However, others express a contrary view, with Independent Contractors Australia stating that bargaining parties should always be named publicly and that authority to bargain collectively should only be granted to parties who have direct commercial arrangements with the bargaining target (DR sub, page 9).

The ACCC also supports amending and simplifying the collective bargaining notification process to increase the use of collective bargaining by small business. It observes that it continues to receive more applications for authorisation of collective bargaining arrangements than notifications, even though the notification process is intended to be simpler and less expensive than the authorisation process. This indicates that the notification process is not working as intended.

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658 See, for example: Australian Chicken Growers' Council Limited, DR sub, pages 2-5; Australian Dairy Farmers, DR sub, page 14; Australian Newsagents' Federation, DR sub, pages 28-30; Business Council of Cooperatives and Mutuals, DR sub, page 4; Grain Producers SA, DR sub, page 3; Growcom, DR sub, page 2; and Woolworths Limited, DR sub, pages 32-33.

659 Australian Newsagents' Federation, sub, pages 11-12.

660 See, for example: Australian Chicken Growers' Council Limited, sub, page 7; and Australian Dairy Farmers, sub, page 11.

661 See, for example: Australian Dairy Farmers, sub, page 11.

The ACCC also notes that, currently, it receives very few collective bargaining proposals that include collective boycott activity, even when that activity could be efficiency-enhancing. The ACCC believes there may be a perception among small businesses and their advisors that a collective bargaining arrangement that includes the prospect of a collective boycott would not be approved. The ACCC submits to the contrary that such arrangements are capable of being approved in appropriate circumstances (DR sub, pages 112-113).

Box 22.1 below identifies a number of changes the ACCC recommends making to the collective bargaining notification process to improve its utility.

### **Box 22.1: ACCC-proposed collective bargaining reforms**

The ACCC identifies a package of amendments to address current deficiencies in the collective bargaining notification process (DR sub, pages 112-113).

First, the ACCC considers safeguards are necessary to make notifications involving collective boycott proposals more likely to be approved. In particular, the ACCC recommends that:

- The ACCC be able to impose conditions on notifications involving collective boycott activity where conditions could address any identified concerns and enable the ACCC to allow the notification to stand. Currently, the ACCC is not able to allow the notification to stand subject to conditions, and so must object to the notification in its totality in such circumstances.
- The timeframe for the ACCC to assess collective boycott notifications be extended from 14 to 60 days. A longer time period before a collective boycott notification would come into force would allow the ACCC adequate time to consult with the counterparty/ies and assess the proposed conduct.
- In exceptional circumstances where a collective boycott is causing imminent serious detriment to the public, the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, subject to Tribunal review.

Second, the ACCC considers it important to address the current inflexibility with the notification process and recommends that greater flexibility be provided:

- in the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members of the bargaining group;
- in the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- for the ACCC to impose different timeframes for the expiration of collective bargaining notifications. Currently collective bargaining/collective boycott notifications expire automatically after three years. The ACCC should be able to set a timeframe to suit the circumstances, with the current three-year period remaining as a default.

Third, the current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed to ensure that they are not restricting participation by small businesses.

In conjunction with the proposed legislative changes, the ACCC would amend its collective bargaining notification guidelines to provide information about the range of factors relevant to considering whether a collective boycott may be necessary to achieve the benefits of collective bargaining. This may help to address the perception that collective boycotts are unlikely to be approved.

**Box 22.1: ACCC-proposed collective bargaining reforms (continued)**

The ACCC supports the Draft Report's recommendation that the ACCC should enhance the awareness of the collective bargaining notification process and its benefits for small business. This will be particularly important if the ACCC's proposed amendments are implemented and the collective bargaining notification process becomes more flexible and accessible for small business.

**The Panel's view**

The collective bargaining notification process is potentially of significant benefit to small business and could be more widely used. The regime could be simplified in respect of the businesses covered by a notification. The regime could also better facilitate collective boycott activity where it enhances efficiency.

The Panel considers that the ACCC's proposals strike an appropriate balance between facilitating the exemption of collective bargaining, including the potential to engage in boycott activity, while maintaining safeguards.

**Recommendation 54 — Collective bargaining**

The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business.

Reform should include allowing:

- the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members;
- the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- different timeframes for different collective bargaining notifications, based on the circumstances of each application.

Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public.

The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions.

The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.



## 22.3 BLOCK EXEMPTIONS

Competition law regimes in some other jurisdictions provide a mechanism by which defined categories of conduct are granted a ‘safe harbour’ exemption from competition law. Box 22.2 below summarises examples of block exemptions in other jurisdictions.

The block exemption removes the need to make individual applications for exemption. The exemption is granted if the competition regulator considers that certain conditions are satisfied: either that the category of conduct is unlikely to damage competition; or that the conduct is likely to generate a net public benefit.

### Box 22.2: International examples of block exemptions

#### UK

The Secretary of State may make a block exemption order exempting agreements from the prohibition against certain horizontal conduct.<sup>662</sup> These agreements must contribute to improving production or distribution, or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The agreements must not impose on the parties concerned restrictions that are not indispensable to the attainment of those objectives, or afford the undertakings concerned the possibility of eliminating competition.

#### EU

The European Commission may grant exemptions for certain agreements and practices if those agreements and practices are assessed as having significant countervailing benefits. This may be done on an agreement-by-agreement basis or through applying block exemptions for categories of conduct.<sup>663</sup>

#### Singapore

Under section 36 of the Competition Act 2004 (Singapore), the Competition Commission of Singapore may recommend to the Minister that a particular category of agreement be exempted from the prohibition on anti-competitive agreements.

A block exemption power under the CCA may be an efficient way to deal with certain types of business conduct that are unlikely to raise competition concerns, either because of the parties engaged in the conduct or the nature of the conduct itself. This would be an efficient means to provide certainty for businesses in respect of conduct that is unlikely to raise significant competition problems. It may also play a role in educating and informing business about the types of conduct that do not raise competition concerns and those that do.

Submissions to the Draft Report broadly support empowering the ACCC to grant block exemptions,<sup>664</sup> with a number seeking more details on how the recommendation would work in practice.<sup>665</sup>

662 *Competition Act 1998* (UK), section 6.

663 Treaty on the Functioning of the European Union, Article 101(3).

664 See, for example: Arnold Bloch Leibler, DR sub, page 3; Australian Chicken Growers Council Ltd, DR sub, page 3; ACCC, DR sub, page 67; Australian National Retailers Association, DR sub, page 14; Baker & McKenzie, DR sub, page 2; BHP Billiton, DR sub, page 1; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 24-28; Queensland Law Society, DR sub, page 6; and Retail Guild of Australia, DR sub, page 7.

The ACCC supports this proposal. It also notes that such a power would be an effective way to deal with shipping conference agreements if Part X of the CCA were repealed, and could be used in the context of intellectual property (IP) licences if subsection 51(3) of the CCA were repealed (DR sub, page 67).

The ACCC submits that a block exemption regime should incorporate the following features (DR sub, page 68):

- The basis for the ACCC issuing a particular block exemption should be either that the conduct is unlikely to substantially lessen competition or that it results in a net public benefit.
- The ACCC should have the ability to set parameters that exclude or limit the benefit of the block exemption in certain circumstances and to revoke or amend the block exemption in particular circumstances, subject to an appropriate consultation and notice period.
- It should be possible for the ACCC to impose a time limit on the operation of the block exemption, after which it may review and re-consider the terms of the block exemption and issue a new one if the public benefit/detriment test is met.
- The ACCC should publicly consult and issue a draft document prior to issuing the block exemption.<sup>666</sup>

The Panel considers that the ACCC's suggestions have merit.

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665 See, for example: Australian Newsagents' Federation, DR sub, page 18; Australian Taxi Industry Association, DR sub, page 12; Consumer Action Law Centre, DR sub, page 18; Law Council of Australia — SME Business Law Committee, DR sub, page 20; and Spier Consulting Legal, DR sub, page 19.

666 See also discussion by Consumer Action Law Centre, DR sub, page 18.

### The Panel's view

A block exemption power, exercisable by the ACCC, should be introduced to the CCA to supplement the authorisation and notification frameworks.

Such a power would be helpful in establishing 'safe harbours' for business, reducing compliance costs and providing further certainty about the application of the CCA. It would also create a preferable process for exempting efficiency-enhancing arrangements entered into by international liner shipping firms and IP owners if Part X and subsection 51(3), respectively, were to be repealed in line with the Panel's recommendations.

The test to be applied for granting a block exemption should be consistent with the test the Panel proposes in respect of authorisations and notifications generally — that the ACCC be satisfied that the conduct described in the block exemption:

- would not have the effect, or be likely to have the effect, of substantially lessening competition; or
- would result, or be likely to result, in a benefit to the public that outweighs any detriment to the public flowing from the conduct.

The ACCC should be empowered to grant a block exemption that applies generally to specified conduct or is limited such that it applies: to specified persons or classes of persons; in specified circumstances; or on specified conditions. A block exemption should cease to have effect at the end of a period specified in the exemption.

The details of the procedural aspects of the block exemption power should be refined as part of any implementation process. The Panel considers that the ACCC should publicly consult and issue a draft document prior to issuing the block exemption. The ACCC should also maintain a public register of all block exemptions, including those no longer in force.

### Recommendation 39 — Block exemption power

A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA.

This power would enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns, on the same basis as the test proposed by the Panel for authorisations and notifications (see Recommendation 38).

The ACCC should also maintain a public register of all block exemptions, including those no longer in force. The decision to issue a block exemption would be reviewable by the Australian Competition Tribunal.

The Panel's recommended form of block exemption power is reflected in the model legislative provisions in Appendix A.

## 23 ENFORCEMENT AND REMEDIES

The *Competition and Consumer Act 2010* (CCA) confers both public and private enforcement rights to take action under the competition law.

Public enforcement is undertaken by the Australian Competition and Consumer Commission (ACCC). The ACCC is empowered to investigate possible contraventions of the competition law and to institute proceedings in the Federal Court of Australia seeking penalties and other remedies depending on the contravention.<sup>667</sup>

The ACCC is also empowered under section 155 of the CCA to compel individuals to appear before it to answer questions about a potential contravention, and to compel corporations and individuals to provide information and produce documents.

Individuals may also bring proceedings in the Federal Court to seek redress for contraventions of the competition law.

Submissions raise a number of concerns about the scope of public and private enforcement rights under the CCA and about the ACCC's use of its powers under section 155 of the CCA.

