

COMPETITION POLICY REVIEW

Submission

Caron Beaton-Wells¹

10 June 2014

I welcome the opportunity to make this submission to the Competition Policy Review (CPR). This submission is in addition to the submission that I have made jointly with Brent Fisse. The latter submission concerns the provisions of the *Competition and Consumer Act 2010 (CCA)* that deal with cartel conduct, and with the approach taken to the enforcement of those provisions.

This submission concerns the functions and powers of the Australian Competition and Consumer Commission (ACCC) and is relevant to the terms of reference of the CPR that direct the review panel to examine the effectiveness of relevant agencies and institutional arrangements generally.² In particular, it is relevant to questions bearing upon the ‘Administration of Competition Policy’, identified in the CPR Issues Paper as follows:

- are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?³
- what institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?⁴

The submission makes two proposals directed at strengthening the capacity of the ACCC to enforce the CCA effectively as well as its capacity to have input to the ongoing development and implementation of Australian competition policy. Those proposals are that:

1. the ACCC undertake regular rigorous ex post review and evaluation of its enforcement decisions and processes; and
2. the ACCC be given a consolidated and explicit power and resources to develop a program of market studies.

The case for these proposals and the considerations relevant to implementing them are set out in detail in a paper that I presented at the Competition Law Conference on 24 May 2014. That paper is annexed to and should be treated as part of this submission.

¹ Professor, Melbourne Law School, University of Melbourne; Director, University of Melbourne Competition Law & Economics Network, Director of Studies, Competition and Consumer Law Specialty, Melbourne Law Masters; c.beaton-wells@unimelb.edu.au

² See CPR Terms of reference, [2], [3].

³ See CPR Issues Paper, 14 April 2014, p44.

⁴ See CPR Issues Paper, 14 April 2014, p44.

Annexure

THE ACCC: ROOTS AND BRANCHES[#]

Proposals to enhance ACCC effectiveness

Professor Caron Beaton-Wells^{*}

Competition Law Conference

Sydney, 24 May 2014

THE ACCC: ROOTS AND BRANCHES[#]

Proposals to enhance ACCC effectiveness

Professor Caron Beaton-Wells^{*}

INTRODUCTION

The Australian Competition and Consumer Commission (ACCC) has deep roots and an extensive network of branches. Now 40 years old, well-established and generally highly regarded, the ACCC has the stability, independence and confidence to perform its functions. It is also an agency with a wide-ranging mandate, significant responsibilities and exceptional powers which enable it to have a substantial impact on the welfare and lives of all Australians.

The ACCC's primary root is the strong and sustained support of governments on both sides of politics and at both federal and State levels for a single independent public agency and one with considerable resources and powers to discharge its statutory responsibilities in enforcing the *Competition and Consumer Act 2010 (CACCA)*. Political support of this kind is not enjoyed by every competition authority around the world.⁵

[#]The title of this article derives from the name originally given to the Competition Policy Review, that is a 'root and branch' review of competition policy and law: see B Billson, MP, 'Review of Competition Policy', Media Release, 4 December 2013.

^{*}Melbourne Law School, University of Melbourne. Director, Competition Law & Economics Network; Director of Studies, Competition and Consumer Law specialty, Melbourne Law Masters; Associate Dean (Melbourne Law Masters). The author is grateful to several colleagues and both former and current ACCC representatives who answered questions relating to matters canvassed in this paper, as well as the ACCC Media Unit that supplied the data in notes 9, 10. She is also grateful for helpful feedback provided by delegates at the Competition Law Conference, Sydney, 24 May 2014, at which an earlier version of the article was given as a paper. The usual disclaimers apply.

⁵ Cf the unceremonious sacking of the Chairman of the Competition Commission of Pakistan following the Commission's imposition of a significant fine on a cement cartel: 'Khalid Mirza sacked', *The News*, 5 September 2009. Less dramatically but ultimately with similar effect for the agency, in the UK the Office of Fair Trading was the subject of regular criticism by

An important secondary root is the respect that the ACCC has earned from the business community and the legal and economics professions.⁶ This is not to say that the respect is not begrudging at times or that the agency is free from criticism. As would be expected of any enforcement body, the ACCC's strategies, processes or interpretations adopted in relation to individual cases or issues are often questioned publicly by stakeholders.⁷ However, it has been over a decade since the ACCC has experienced any credible attack on its governance or institutional values and integrity.⁸