### 23.1 PUBLIC ENFORCEMENT

In proceedings commenced by the ACCC, the Federal Court may impose various sanctions or grant various categories of relief in respect of a contravention of the competition laws, including:<sup>668</sup>

- in the case of cartel conduct, a term of imprisonment for up to 10 years on an individual who has knowingly participated in the contravention (or a fine of up to 2,000 penalty units, currently \$340,000, or both) and, in respect of a contravening corporation, a fine in an amount not exceeding the greater of \$10 million, three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the corporation's annual turnover;
- in the case of a contravention by a corporation of any other competition law provision (except sections 45D, 45DB, 45E, or 45EA), a civil penalty in an amount not exceeding the greater of \$10 million, three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the corporation's annual turnover;
- in the case of a contravention by a corporation of section 45D, 45DB, 45E, or 45EA, a civil penalty not exceeding \$750,000;
- an injunction to prevent the continuation of the contravening conduct;
- a range of probationary and community service-type orders;
- orders publicising the contravention;
- orders for compensation on behalf of other identified persons; and
- in the case of a merger that has been completed, an order that the acquiring corporation divest the business or assets that were acquired.

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<sup>667</sup> The Commonwealth Director of Public Prosecutions may also commence prosecutions relating to criminal offences such as making and giving effect to cartel provisions in sections 44ZZRF and 44ZZRG of the CCA.

<sup>668</sup> See *Competition and Consumer Act 2010*, Part VI.

Only a few submissions address the adequacy of the sanctions and remedies that may be imposed for contraventions of the competition law. There appears to be general approval of the severity of the sanctions.

The Panel received some comments, particularly from the Australian Mines and Metals Association (sub, page 7), in relation to the adequacy of pecuniary penalties for contravening the secondary boycott provisions. As discussed earlier, the Panel considers that the maximum penalty should be the same as that for other contraventions of Part IV (see Recommendation 36).

A few submissions propose that a divestiture remedy be available for contraventions of section 46 (in addition to applying to breaches of the merger provisions). This issue is discussed above in [Section 19.1](#) in the context of section 46. The Panel does not support such a proposal.

## 23.2 PRIVATE ENFORCEMENT

Consumers or businesses harmed by a contravention of the competition law can seek relief from the Federal Court, most commonly damages (compensation) or injunctions to prevent and restrain the contravening conduct.

A number of submissions comment on the difficulties confronting many consumers and small businesses that wish to bring private actions in the Federal Court in respect of competition law. For example, Caron Beaton-Wells and Brent Fisse note that private parties face a range of difficulties in pursuing private action, including:

- uncertainty as to when the limitations period commences;
- difficulties in obtaining access to information generally and information from the ACCC;
- the apparent inability to rely on admissions made in ACCC proceedings, owing to the uncertain scope of section 83 of the CCA;
- challenges in proving and quantifying loss; and
- requirements imposed by section 5 of the CCA to seek ministerial consent in relation to proceedings involving extraterritorial conduct. (sub, pages 29-30)

From submissions and consultations with small business, the Panel is convinced that there are significant barriers to small business taking private action to enforce the competition laws.<sup>669</sup> A private action would be beyond the means of many small businesses. In some cases, a small business might not wish to bring a proceeding for fear of damaging a necessary trading relationship.

These issues are considered below.

### Section 83 of the CCA

The CCA provides one mechanism intended to reduce the costs associated with private enforcement proceedings. Section 83 is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be used as prima facie evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant).

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<sup>669</sup> See, for example: Retail Guild of Australia, DR sub, page 48; and Ritchies Stores, DR sub, page 3.

However, a significant potential deficiency has emerged in respect of the scope of section 83. Many ACCC proceedings are resolved by the corporate defendant making admissions of fact(s) that establish the contravention, but it is uncertain whether section 83 applies to such admissions. A number of decisions of the Federal Court suggest that section 83 is confined to findings of fact made by the court after a contested hearing.<sup>670</sup>

The effectiveness of section 83 as a means of reducing the costs of private actions could be enhanced if the section were amended to apply, not just to *findings* of fact, but to *admissions* of fact made by a corporation in another proceeding.<sup>671</sup>

However, submissions express concern about the impact that extending section 83 to admissions of fact might have on the willingness of parties to co-operate in cartel matters or settle matters with the ACCC, compromising the effectiveness of public enforcement of the CCA.<sup>672</sup> The assumption underlying those concerns is that companies may choose to settle a proceeding brought by the ACCC on the basis of admissions of fact, believing that those admissions cannot be relied upon by a private litigant seeking compensation in a follow-on proceeding. If the admissions could be relied upon, it might change how respondent companies assess the advantages of settlement.

Despite these concerns, the Panel continues to support extending section 83 to admissions of fact, for the following reasons:

- First, the current distinction between findings of fact and admissions of fact for the purposes of section 83 is somewhat artificial. Most contested hearings involve a mixture of factual admissions (often made in pleadings) and factual findings to resolve the dispute. It is difficult to separate the factual admissions and findings. Further, there is a real possibility that admissions of fact made by a respondent company in a proceeding brought by the ACCC would be admissible against that company in a follow-on proceeding under section 81 of the *Evidence Act 1995* in any event, thereby rendering the perceived distinction under section 83 irrelevant.<sup>673</sup>
- Second, it is doubtful that a change to section 83 would materially alter the assessment by a respondent whether or not to settle an ACCC proceeding. The decision to resolve an ACCC matter by admissions is a significant one that would usually subject the respondent company to a financial sanction and adverse publicity. Having taken that decision, it is unlikely that the respondent company would subsequently contest the admitted facts in a follow-on proceeding.

Even if the respondent company wished to preserve that right, the proposed change to section 83 would not prevent it from doing so. Section 83 merely makes the admitted fact *prima facie* evidence of that fact in the follow-on proceeding. The respondent company remains free, should it so choose, to adduce evidence in the follow-on proceeding contrary to

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670 *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 at [24]; *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 588 at [51]; *ACCC v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265 at [118]; *ACCC v Dataline.net.au Pty Ltd* [2006] FCA 1427 at [107].

671 See, for example: CHOICE, DR sub, pages 29-30; Consumer Action Law Centre, DR sub, page 18; Law Council of Australia — SME Committee, DR sub, page 21; Master Grocers Association/Liquor Retailers Association, DR sub, page 25; National Seniors Australia, DR sub, page 15; Retail Guild of Australia, DR sub, page 7; Spier Consulting Legal, DR sub, pages 20-21 and David Wright, DR sub, page 8.

672 ACCC, DR sub, page 79. See also submissions opposing changes to section 83 from Arnold Bloch Leibler, DR sub, page 8; Business Council of Australia, DR sub, page 22; Minter Ellison, DR sub, page 7; and Queensland Law Society, DR sub, pages 7-8.

673 See the discussion by Ryan J in *ACCC v Pratt (No 3)* [2009] FCA 407.

the admitted fact. Furthermore, admissions of fact in an ACCC proceeding will rarely, if ever, address the question of loss and damage suffered by market participants as a result of the contravening conduct. Accordingly, a plaintiff in a follow-on proceeding would need to prove loss and damage against the respondent company in order to recover compensation.

The proposed amendment to section 83 removes doubt about its operation in the context of factual admissions and reduces the costs and risks of proceedings brought by persons who may have suffered loss and damage by reason of admitted contravening conduct.

### Cost of litigation and access to justice

Smaller businesses frequently seek assistance from the ACCC in respect of competition law concerns. The ACCC plays a very important role in enforcing the law on behalf of businesses that are unable to do so themselves. Nevertheless, the ACCC is unable to take proceedings in respect of all complaints brought to it. Understandably, it seeks to prioritise the cases that it will pursue within its budgetary constraints. This can lead to some dissatisfaction among small businesses when the ACCC does not pursue their complaints. In part, this dissatisfaction is due to the absence of an effective alternative option they can pursue themselves.

In general, the dispute resolution processes currently available to smaller businesses for competition law-related disputes do not meet their expectations. The Panel sympathises with their frustrations and considers that developing alternative dispute resolution processes could go some way to addressing small business concerns.

The Australian Chamber of Commerce and Industry (ACCI) considers, ‘alternative dispute resolution services that provides quality information quickly, informally and at low cost is essential to improving both competition and productivity for small and medium businesses’ (sub, page 13).

A number of possible alternative dispute resolution options are put forward by small business. The Office of the Australian Small Business Commissioner states:

Access to justice is another key component of a competitive marketplace. A small business focuses on plying its trade or profession. Disputes will arise from time to time, but small businesses will often not have the skills and resources on hand to deal with these incidents that arise in the course of business but are not a part of the *ordinary* course of that business. These types of business disruption are not easily catered for by small business and, depending on the particular dispute, can impact small business disproportionately, particularly where there is unequal bargaining power. (sub, page 4)

The Australian Small Business Commissioner is an Australian Government initiative designed to act as an advocate for small businesses. However, the Australian Small Business Commissioner does not directly provide mediation or arbitration services.<sup>674</sup>

The Panel notes that some States and Territories have introduced their own small business commissioners, offices of small business and ombudsmen that provide dispute resolution services.

Both the South Australian Small Business Commissioner and the New South Wales Small Business Commissioner have some capacity to consider complaints falling within the remit of the CCA. The South Australian Small Business Commissioner is able to assist with businesses that are treated

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674 Australian Small Business Commissioner, Our Role, Australian Small Business Commissioner, Canberra, viewed 10 February 2015, <<http://asbc.gov.au/about/our-role>>.

unfairly in their commercial dealings with other businesses in the marketplace and in franchising disputes.<sup>675</sup> The New South Wales Small Business Commissioner lists a range of disputes that can be considered through its mediation service, including those involving suppliers, wholesalers and purchasers, service providers, franchises and unfair contracts.<sup>676</sup> The Western Australian Small Business Development Corporation states that it provides Western Australian small businesses with access to a speedy, low-cost, non-litigious process to resolve disputes with other businesses (sub, page 28).

These services are in addition to any court or tribunal-based dispute resolution services, which are often available for consumer law matters.

The Panel supports the positive comments received in submissions about the offices of small business and ombudsmen services. The Law Council of Australia — SME Committee notes that these offices already provide a valuable mediation function to many small businesses and believes that these initiatives should be supported and if possible extended (DR sub, pages 2-3).

A number of concerns small businesses raise with the Panel were also raised with the Productivity Commission (PC) in the context of the PC's *Access to Justice Arrangements* inquiry:

- access to effective and low cost small business advice and dispute resolution services that are responsive to their individual needs;
- the variety of frameworks providing dispute resolution services, some of which overlap; and
- the cost of accessing court-based dispute resolution and the frequently drawn-out nature of proceedings.

The PC's *Access to Justice Arrangements* report concludes:

Adequately resourced advice and resolution services that cater to the needs of small business, such as small business commissioners, have the potential to quickly and fairly resolve many legal disputes and allow small businesses to avoid the uncertainty and hiatus associated with being involved in a protracted, formal dispute.<sup>677</sup>

The PC recommends that the Australian, state and territory governments should ensure by no later than 31 December 2015 that their Small Business Commissioners or dedicated Small Business Offices, have the financial resources, personnel and statutory capacity to, at a minimum:

- provide comprehensive advice to small businesses on their rights and obligations, including appropriate referrals to other government and non-government agencies;
- identify emerging and persistent areas of legal concern to small business and advocate for appropriate policy reform;
- work co-operatively with other state, territory and national small business agencies;
- mediate or refer disputes between small businesses and other businesses and state or territory government agencies, including local governments; and

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675 Small Business Commissioner of South Australia, Dispute Resolution, Small Business Commissioner of South Australia, Adelaide, viewed 9 February 2015, <[www.sasbc.sa.gov.au/dispute\\_resolution/overview](http://www.sasbc.sa.gov.au/dispute_resolution/overview)>.

676 NSW Small Business Commissioner, What to expect from our service, NSW Small Business Commissioner, Sydney, viewed 9 February 2015, <[www.smallbusiness.nsw.gov.au/solving-problems/commercial-dispute-resolution](http://www.smallbusiness.nsw.gov.au/solving-problems/commercial-dispute-resolution)>.

677 Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.



- have the power to compel state or territory government agencies, including local governments, to provide information on, and participate in mediation related to, disputes with individual small businesses.<sup>678</sup>

In addition, dispute resolution processes are available under industry codes and through industry ombudsmen; for example, the Telecommunications Industry Ombudsman.

The PC also makes a number of recommendations designed to ensure efficient and streamlined services and minimise court-related costs for businesses:

- ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;<sup>679</sup>
- broaden the use of the Federal Court’s fast-track model to facilitate lower cost and more timely access to justice;<sup>680</sup> and
- better manage the costs of litigation, including through the use of costs budgets for parties engaged in litigation.<sup>681</sup>

Although some submissions argue ‘no costs’ orders for small businesses would be of assistance,<sup>682</sup> such changes could have unintended consequences; for example, encouraging frivolous or vexatious actions.

The Panel also notes that the proposal for a Small Business and Family Enterprise Ombudsman is in the process of being implemented and is expected to be finalised by 1 July 2015.<sup>683</sup> The proposal to extend unfair contract terms laws to small business contracts also remains in progress, with the Australian Government currently reviewing feedback from consultations and developing a response in co-operation with state and territory consumer affairs ministers.<sup>684</sup>

The Law Council of Australia — SME Committee does not support creating a new body solely to handle CCA-related small business disputes (DR sub, pages 2-3). The submission from the Office of the Australian Small Business Commissioner indicates that dispute resolution services are already available at both Commonwealth and state level; rather, the issue is raising small business’ awareness of their existence (DR sub, pages 1-3). Any new functions should be given to current service providers. Noting these submissions, the Panel does not consider a specific body is needed to deal with competition law dispute resolution.

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678 Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, page 299 and Recommendation 8.3.

679 Ibid., Recommendation 9.3.

680 Ibid., Recommendation 11.1.

681 Ibid., Recommendation 13.3.

682 See, for example: Master Grocers Australia, DR sub, page 58; and Independent Supermarket Retailers Guild of South Australia, DR sub, page 6.

683 The Australian Small Business Commissioner will continue to operate until the Small Business and Family Enterprise Ombudsman commences, which is expected to occur by 1 July 2015. See Department of the Treasury, *Small Business and Family Enterprise Ombudsman*, Department of the Treasury, Canberra, viewed 9 February 2015, <[www.treasury.gov.au/Policy-Topics/Business/Small-Business/Family-Enterprise-Ombudsman](http://www.treasury.gov.au/Policy-Topics/Business/Small-Business/Family-Enterprise-Ombudsman)>.

684 Department of the Treasury, *Extending Unfair Contract Term Protections to Small Businesses*, Department of the Treasury, Canberra, viewed 9 February 2015, <[www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms](http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms)>.

During consultation, the Panel heard concerns from some small businesses about their experience of raising concerns about anti-competitive conduct with the ACCC. These include:

- responses from the ACCC that fail to explain clearly why the ACCC has decided not to pursue particular matters;
- responses from the ACCC that were not timely; and
- where the ACCC decided to pursue concerns raised by a small business, it failed to provide regular updates on the investigation's progress.

The Panel considers that the ACCC should tighten up its response to small business complaints concerning competition laws. If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution procedures. Where the ACCC does pursue a complaint raised by small business, it should keep the small business informed of the progress and outcome of its investigation.

While the Panel finds no evidence of systemic concerns, it is pleasing to note that the ACCC continues to look for ways to enhance its interaction with small business complainants and acknowledges room for improvement (ACCC, DR sub, page 109).

### Private actions involving overseas conduct

Conduct that contravenes Australia's competition laws may take place overseas. From time to time, multinational corporations have entered into cartel arrangements that apply to many parts of the world, including Australia. Recent examples that have been the subject of ACCC proceedings include international cartels concerning vitamins, international air freight and the supply of marine hoses.

Currently, those seeking compensation under Australian competition law in respect of contravening conduct that occurs overseas face two regulatory impediments: the business residence test; and the need to obtain ministerial consent.

### Business residence test

Overseas conduct will only be subject to Australian law if it is engaged in by a corporation incorporated in, or carrying on business within Australia (subsection 5(1) of the CCA). The effect of that provision is that, in respect of contravening conduct that occurs overseas, a foreign corporation will only be subject to Australian competition law if it otherwise carries on business in Australia.

The Panel considers that the application of the law to a foreign corporation should not depend on whether the corporation otherwise carries on business in Australia.<sup>685</sup> Australian competition law is generally limited in its scope (and should be so limited) to conduct that harms competition in an Australian market. If a foreign corporation engages in conduct that harms competition in an Australian market, it should be subject to Australian law.

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685 The Commonwealth has power under subsection 51(xx) of the Constitution to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth and foreign corporations. There is no additional requirement that foreign corporations have any particular connection with Australia.

Submissions on this topic support the Panel’s Draft Recommendation to remove the ‘business residence’ requirement in section 5 of the CCA.<sup>686</sup>

A number of submissions question whether it is appropriate for Australia’s competition laws to be limited to conduct that harms competition in an Australian market. For example, the Law Council of Australia — Competition and Consumer Committee notes that the ‘market in Australia’ requirement provides a strong jurisdictional nexus with Australia, but it might be too high a threshold to establish in all cases. An alternative is for the conduct to have an effect on local prices or terms of supply (DR sub, page 7). Ian Stewart comments:

The logical jurisdictional connection lies somewhere between extraterritorial conduct that affects prices or terms of supply of goods or services supplied in a market in Australia ... and extraterritorial conduct that affects prices or terms of supply of goods or services supplied into Australia (regardless of whether or not a market in Australia for those goods or services can be said to exist). (DR sub, pages 2 and 3)

This issue does not arise directly out of the Panel’s recommendation to reform section 5 to remove the ‘business residence’ requirement. Since its enactment, Australia’s competition law prohibitions have generally been limited to conduct that harms competition in a market in Australia. That limitation arises out of the substantive prohibitions, not section 5.

Until recently, the limitation has not been controversial. However, it assumed importance in the ACCC’s recent proceedings against two international airlines, Air New Zealand and Garuda, in respect of alleged cartel conduct that occurred overseas. The case related to surcharges applied to air freight services on routes from overseas locations to Australia. On 31 October 2014, the Federal Court found that the air freight services affected by the cartel conduct were not supplied in a market in Australia and, accordingly, the cartel conduct was not prohibited by Australian law (as in force at the time of the conduct).<sup>687</sup>

The air freight surcharge case concerned the law against price fixing prior to the enactment of the cartel conduct prohibitions in Division 1 of Part IV of the CCA. As discussed in [Chapter 20](#), the new cartel conduct prohibitions do not expressly require the conduct to affect goods or services traded in an Australian market. Although the Panel considers that the cartel conduct prohibitions should be limited to conduct that has a relevant territorial nexus with Australia, the Panel agrees with submissions that the appropriate nexus should not be stated in terms of having an effect on a market in Australia. Such a test would be inappropriate for a criminal offence that requires determination before a jury. Instead, the Panel recommends that, for cartel conduct to be an offence in Australia, it should have an effect on trade or commerce within, to or from Australia (see Recommendation 27).

However, the Panel is not persuaded that further change is required to the substantive competition law provisions to remove the requirement that the relevant conduct must harm competition in a market in Australia. While from time to time cases such as the air freight surcharge case may give rise to difficult questions about the application of the law, the Panel considers that the ‘market in Australia’ requirement is a sensible limitation to the scope of Australia’s competition laws.

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686 See, for example: Arnold Bloch Leibler, DR sub, page 2; Australian Automotive Aftermarket Association, DR sub, page 3; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian Competition and Consumer Commission, DR sub, page 35; Australian Industry Group, DR sub, page 20; Australian National Retailers Association, DR sub, page 12; Law Council of Australia — SME Committee, DR sub, pages 12-13; and Ian Stewart, DR sub, pages 1-2.

687 *Australian Competition and Consumer Commission v Air New Zealand Limited* [2014] FCA 1157 at [20].

Although the Panel considers that the business residence test in section 5 is unnecessary, a question remains whether section 5 should stipulate any other connection between the conduct and Australia as a requirement when the competition law is applied to overseas conduct. As discussed above, such a connection will often be required in any event because many of the substantive competition law provisions depend upon the conduct harming competition in an Australian market. However, not all provisions have that requirement (for example, resale price maintenance).

The Panel considers that it would be appropriate to re-frame section 5 so that the competition law applies to conduct undertaken overseas insofar as the conduct relates to ‘trade or commerce’ as defined in the CCA: that is, trade or commerce within Australia or between Australia and places outside Australia. That requirement would state a minimum connection between the overseas conduct and Australia. This would ensure that Australian law could not be applied to overseas conduct that had no direct relationship to trade or commerce within Australia or between Australia and places outside Australia.

### Ministerial consent

The second regulatory impediment to private proceedings in section 5 of the CCA is that, if a person wishes to seek damages or other compensatory orders in relation to contravening conduct that occurred overseas, he or she must obtain the consent of the Minister (subsections 5(3) and (4)). The Minister is required to grant consent unless the conduct was required or specifically authorised by a foreign law and the Minister is of the view that it is not in the national interest to grant consent (subsection 5(5)).<sup>688</sup> This requirement was introduced in 1986, at a time when there was concern over the extra-territorial reach of some competition laws.<sup>689</sup>

The concern originated out of litigation commenced years earlier in the US by Westinghouse in respect of an overseas uranium cartel. Australian uranium producers became defendants to the US litigation.<sup>690</sup> This resulted in the Australian Government enacting legislation to prevent the enforcement of the US judgment in Australia.<sup>691</sup>

Also, at that time, many other jurisdictions, particularly developing countries, did not have competition laws. As a result, there was potential for diplomatic issues to arise if proceedings were brought in Australia for contravention of Australia’s competition laws in respect of overseas conduct that was authorised or permitted by the laws of the jurisdiction in which the conduct occurred.

Since that time, many countries have enacted competition laws. Further, a greater uniformity has emerged concerning the extra-territorial reach of competition laws in comparable jurisdictions. In general, competition laws of comparable jurisdictions apply to overseas conduct if the conduct has a direct effect on domestic markets or trade.<sup>692</sup>

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688 Similar requirements exist for the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001*, section 12AC.

689 *Trade Practices Revision Act 1986*, section 8.

690 A summary of the litigation arising from the uranium cartel, and the political responses to the litigation, is contained in Senz, D and Charlesworth, H, 2001, ‘Building Blocks: Australia’s Response to Foreign Extraterritorial Legislation’, *Melbourne Journal of International Law*, Melbourne Law School, Melbourne, Vol 2, pages 69-121.

691 *Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979*, which was subsequently incorporated into the *Foreign Proceedings (Excess of Jurisdiction) Act 1984*.

692 In the US, see *F. Hoffman La Roche Ltd v Empagran SA* (2004) 542 US 174. In the EU, see *A. Ahlstrom OY v EC Commission* [1988] 4 CMLR 901 (known as the Wood Pulp case).

In comparable overseas jurisdictions, such as the US, Canada, UK, EU, and New Zealand, there is no requirement to seek governmental consent in order to take proceedings in respect of contravening conduct that occurs overseas (see [Appendix B](#)).

The requirement for ministerial consent imposes a material hurdle for private plaintiffs seeking redress for breaches of competition law and can give rise to substantial additional costs in the litigation. The ministerial consideration of the issue also takes time. Further, a defendant to a proceeding can seek judicial review of the Minister's decision, which may cause delay in the principal proceeding.<sup>693</sup>

The ministerial consent requirements apply to the Australian Consumer Law (ACL) as well as the competition law. Although the Panel is not reviewing the ACL generally, the Terms of Reference ask the Review to consider the ACL to the extent that it extends to protections for small business. This requirement could be relevant to small businesses privately enforcing the laws concerning unconscionable conduct.

While a number of submissions support the Draft Recommendations concerning section 5,<sup>694</sup> few expressly address the requirement for ministerial consent. The Law Council of Australia — Competition and Consumer Committee supports removing the requirement for ministerial consent (DR sub, page 8), as does Spier Consulting Legal (DR sub, page 9). Professor Philip Clarke does not support that recommendation, arguing that the requirement for ministerial consent helps to prevent damage to international comity from the extra-territorial operation of domestic competition laws (DR sub, page 2).

The Panel considers that, today, there is a very low likelihood that Australian competition law proceedings involving overseas conduct would create diplomatic concerns. Accordingly, it considers that there is no ongoing need for the requirement for ministerial consent. Removing that requirement would reduce the costs of such actions where consent would currently be required.

### Proving loss or damage

A matter raised in some submissions is the inclusion of a power to seek orders, in the nature of 'cy-pres' orders, for breach of the competition law. A cy-pres order is used in the administration of estates or trusts where the original bequest or trust object fails for some reason. The court may order a cy-pres scheme to direct the application of funds toward a similar objective as the original gift or trust.

In the context of competition law, it has been proposed that orders of that kind might be used when it can be shown that contravening conduct has caused quantifiable detriment, but it is not possible to identify the persons damaged by the conduct.<sup>695</sup> The suggestion is that the court would order an amount of compensation or damages be paid into a trust fund to be spent in a manner directed by the court.

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693 In 2008, Cathay Pacific unsuccessfully challenged the Minister's decision to grant consent: *Cathay Pacific Airways Limited v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* [2010] FCA 510.

694 See, for example: Arnold Bloch Leibler, DR sub, page 2; Australian Aftermarket Automotive Association, DR sub, page 3; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian Competition and Consumer Commission, DR sub, page 35; Australian Industry Group, DR sub, page 20; Australian National Retailers Association, DR sub, page 12; Law Council of Australia — SME Committee, DR sub, pages 12-13; and Ian Stewart, DR sub, pages 1-2.

695 See, for example: Consumer Action Law Centre, DR sub, pages 18-19.

This proposal was previously considered (and rejected) by the Dawson Review. The Panel agrees with the conclusion of the Dawson Review:

Such orders would involve the payment of compensation or damages into a trust fund to be directed toward purposes that are identified by the Court. For example, money from the trust might be used for the promotion of consumer or other affected interests. Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance.<sup>696</sup>

### The Panel's view

Private enforcement of competition laws is an important right. However, there are many regulatory and practical impediments to exercising this right. The Panel considers it important to find ways to reduce those impediments.

The effectiveness of section 83 of the CCA, as a means of reducing the costs of private actions, would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of fact.

Small businesses face significant practical difficulties in exercising rights of private enforcement. Understandably, the ACCC is not able to take proceedings in respect of all complaints brought to it. However, the ACCC should place some priority on its response to small business complaints concerning competition laws. If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the complainant to alternative dispute resolution processes.

Small business commissioners, small business offices and ombudsmen provide important, effective and low cost services to small businesses. These services are capable of resolving commercial disputes involving competition law issues in an effective and low-cost manner. They should provide dispute resolution services over competition-related disputes rather than having a CCA-specific dispute resolution scheme.

The Panel agrees with Recommendation 8.3 of the PC's *Access to Justice Arrangements* report, which is directed to enhancing the capacity of the Small Business Commissioners and dedicated Small Business Offices in each jurisdiction to provide alternative dispute resolution processes.

Contravening conduct that occurs overseas should be subject to Australian competition law if the conduct relates to trade or commerce within Australia or between Australia and places outside Australia, regardless of whether the person engaging in the conduct carries on business in Australia.

Given that competition laws and policies are now commonplace around the world, there is no reason why private parties should have to seek ministerial consent before launching a proceeding that involves overseas conduct.

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696 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra, page 163.

**Recommendation 41 — Private actions**

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

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

**Recommendation 53 — Small business access to remedies**

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

Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

The Panel endorses the following recommendations from the Productivity Commission's *Access to Justice Arrangements* report:

- Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;
- Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;
- Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;
- Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and
- Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.<sup>697</sup>

<sup>697</sup> Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.

### Recommendation 26 — Extra-territorial reach of the law

Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.

The in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law.

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

## 23.3 ACCC'S INVESTIGATIVE POWERS

The ACCC's primary investigative power is contained in section 155 of the CCA. Section 155 gives the ACCC power:

- to compel individuals to appear before it to answer questions about a potential contravention; and
- to compel corporations and individuals to provide information and to produce documents to it, if the ACCC has reason to believe that the person or corporation is capable of giving evidence, furnishing information or producing documents relating to a possible contravention of the CCA. It is not necessary for the ACCC to have reasonable grounds to believe that a contravention has occurred before exercising those powers.

The section 155 powers have been a longstanding feature of Australia's competition law framework. Contraventions of competition laws, particularly cartel-type conduct, are often clandestine. Thus, it is thought necessary to give the competition regulator strong coercive powers to uncover such contraventions.

The ACCC outlines ways to strengthen its investigative powers under section 155 (sub 1, pages 97-101). The ACCC proposes that the section 155 powers be able to be used in a wider range of circumstances. Such circumstances include: after seeking injunctive relief; during multi-party investigations; and in relation to specific matters, such as designated telecommunication matters and the investigation of compliance with court-enforceable undertakings, which are not currently open to section 155 notices.

Conversely, a range of submissions criticise the ACCC's use of its current section 155 powers, citing the scope of the notices and the costs of compliance.<sup>698</sup> Submissions also comment on the use of section 155 powers in the context of applications for merger clearance.<sup>699</sup>

An appropriate balance must be achieved with respect to coercive powers. The Panel considers that the ability to compel business to provide evidence, information and documents relating to a potential contravention of the competition law is crucial to the ACCC's administration of the CCA.

<sup>698</sup> See, for example: Arnold Bloch Leibler, sub, pages 6-7; and Telstra, sub, pages 12-13.

<sup>699</sup> See, for example: Foxtel, sub, pages 7-8.



However, the Panel does not support the ACCC's proposal that the powers be available for use after the ACCC has commenced proceedings in respect of an alleged contravention. The use of the powers at that time is likely to cause conflict with the court's overall supervision of the proceedings. The court's discovery and subpoena powers can be exercised to require production of additional documents.

The Panel considers that the ACCC should be able to use section 155 powers to investigate compliance with court-enforceable undertakings. The ability to gather information about a possible contravention of an undertaking accepted by the ACCC would assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

The Panel understands the concerns expressed by business over the cost of compliance with section 155 notices that require the production of documents. In the digital age, businesses retain many more documents, such as emails, than was the case 20 years ago. As a consequence, compliance with a section 155 notice may require electronic searches of tens of thousands of documents, which can occasion very large expense.<sup>700</sup>

The courts have recognised the cost of documentary searches and, over the last 10 years, have modified the rights of discovery. For example, the Federal Court Rules 2011 (20.14) now require a party to undertake a reasonable search for documents. In determining what is a reasonable search, the party may take into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

The ACCC's published guideline on section 155 acknowledges the burden that section 155 notices may impose on a recipient and accepts that the ACCC should take the burden into account.<sup>701</sup> The Panel considers that this is an important responsibility for the ACCC, which should be exercised on each occasion that a notice is issued. The ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated.

There may also be scope to recognise, in the CCA or in a guideline, a principle equivalent to that recognised in the Federal Court Rules: that, in a digital age, the obligation to search for documents should be subject to a requirement of reasonableness, having regard to factors such as the number of documents involved and the ease and cost of retrieving the document. A number of submissions support such a proposal.<sup>702</sup> However, some fear this could 'water down' a powerful tool used to obtain evidence about serious contraventions of the CCA.<sup>703</sup> For its part, the ACCC states that it will review its internal processes for issuing section 155 notices in view of the concerns raised in submissions to the Review (DR sub, page 72).

As to whether the reasonable search criteria should be enacted in the CCA or implemented as an administrative guideline, a number of submissions consider that the requirement that recipients

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700 See, for example: Coles Group Limited, DR sub, page 10; and Telstra, sub, page 13.

701 Australian Competition and Consumer Commission 2008, *A guide to the Australian Competition and Consumer Commission's power to obtain information, documents and evidence under s 155 of the Trade Practices Act 1974*, Canberra, page 8.

702 See, for example: AGL Energy Limited, DR sub, page 6; Australian Corporate Lawyers Association, DR sub, page 3; Australian Motor Industry Federation, DR sub, page 13; Coles Group Limited, DR sub, pages 10-11; Law Council of Australia — Competition and Consumer Committee, DR sub, page 34; Queensland Law Society, DR sub, page 7; Retail Guild of Australia, DR sub, page 7; and Wesfarmers Limited, DR sub, page 3.

703 See, for example: ACCC, DR sub, page 72; Law Council of Australia — SME Committee, DR sub, page 21; and Spier Consulting Legal, DR sub, page 20.

undertake a reasonable search for documents should be enshrined in legislation.<sup>704</sup> The Panel agrees. The failure to comply with a section 155 notice is an offence; accordingly, it is important that the scope of the legal obligation imposed by section 155 be contained in the legislation.

The Panel agrees with the ACCC's suggestion that, should a reasonable search test be introduced into the CCA, the most effective approach would be to introduce a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that would be available to a recipient of a notice issued under paragraph 155(1)(b) who can demonstrate that a reasonable search was undertaken in order to comply with the notice (DR sub, page 73).

### The Panel's view

Compulsory evidence-gathering powers are important to the ACCC's ability to enforce the CCA. Those powers should extend to gathering information about a possible contravention of an undertaking accepted by the ACCC. This will assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

The exercise of the ACCC's powers under section 155 can impose a regulatory burden on recipients of compulsory notices.

The ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated.

Further, in complying with a section 155 notice, the recipient should be required to undertake a reasonable search.

Compliance with compulsory powers facilitates the ACCC's ability to investigate competition concerns. The ACCC states that the current sanction for a corporation failing to comply with a section 155 notice is too low. The present sanction is up to 20 penalty units for an individual (or 12 months imprisonment) which, when applied to a corporation, amounts to a fine of up to \$17,000.<sup>705</sup>

In contrast, a person failing to comply with a notice issued by the Australian Securities and Investments Commission faces a sanction of up to 100 penalty units or two years imprisonment, or both,<sup>706</sup> which translates to a fine of \$85,000 for a corporation. Given the importance of compliance with section 155 notices to the administration of competition laws, the Panel agrees that the current sanction for a corporation failing to comply is inadequate.

### The Panel's view

The current sanction for a corporation failing to comply with section 155 of the CCA is inadequate.

704 See, for example: Business Council of Australia, DR sub, pages 24-25; Foxtel, DR sub, page, 7; Telstra Corporation Limited, DR sub, page 4; and Woolworths Limited, DR sub, pages 26-27.

705 *Competition and Consumer Act 2010*, subsection 155(6A). See sections 4AA (level of penalty units) and 4B (penalties for corporations five times that of individuals) of the *Crimes Act 1914*.

706 *Australian Securities and Investments Commission Act 2001*, section 63.

**Recommendation 40 — Section 155 notices**

The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings.

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice.

The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*.

## 24 NATIONAL ACCESS REGIME

In some markets, competition depends on access to infrastructure facilities that occupy strategic positions in an industry (the so-called ‘essential’ or ‘bottleneck’ facilities).

The National Access Regime (the Regime) in Part IIIA of the *Competition and Consumer Act 2010* (CCA) provides a legal framework by which third parties can seek and obtain access to such bottleneck facilities in order to compete, or compete more effectively, in upstream and downstream markets.

The two objectives of the Regime, as stated in the objects clause of Part IIIA, are to:

- ... promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.<sup>707</sup>

Generally, to gain access to bottleneck infrastructure under the Regime, two steps must be taken.<sup>708</sup>

First, an application must be made to the National Competition Council (NCC) to recommend declaration of the infrastructure service, and the relevant Minister must then accept the recommendation and declare the service. To recommend declaration of an infrastructure service and declare the service, the NCC and the Minister respectively must be satisfied of specified criteria concerning the service (see Box 24.1). Declaration activates the arbitration processes under the Regime.

Second, the person seeking access must request access from the infrastructure owner. If negotiations fail, terms and conditions of access can be arbitrated by the Australian Competition and Consumer Commission (ACCC).

The Panel recommends combining the roles of the NCC and the ACCC under the Regime in the proposed Access and Pricing Regulator. See [Section 27.1](#) for further discussion of these issues.

### Box 24.1: Declaration criteria in the CCA (sections 44G and 44H)

The NCC cannot recommend that a service be declared, and the Minister cannot declare a service, unless satisfied of all of the following matters:

- a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
- b) that it would be uneconomical for anyone to develop another facility to provide the service;

<sup>707</sup> *Competition and Consumer Act 2010*, section 44AA.

<sup>708</sup> National Competition Council 2011, *Access to Monopoly Infrastructure in Australia*, Canberra, page 4.

**Box 24.1: Declaration criteria in the CCA (sections 44G and 44H) (continued)**

- c) that the facility is of national significance, having regard to:
- (i) the size of the facility; or
  - (ii) the importance of the facility to constitutional trade or commerce; or
- the importance of the facility to the national economy;
- e) that access to the service:<sup>709</sup>
- (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or
  - (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the NCC/designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement; and
- f) that access (or increased access) to the service would not be contrary to the public interest.

An infrastructure service may be exempted from declaration under Part IIIA of the CCA by any of the following regulatory processes:

- Prior to the construction of a new facility, the operator of the proposed facility may apply to the NCC for a recommendation to the relevant Minister that the facility be ineligible for declaration. The facility will become ineligible if the Minister makes that decision. The Minister may only make that decision if he or she is satisfied that one of the declaration criteria will not be fulfilled.
- A State or Territory applies to the NCC for a recommendation to the relevant Australian Government Minister that an access regime for a particular infrastructure service in that State or Territory is 'effective'. The infrastructure service will be exempted from declaration if the Australian Government Minister makes that decision. The criteria to be applied for that decision are set out in the Competition Principles Agreement (CPA).<sup>710</sup>
- The Australian Government or a State or Territory may apply to the ACCC for approval of a competitive tender process for the construction and operation of an infrastructure facility that is to be publicly owned. The facility will be exempted from declaration if the ACCC makes that decision. The ACCC may only approve the tender process if it is satisfied that reasonable terms and conditions of access to the facility will be the result of the tender process.
- Operators of monopoly infrastructure submit an undertaking to the ACCC setting out the terms and conditions on which the operator will offer services using the infrastructure. The ACCC is empowered to accept or reject the undertaking. If the undertaking is accepted, the service cannot be declared.

709 Criterion (d) was repealed effective 14 July 2010.

710 Council of Australian Governments 1995 (as amended to 13 April 2007), [Competition Principles Agreement](#), clause 6.

The Regime was recently reviewed by the Productivity Commission (PC),<sup>711</sup> which recommended retaining the Regime but revising its declaration criteria. The Review's Terms of Reference require the Panel to consider whether the Regime is adequate, taking into account the PC's inquiry.

A number of submissions comment on the Regime, raising the primary issues of:

- whether it is in the public interest to retain the Regime;
- whether the PC's recommendations concerning the declaration criteria should be implemented; and
- whether there should be broader rights of review of access declarations and arbitrations before the Australian Competition Tribunal (the Tribunal).

## 24.1 COSTS AND BENEFITS OF THE NATIONAL ACCESS REGIME

Australia is unique among comparable jurisdictions in having a general access regime that may potentially apply to any privately owned infrastructure facility that exists within a supply chain.<sup>712</sup>

The Regime facilitates intrusive economic regulation of infrastructure assets. It overrides private property rights, mandating that the operator of an infrastructure facility make that facility available for use by a third party on terms and conditions (including price) determined by a regulatory body (the ACCC). By that process, the economic return that the operator is able to earn on its investment in the facility will be subject to regulation.

Economic regulation of privately owned assets can impose costs on the economy. In recommending the introduction of the Regime, the Hilmer Review was conscious of the economic costs that might be imposed:

The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment. Nevertheless, there are some industries where there is a strong public interest in ensuring that effective competition can take place ...<sup>713</sup>

The PC also noted the costs created by access regulation:

Access regulation also imposes costs, in particular where it adversely affects incentives for investment in markets for infrastructure services. There are costs associated with errors in setting access prices. For example, when prices are set too low, this can lead to delayed investment in infrastructure, or the non-provision of some infrastructure services. Regulated third party access can also impose costs on infrastructure service providers from coordinating multiple users of their facilities.<sup>714</sup>

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

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711 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra.

712 See, for example: Aurizon, sub, page 64; BHP Billiton, sub, page 28; and BCA, sub Main Report, page 79.

713 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 248.

714 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 7-8.

## Original objective of the regime

The Regime was introduced in 1995 based on the recommendation of the Hilmer Review.

One of the Hilmer Review's major recommendations was to introduce competition into various industries that, at that time, were largely in public ownership. Those industries included electricity, gas, rail, airports, ports and telecommunications. Each of those industries consisted of potentially contestable commercial activities that required the use of 'bottleneck' infrastructure facilities.

The Hilmer Review recommended introducing competition into those industries by separating them into their contestable and natural monopoly elements. As the contestable elements required access to the natural monopoly elements, the Hilmer Review recommended introducing a single national access regime to regulate that access.

Part IIIA of the CCA was originally enacted to provide a common framework for access to infrastructure within each of those industries. However, it soon became clear that each industry had distinct physical, technical and economic characteristics and that it was preferable to address access issues on an industry-by-industry basis. Distinct access regimes have subsequently emerged (see Box 24.2).

### Box 24.2: Existing access regimes

In the **electricity** industry, generators and retailers require access to the transmission and distribution wires. Access is governed by an industry-specific regime established by the National Electricity Law.

In the **gas** industry, producers and retailers require access to transmission and distribution pipelines. Access is governed by an industry-specific regime established by the National Gas Law.

In the **telecommunications** industry, providers of residential fixed line telephony and data services require access to fixed line infrastructure (historically copper wire, but currently being replaced by optical fibre and wireless services). Access to fixed line infrastructure is governed by an industry specific access regime, established under Part XIC of the CCA.

The interstate **rail** track network is the subject of an access undertaking given by the rail track's operator, Australian Rail Track Corporation (ARTC), to the ACCC under Part IIIA. Intrastate rail track networks are subject to access regimes established in the State or Territory in which the railway is located.

**Ports** throughout Australia are subject to various regulatory frameworks established in the State or Territory in which the port is located.

**Airport** facilities are not regulated by an industry-specific access regime and are potentially subject to declaration under Part IIIA. Currently, no airport services are the subject of declaration.

## What is the role of Part IIIA today?

Currently, only two services are declared under Part IIIA:

- the Tasmanian railway network was declared in 2007; and
- the Goldsworthy iron ore railway in the Pilbara, owned by BHP Billiton, was declared in 2008.

No-one has sought access to the Goldsworthy railway since it was declared.<sup>715</sup>

Access to the ARTC interstate<sup>716</sup> and Hunter Valley<sup>717</sup> rail networks, as well as the Co-operative Bulk Holdings bulk wheat port terminals in Western Australia,<sup>718</sup> are governed by access undertakings accepted by the ACCC under Part IIIA.

Since Part IIIA was enacted in 1995, four other services have been declared but the declarations have since expired or been revoked:

- airport services at Melbourne Airport — declared in 1997, expired in 1998;
- airport services at Sydney International Airport — declared in 2000, expired in 2005;
- airport services at Sydney Airport — declared in 2005, expired in 2010; and
- sewage transmission services on Sydney Water’s sewage reticulation network — declared in 2005. As the access seeker did not pursue access, the declaration was revoked in October 2009 following the enactment of a separate New South Wales access regime under the *Water Industry Competition Act 2006*.

Thus, few infrastructure assets are currently regulated under Part IIIA. For the most part, the bottleneck infrastructure assets cited by the Hilmer Review as requiring access regulation have been regulated by industry-specific access regimes. Those regimes are either established under a co-operative legislative scheme of the States and Territories (for example, the National Electricity Law and the National Gas Law) or under a legislative scheme of individual States and Territories (for example, port regulation).

However, Part IIIA continues to provide a legislative framework upon which industry-specific access regimes are based, acting as both a model and a ‘back stop’. Its legislative provisions are a model upon which industry specific access regimes have been developed. It also operates as a back stop to access regimes implemented through access undertakings accepted under Part IIIA (such as the ARTC rail track) or access regimes implemented under state and territory laws and certified as effective under Part IIIA. The undertaking and certification processes exempt the relevant facility from declaration under Part IIIA.

Accordingly, Part IIIA has an indirect role in supporting many industry-specific access regimes, even though its direct role is limited.

### What is the anticipated role of Part IIIA into the future?

In considering the anticipated role of Part IIIA into the future, the Panel has asked: What are the infrastructure facilities for which access regulation under Part IIIA would be expected to improve competition and economic efficiency in the Australian economy in the future? The Panel is of the view that, unless those facilities or categories of facilities can be identified, it is difficult to conclude that economic benefits outweigh the regulatory burden and costs imposed by Part IIIA on Australian businesses fits.

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715 BHP Billiton, sub, page 23.

716 Australian Competition and Consumer Commission 2008, [ARTC Interstate Rail access undertaking 2008](#).

717 Australian Competition and Consumer Commission 2011, [ARTC Hunter Valley access undertaking 2011](#).

718 ACCC, sub 1, page 133.



Thus, in the Draft Report, the Panel invited comment on:

- the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; and
- whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.

Submissions responding to this invitation reflect two different perspectives.

Some argue that it is unnecessary to identify the types of infrastructure to which Part IIIA might be applied in the future. The Australian Pipeline Industry Association is of the view that ‘the categories should be as broad as possible’; it considers that ‘effective use of the declaration criteria should ensure declaration only occurs where it is in the public interest’ (DR sub, page 1).

The New South Wales Government states, ‘it is appropriate to maintain the current scope of the application of the Part IIIA regime’ (DR sub, page 14). Similarly, the ACCC does not see a need to identify those facilities for which access regulation will be required in the future:

... the competition principles relating to access regulation and the back-stop role of Part IIIA mean that Australia’s competition policy can flexibly adapt to apply (or cease to apply) to facilities in response to changes in technological or other market conditions. (DR sub, page 84)

The NCC also supports the back stop role performed by Part IIIA. It submits:

One of the important objectives of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in various industries. The certification process is designed to allow effective state and territory regimes to supplant the National Access Regime where such regimes also incorporate the principles set out in the Competition Principles Agreement. A principles based approach to the scope and operation of access regulation is important. (DR sub, page 3)

Other submissions express a contrary view. Professors Ergas and Fels observe:

Regulatory and third party access regimes exist outside of the Part IIIA declaration framework for virtually all of the industries identified by the Hilmer Committee as requiring a framework for access. No industries where additional access regulation would be necessary were identified by the Productivity Commission in its review of the National Access Regime. (DR sub, page i)

The Business Council of Australia (BCA) (DR sub, page 23), Virgin Australia (DR sub, page 7) and the Department of Infrastructure and Regional Development (DR sub, page 5) raise the potential need for access regulation at airports in the future. The Department of Infrastructure and Regional Development also notes:

... the likelihood of capacity constraints at some airports and intermodal terminals in the next decade does have the potential to lead to an increase in access disputes ... The Department believes that in the event commercial negotiations fail to provide acceptable outcomes, the National Access Regime in its current form provides an important backstop to the regulatory system. (DR sub, page 5)

The regulatory issue that arises in respect of airports is generally one of monopoly pricing rather than access. Although airports are bottleneck facilities, their operators are not vertically integrated into upstream and downstream markets. Hence, they have limited incentive to reduce competition in

dependent markets,<sup>719</sup> but they have power to impose monopoly charges on users of their facilities. To some extent, Part IIIA can be used as a means of addressing monopoly pricing at airports. However, that is not its original objective and its processes are cumbersome and not well suited to that function. As noted above, particular airport services at Melbourne Airport, Sydney Airport and Sydney International Airport have, in the past, been declared under Part IIIA, but those declarations have lapsed. Virgin Australia describes Part IIIA as a second-best option for ensuring access at airports but submits that Part IIIA should remain available in respect of airports until a better airport regulatory model is put in place (DR sub, page 7).

Asciano raises the potential need for access regulation of privatised ports in the future. It observes that two issues arise from the creation of private port operator monopolies: vertical integration and monopoly pricing. If the port operator integrates into downstream services, such as stevedoring, incentives may arise to restrict access to port services by competing stevedoring businesses. Currently, Part IIIA addresses such issues where they arise, although Asciano is critical of the time involved in invoking that regime. Asciano submits that Part IIIA is not suited to addressing monopoly pricing issues and that ports require economic regulation at the time of privatisation (DR sub, pages 15-19).

Glencore Coal observes, 'The historical development of coal mining infrastructure in Australia has resulted in multi-user infrastructure, developed by State and Federal governments and now in the process of passing into the hands of private owners' (DR sub, page 1). With a focus on the east coast coal supply chains, Glencore Coal submits that Part IIIA should apply to the following kinds of mining infrastructure:

- below rail infrastructure, particularly existing below rail infrastructure and extensions of and expansions to that infrastructure;
- port terminal infrastructure; and
- port authority activities including rights to approve the construction of new terminals, control of vessel movements and port channel access. (DR sub, page 3)

However, Glencore Coal draws a distinction between privately developed single-user infrastructure and publicly developed multi-user infrastructure that has been privatised:

... we would regard it as being highly significant to the decision to impose regulation whether the infrastructure has been developed by a private party who has borne the cost and risk of that development without government support, or whether the infrastructure has been developed by government before being sold to a private owner as an existing multi-user monopoly, or with some other form of government support. (DR sub, page 11)

A number of other submissions note this distinction. Rio Tinto submits that single-user infrastructure used primarily for the export of goods that is closely integrated with the production of those goods should be excluded from declaration under Part IIIA. It observes:

Where infrastructure is integrated with the production of goods and has a single owner or operator, the production process and the operation of infrastructure are likely to be highly co-ordinated. Introducing a third party user onto such infrastructure will necessarily interrupt that coordination and create inefficiencies.

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719 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, pages 240-241; and Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 276 and 278.

... Where such infrastructure is used to produce and export goods, third party access is unlikely to generate any benefits for Australian consumers. Where goods are being exported it is highly likely they are being exported into a competitive global market and that access to infrastructure is not necessary to allow competition in such markets. (DR sub, pages 7-8)

BHP Billiton makes a similar submission (DR sub, page 7). It notes that, in 2005, the Exports and Infrastructure Taskforce<sup>720</sup> considered the impact of applying the Part IIIA declaration regime to export infrastructure, and concluded that excluding from the application of that regime:

... vertically integrated, tightly managed, logistics chains, especially those related to our export industries ... would minimise the risk that access regimes would disrupt and undermine the very areas of the economy that have performed best in the management of export related infrastructure. (DR sub, page 6)

Professors Ergas and Fels also consider that Part IIIA should not apply to vertically integrated commercial facilities, including facilities used to export commodities. They observe:

... any potential benefit from the Part IIIA declaration provisions would be limited, and any benefits could only be achieved at a considerable cost:

- The declaration of vertically integrated facilities used to export commodities whose prices are determined in competitive global markets would not affect the prices of these commodities. Declaration would therefore not lead to competition benefits.
- The declaration of vertically integrated commercial facilities operating in a competitive market context would give rise to a range of economic costs that may be very large. These include the ongoing costs of disputes, the consequences of pricing inefficiencies, inefficiencies arising from the disruption of vertically integrated processes, and dynamic (investment) inefficiencies'. (DR sub, page i)

Three important themes emerge from the foregoing.

First, Part IIIA has played an important role in developing industry-specific access regimes for the bottleneck infrastructure identified by the Hilmer Review and introducing competition in those industries.

Second, in the future, Part IIIA will continue to provide a back stop to those industry-specific access regimes. While it would be possible to devise other legislative arrangements to maintain the current access regimes, it seems unnecessary to disrupt the role performed by Part IIIA in that context. That back stop role also applies to airports and ports. Although the primary economic issue at ports and airports is monopoly pricing, access problems might arise in the future that could be addressed by Part IIIA.

Third, beyond the circumstances envisaged by the Hilmer Review, imposing an access regime upon privately developed single-user infrastructure is more likely to produce inefficiency than efficiency, impeding the competitiveness of Australian industry. This is particularly so for vertically integrated export industries that are subject to the constraints of international competition in the final goods market.

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720 The Exports and Infrastructure Taskforce was established to identify and report to the then Prime Minister on 'any bottlenecks, of a physical or regulatory kind, in the operation of Australia's infrastructure that may impede the full realisation of Australia's export opportunities'.

In the Panel's view, it is important to preserve the beneficial aspects of the Regime while modifying its economically detrimental aspects.

## Conclusions of the Productivity Commission

The PC considered that the Regime results in a range of potential benefits:

- improvements to economic efficiency where the Regime reduces monopoly pricing, increases competition in dependent markets, or results in more efficient investment;
- benefits from greater consistency in access regulation across the economy; and
- administrative and compliance cost savings and more effective and efficient infrastructure regulation if the Regime supplants other less effective policy responses, or if its role as an overarching access regime improves other access regimes.<sup>721</sup>

However, the PC also recognised that the Regime imposes costs:

- access regulation may result in economic distortions including adverse effects on investment in markets for infrastructure services;
- administrative and compliance costs can be substantial; and
- where access regulation is applied, there might be production costs incurred by the infrastructure service provider from co-ordinating multiple users of its facility.<sup>722</sup>

The PC concluded that the Regime had net benefits and should be retained:

Based on a qualitative assessment of the available data, the Commission has determined that the Regime is likely to generate net benefits to the community. The Commission considers that the Regime should be retained, and its scope confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third party access. Renewed emphasis should be given to ensuring that the Regime better targets the economic problem to reduce the risk of imposing unnecessary costs on the community and deterring investment in markets for infrastructure services for little gain.<sup>723</sup>

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721 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 215.

722 Ibid., pages 215-216, 237-240.

723 Ibid., page 10.

### The Panel's view

The National Access Regime in Part IIIA of the CCA was originally established to enable third-party access to identified bottleneck infrastructure where it was apparent that economic efficiency would be enhanced by promoting competition in markets that were dependent upon access to that infrastructure.

The bottleneck infrastructure identified by the Hilmer Review included electricity wires, gas pipelines, telecommunication lines, freight rail networks, airports and ports. Distinct access regimes have emerged for these different types of infrastructure, reflecting their distinct physical, technical and economic characteristics. Those regimes appear to be achieving the original policy goals identified by the Hilmer Review. Part IIIA has played an important role in developing these access regimes.

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

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

The Panel agrees with the conclusion of the recent PC inquiry that the National Access Regime is likely to generate net benefits to the community, but its scope should be confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.

## 24.2 THE DECLARATION CRITERIA

The scope of the Regime is largely governed by the criteria for declaration (set out in Box 24.1). An infrastructure facility cannot be declared (activating the Regime) unless the relevant Minister is satisfied that all of the criteria for declaration are satisfied.

The PC recommended the following changes to the declaration criteria in Part IIIA:

- that criterion (a) will be satisfied if access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market;
- that criterion (b) will be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility;
- as an alternative recommendation, that criterion (b) will be satisfied where it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- that criterion (f) will be satisfied if access on reasonable terms and conditions through declaration would promote the public interest.<sup>724</sup>

A number of submissions address the proposed changes to criteria (a), (b) and (f).

<sup>724</sup> Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 249-252.

## Criterion (a)

As outlined in Box 24.1, criterion (a) is ‘that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service’.

The PC concluded that criterion (a) should be expressly focused on the specific effect of declaration (rather than access) on promoting competition in dependent markets. It reasoned that the relevant comparison should be between the future state of competition in a dependent market without declaration (the status quo) and a situation in which the service is declared. The test should not be satisfied where there is already effective competition in dependent markets because declaration would be unlikely to promote a material increase in competition.<sup>725</sup>

No submissions oppose the proposed change to criterion (a) and the change does not appear to be controversial. However, a number of submissions argue that the PC’s recommendation does not go far enough. Professors Ergas and Fels observe that the word ‘material’ is intended to be read as ‘not trivial’,<sup>726</sup> thus creating a low threshold, and that the criterion can be met in circumstances where claimed increases in competition in a dependent market are hypothesised or speculative, and where the dependent market is of no or very limited national significance (DR sub, pages v and 31).

They recommend that criterion (a) be amended such that access must result in a ‘substantial improvement in competition’ (DR sub, page 60). They also submit that criterion (a) should require that the dependent market, in which competition is to be improved by access, should be ‘substantial or nationally significant’ (DR sub, pages 60-61).

Similarly, BHP Billiton draws attention to the conclusions of the Tribunal when reviewing the declaration of the Goldsworthy rail line in the Pilbara. The Tribunal concluded that access to the Goldsworthy rail line would not increase competition in the downstream global market for iron ore as that market was already subject to effective competition.<sup>727</sup> It also concluded that access would not increase competition in the upstream market for iron ore tenements in the Pilbara observing, ‘In the case of the Goldsworthy line, it has the fewest tenements surrounding it, many of which are within trucking distance to the port. Access to that line will have only a minor effect on the tenement market’.<sup>728</sup> Nevertheless, it concluded that criterion (a) was satisfied because access would increase competition in a market for rail haulage for iron ore in the vicinity of the Goldsworthy railway, and that that increase was more than trivial.<sup>729</sup>

In respect of that conclusion, BHP Billiton observes:

BHP Billiton is the only supplier and the only customer in that ‘market’. In the almost six years since the Goldsworthy railway was declared, no party has sought access to the Goldsworthy railway or otherwise sought to enter that ‘market’, and declaration has had no impact on competition in that “market”. The promotion of competition in that ‘market’, even had it occurred, could have no expected impact on national competitiveness. (DR sub, page 18)

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725 Ibid., pages 172-173.

726 See also *Re Fortescue Metals Group* (2011) 271 ALR 256 at [583].

727 Ibid, at [1083] and [1084].

728 Ibid, at [1131].

729 Ibid, at [1144] - [1147].

The Panel agrees with the PC's recommendation to re-focus criterion (a) on the specific effect of declaration. However, the Panel is also concerned that criterion (a) sets a low threshold for declaration. The burdens of access regulation should not be imposed on the operations of a facility unless access is expected to produce significant efficiency gains from competition. This requires that competition be increased in a market that is significant and that the increase in competition is substantial.

## Criterion (b)

As outlined in Box 24.1, declaration criterion (b) is 'that it would be uneconomical for anyone to develop another facility to provide the service'.

Until the High Court decision in the Pilbara rail access case,<sup>730</sup> the NCC and the Tribunal had interpreted criterion (b) as a 'natural monopoly' test. Under that test, it would be uneconomical to develop another facility if the facility in question could provide society's reasonably foreseeable demand for the service at a lower total cost than if it were to be met by two or more facilities.

In the Pilbara rail access case, the High Court rejected that interpretation of criterion (b) in favour of a 'private profitability' or 'economic feasibility' test:

... requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility.<sup>731</sup>

The High Court's interpretation of criterion (b) gave effect to clause 6 of the CPA, which was entered into by all Australian jurisdictions following the Hilmer Review. By clause 6, all jurisdictions agreed that the Regime should be a regime for access to services provided by means of significant facilities where, among other things:

- it would not be economically *feasible* to duplicate the facility; and
- access to the service is *necessary* in order to *permit* effective competition in a downstream or upstream market.

Those tests require an evaluation of whether duplication is feasible or practical for a participant in the market.<sup>732</sup>

Understood in that way, criterion (b) directs attention to the competition objective that lies at the heart of Part IIIA: whether the facility is a bottleneck, in the sense that access to the facility is necessary or essential to participate in an upstream or downstream market. Applying criterion (b) in that way promotes both competition and economic efficiency. If it is commercially feasible to develop another facility, the facility owner and access seeker have commercial incentives to reach an access agreement where it is efficient to do so. Where the facility can be bypassed, the facility owner has no incentive to refuse access and has an incentive to allow access if its overall costs will thereby be reduced.

If the facility owner and access seeker are unable to reach agreement, it is a strong indication that substantial inefficiencies will result from access. Even if developing another facility causes average industry costs to increase, that occurs in many industries in which the presence of bottlenecks is not an issue.

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<sup>730</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

<sup>731</sup> *Ibid.*, at [77].

<sup>732</sup> *Ibid.*, at [96].

Further, the development of an alternative facility is likely to lead to more intense competition between the facility owner and the access seeker than would arise under access. There are substantial economic benefits from facilities-based competition including the expansion of overall capacity in the market, technological innovation, experimentation with different operational methodologies and the avoidance of co-ordination costs and other diseconomies.

As discussed above, criterion (a) also has a competition focus, but it is a different focus to criterion (b). Criterion (b) asks whether the facility is a bottleneck in the sense that it is commercially infeasible to bypass the facility. If the facility is a bottleneck, criterion (a) asks whether declaration will increase competition in a dependent market. Such a range of competitors may already be participating in the dependent markets through other means that access to the facility will not have a material effect on competition. This is particularly so in a dependent market that is export-oriented.

In its recent inquiry, the PC concluded that neither the 'private profitability' test approved by the High Court nor the 'natural monopoly' test previously applied by the NCC was apt. The PC was concerned that the private profitability test might be difficult to assess in practice and give rise to disputes (as argued by the ACCC and the NCC in their submissions to the PC inquiry). On the other hand, the natural monopoly test as traditionally applied was narrowly focused on demand for the service supplied by the relevant infrastructure, rather than total market demand.

The PC concluded that a new test was preferable:

The Commission's preferred approach to criterion (b) accounts for both the total demand in the market in which the infrastructure service is supplied, and the production costs incurred by infrastructure service providers from coordinating multiple users of infrastructure.

Criterion (b) should be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility.<sup>733</sup>

The PC also concluded that, if the test were to remain as a 'private profitability' test, criterion (b) should be amended to exclude any consideration of whether the operator of the infrastructure service was able to duplicate the facility:

If criterion (b) continues to be applied as a private profitability test, the Commission considers that the term 'anyone' should not include the incumbent infrastructure service provider. This is because an incumbent service provider would avoid access regulation if it successfully argued that it could profitably duplicate its own facilities (although it would not be required to do so). All else equal, having the incumbent duplicate, or say it will duplicate, its facility would do little to nothing to promote competition.<sup>734</sup>

The NCC (sub, page 10 and DR sub, page 5), Fortescue (sub, page 1), AngloAmerican Metallurgical Coal (sub, page 5), Glencore Coal (sub, page 8 and DR sub, page 10), Baker and McKenzie (DR sub, page 7), Infrashare (DR sub, page 5) and the ACCC (DR sub, page 85) support the PC's proposed change to criterion (b).<sup>735</sup>

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733 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 19.

734 *Ibid.*, page 20.

735 The Queensland Competition Authority 'has not formed a conclusive position on the PC's market-based approach ... [but] considers both the natural monopoly test and the PC's market based approach are superior to the exiting private profitability test' (DR sub, page 2).



BHP Billiton (sub, page 34 and DR sub, page 17), Rio Tinto Iron Ore (sub, page 2 and DR sub, page 9) and Professors Ergas and Fels (DR sub, page 61) do not support the PC's proposal and support instead the 'private profitability' test. Professors Ergas and Fels argue that a natural monopoly test divorces criterion (b):

... from its original purpose: to ensure that access is available where an efficient access seeker requires it to compete (and that a facility was hence essential for competition), and that a facility could not, practically and reasonably, be duplicated. (DR sub, page 20)

In weighing up the 'private profitability' test against the PC's recommendation, Professor Hilmer remarked in 2013:

The PC approach may do better on public benefit, while the High Court approach may do better on certainty and speed of resolution. Either could work, with the proviso that there be a further review after say 5 years ...<sup>736</sup>

The Panel considers that maintaining the 'private profitability/economically feasible' test for criterion (b) will best promote the competition policy objectives underpinning Part IIIA. Under that test, access regulation will only be considered where there is a bottleneck that needs to be addressed. Absent a bottleneck problem, competition and economic efficiency will be advanced if market participants are free to negotiate private arrangements concerning access.

The alternative approach, evaluating whether a facility is a natural monopoly, suffers from a number of shortcomings.

First, as observed by Professors Ergas and Fels, there are many instances in which such a test:

... will almost trivially be met; for example, in respect of any facility that is dimensioned to operate with spare capacity, so that it would be cheaper for a third party to share an existing facility than to construct their own or use a substitute facility. (DR sub, page 20)

Second, the test requires the decision-maker to evaluate least-cost solutions in complex industries, burdened by information asymmetries where the risk of error is high. In contrast, and as observed by the High Court, the 'economically feasible' test:

... is a question that bankers and investors must ask and answer in relation to any investment in infrastructure. Indeed, it may properly be described as the question that lies at the heart of every decision to invest in infrastructure, whether that decision is to be made by the entrepreneur or a financier of the venture.<sup>737</sup>

It is important to recognise that the test for criterion (b) posited by the PC, viz., whether total foreseeable market demand for the infrastructure service could be met at least cost by the facility, is a relevant factor in assessing whether developing an alternative facility is economically feasible. That was recognised by the High Court:

... if the new facility is not more efficient than the existing facility, it is to be doubted that development of the new facility in competition with a natural monopoly would be

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736 Professor F J Hilmer 2013, *National Competition Policy: Coming of Age*, Annual Baxt Lecture on Competition Policy, Melbourne, page 22.

737 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [106].

profitable. Especially would that be so where, as here, the capital costs of establishing the new facility would necessarily be very large.<sup>738</sup>

Nevertheless, the Panel considers that criterion (b) should not be amended to make that test the focus of the enquiry. Rather, criterion (b) should continue to ask a competition question: whether it is economically feasible to bypass the facility. However, the Panel considers that it is desirable to revise criterion (b), as suggested by the PC, so as to exclude the service provider from the assessment of feasible duplication by anyone.

The practical operation of the criterion should be re-assessed after a suitable interval of five to 10 years.

### Criterion (f)

As outlined in Box 24.1, declaration criterion (f) is that 'access (or increased access) to the service would not be contrary to the public interest'.

The PC recommended criterion (f) be amended to strengthen the public interest test. It observed:

Given the costs associated with access regulation, it is appropriate that a service can only be declared where the decision maker is satisfied that declaration is likely to generate overall gains to the community. To support this, criterion (f) would be better drafted as an affirmative test that requires the public interest to be *promoted* (as opposed to access being 'not contrary to' the public interest). This approach is consistent with the focus of the National Competition Policy reforms and the guiding principle that competition will promote community welfare by increasing national income through encouraging improvements in efficiency.

...

Assessments under criterion (f) should specifically include any effects on investment (positive and negative) in markets for infrastructure services and dependent markets, and the administrative and compliance costs that would arise due to declaration. This change would also require criterion (f) to be framed as a test that assesses factors that affect the public interest with and without declaration.<sup>739</sup>

Rio Tinto Iron Ore (sub, page 9 and DR sub, page 9), BHP Billiton (DR sub, page 19), the Law Council of Australia — Competition and Consumer Committee (sub, page 47), the BCA (sub, Main Report, page 78) and Professors Fels and Ergas (DR sub, page 62) support the PC's proposed changes to criterion (f).

The NCC (sub, pages 10-11) and AngloAmerican Metallurgical Coal (sub, pages 5-6) do not support the PC's proposal.<sup>740</sup> The NCC argues:

There is a genuine risk that raising the hurdle higher will render declaration impossible and as a result nullify any effective threat from declaration as a means of encouraging private settlements of access disputes. (sub, page 11)

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738 Ibid., at [102].

739 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 20-21.

740 Infrashare do not comment directly on criterion (f) but argue with respect to the public interest test that 'the Panel should be seeking to make it easier, not more difficult, for access seekers to have critical infrastructure declared' (DR sub, page 6).

A foundational principle of competition policy is that regulatory intervention into markets should only occur where the public interest is promoted. Although criteria (a) and (b) are important considerations in assessing whether an infrastructure facility should be declared, they do not exhaust the considerations that may bear upon the public interest in a given case.

In particular, as the PC observed,<sup>741</sup> third-party access may cause inefficiencies in dependent markets; in particular, access may negatively affect the ability of the infrastructure owner to co-ordinate its supply chain in the most efficient manner and may lead to the need to undertake additional capital investment in dependent markets (for example, larger stockpiles or other facilities). All factors that bear upon the overall public interest, including the history of the ownership of the asset, should be taken into account in the declaration decision.

### The Panel's view

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

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

### Other access regimes

As outlined earlier, a majority of access is regulated through state government or industry-specific access regimes. These regimes are closely linked to the national regime. As the ACCC notes:

Along with the competition principles, Part IIIA provides an umbrella or template from which the industry-specific access regimes are drawn. Part IIIA has been influential in underpinning key principles in industries such as energy, telecommunication, ports, water and rail. (DR sub, page 82)

The Panel considers that the CPA should be updated to reflect the revised declaration criteria. As the PC observed in relation to their recommendations:

There is a strong rationale for aligning the principles in clause 6(3) of the CPA with the relevant declaration criteria in the CCA. Clause 6 of the CPA provides a framework for state and territory access regimes. Therefore, if ... amendments to the declaration criteria are not reflected in clause 6(3), state and territory access regimes may not be appropriately targeted at the economic problem that access regulation should address. The differences in wording between clause 6(3) and the declaration criteria are also likely to increase uncertainty over the interpretation of both.<sup>742</sup>

741 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 100-105.

742 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 255.

In making amendments to the declaration criteria, and the associated changes to the CPA, the Panel is aware that the criteria will flow on to state and industry-specific access regimes. The Panel believes that national conformity in access regimes is important for regulatory certainty across Australia.

#### The Panel's view

The Competition Principles Agreement should be updated to reflect the revised declaration criteria. This should bring about national conformity in the various state and industry-specific access regimes.

### 24.3 REVIEW OF ACCESS DECISIONS BY THE AUSTRALIAN COMPETITION TRIBUNAL

The NCC must decide whether or not to recommend declaration of an infrastructure service within 180 days of receiving the application. The Minister must decide whether or not to declare the service within 60 days of receiving the recommendation from the NCC.

The Minister's decision to declare or not to declare a service is subject to review by the Tribunal. ACCC arbitration decisions in respect of a declared service are also subject to review by the Tribunal.

Since Australia enacted the former Trade Practices Act in 1974, the Tribunal (formerly the Trade Practices Tribunal) has fulfilled an important role in both the development and the administration of the law. While the Tribunal is given a number of functions under the CCA, its primary function is as a body of review. It is empowered to undertake merits reviews of various decisions of the ACCC, including authorisations and access arbitrations. Its particular strength lies in its composition. For the purposes of hearing and determining a matter that comes before it, the Tribunal is constituted by a presidential member (who is a Federal Court judge) and two other members (who have qualifications in industry, commerce, economics, law or public administration).

In the past few years, the role of the Tribunal in reviewing declaration decisions of the Minister and arbitration decisions of the ACCC has been narrowed. By amendments to the CCA made in 2010, the Tribunal's review is largely confined to examining the information taken into account by the NCC (in making a recommendation) or the ACCC (in making an arbitration decision), subject to the ability to request additional information the Tribunal considers reasonable and appropriate.<sup>743</sup>

Additionally, in the Pilbara rail access case, the High Court ruled that a 'reconsideration' of the Minister's decision to declare or not declare a service was different to the Tribunal's usual functions in a re-hearing and involved 'reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker'.<sup>744</sup>

Rio Tinto Iron Ore submits:

The great strength of the Tribunal process prior to the amendments was that primary evidence ... was tested through cross-examination ... This allowed a much more rigorous examination than is possible before the NCC or Minister and is therefore much more likely to arrive at the correct result. (sub, page 10)

<sup>743</sup> *Competition and Consumer Act 2010*, sections 44ZZOAAA and 44ZZOAA.

<sup>744</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60].

Access decisions should be made in a timely manner. The amendments made to the CCA in 2010 were intended to speed up declaration and arbitration decisions, including review by the Tribunal. At that time, the determination of the Pilbara rail access applications had taken many years — an undesirable outcome.

That said, decisions to declare a service under Part IIIA or determine terms and conditions of access are very significant. The Hilmer Review expected that such decisions would be infrequent. As noted above, that is also the view of the PC which re-stated that the scope of Part IIIA should be ‘confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access’.<sup>745</sup>

In circumstances where access declarations and arbitrations are expected to be rare, and the costs of making a wrong decision are likely to be high, the Panel supports enabling a thorough examination of the costs and benefits of the decision while avoiding unnecessary delays. An appropriate balance can be achieved between empowering the Tribunal to undertake merits reviews of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, and maintaining suitable statutory time limits for the review process.

### The Panel’s view

The Australian Competition Tribunal fulfils an important role in both the development and the administration of Australia’s competition laws.

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high.

The Panel favours empowering the Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

## Implementation

Updating the CPA to reflect the revised declaration criteria will require agreement of the States and Territories. Since amendments to the declaration criteria could affect existing access declarations, the Australian Government should work closely with the States and Territories to ensure there are no unintended consequences. However, given Part IIIA was recently reviewed by the PC, there should be no need for further public consultation on the proposed amendments.

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745 Productivity Commission 2013, *National Access Regime*, Inquiry Report no.66, Canberra, page 2.

### **Recommendation 42 — National Access Regime**

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

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

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

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