The esteem in which the ACCC is generally held by those with whom it most closely works is reflected in the positive feedback it receives in annual reviews conducted by the Global Competition Review (GCR) for the purposes of its ranking of competition authorities world-wide.⁹ Such feedback would reflect not just views of ACCC enforcement decisions and actions but also the ACCC's commitment to stakeholder engagement - a commitment that appears to have been reinvigorated in recent years. In its 2013-14 Corporate Plan, the ACCC identified one of its key goals as being to 'increase our engagement with the broad range of groups affected by what we do'.¹⁰

government bodies (see, eg, UK Department of Business, Innovation and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011; National Audit Office, *The Office of Fair Trading: Enforcing Competition in Markets*, 2005-2006, HC 593 (UK)), expressing the view that the OFT had misallocated its resources, taken too long to conclude investigations often with no or minor infringements found, and under-enforced the law. Ultimately these concerns led to the government's decision to merge the OFT with the Competition Commission to create a new Competition and Markets Authority.

⁶ 'Secondary' only in the sense that, in the absence of strong political backing, it is possible that the ACCC would not enjoy the same degree of support by other stakeholders.

⁷ See, eg, 'ACCC head rapped for denying advice on NBN', *The Australian*, 29 October 2010; 'Fearless watchdog or his master's voice', *The Australian*, 11 August 2008; 'Samuel in Wrong on Pratt, Say Jews', *The Australian*, 16 July 2008; 'Metcash black eye puts ACCC's new boss Rod Sims in a spot', *The Australian*, 26 August 2011.

⁸ The last such 'attack' was in the context of the Dawson review in which the ACCC's corporate governance, including its commitment to transparency, accountability and fairness (particularly in relation to the use of the media) was heavily criticised by some business commentators and organisations. See Trade Practices Review Committee, *Report*, April 2003, ch 11. The Committee recommended that consideration be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the CACA and that the Act be amended to establish a consultative committee to advise the ACCC on the administration of the Act.

⁹ Since 2007, the GCR has published an annual ranking of 40 of the world's competition agencies. To assemble the rankings, the GCR supplements its own examination of the agencies' work with interviews and questionnaires that elicit views of practitioners and of the agencies themselves. GCR does not claim scientific precision. It tries to provide a rough idea of where the agencies stand. In the 2013 review, the ACCC was ranked as 4 star ('Very good'), alongside the competition authorities of Japan, Brazil, The Netherlands, Spain and the UK (OFT). In the 5 star category ('Elite') were the competition authorities of the EU, France, Germany, the UK (Competition Commission), and the US (DOJ and FTC). In 2012 GCR named the ACCC the 'International Agency of the Year' in an Asia-Pacific, Africa and Middle East grouping: see <https://www.accc.gov.au/media-release/accc-receives-international-agency-of-the-year-award-from-global-competition-review>.

¹⁰ ACCC and AER, *Corporate Plan & Priorities 2013-2014*. The plan identifies the following strategies to achieve this goal: 'Implement a comprehensive strategy to ensure effective communication with our diverse audiences that supports our goals. Undertake an active program of stronger and managed partnerships with a broad range of organisations that can assist us deliver outcomes that impact favourably on consumer welfare.' The ACCC also engages with stakeholders through a number of consultative committees (see <http://www.accc.gov.au/about-us/consultative-committees>), and ACCC representatives (the Chairman especially) make a large number of speeches to wide range of gatherings (see <http://www.accc.gov.au/media/speeches>). In his inaugural speech to the Law Council Competition and Consumer Committee, shortly after his appointment, Chairman Sims made it clear that he regarded an effective communication strategy as critical to the effectiveness of the ACCC: see R Sims, 'The ACCC: Future Directions', 27 August 2011. See further, R Sims, 'Economic philosophy & the ACCC (& we are all economic philosophers)', National Press Club, 27 March 2013.

The ACCC also enjoys a high profile and general support amongst the public,¹¹ support that is important in assuring ongoing political support and also in insulating it from ad hoc attacks by hostile business interests.¹² Crucial to its public profile, but also testament to the interest of the public in its activities, is the regularity with which the media contacts the ACCC with inquiries¹³ and reports on ACCC activity.¹⁴ A public survey conducted by the University of Melbourne in 2010 found 77% of the public to have heard or read about the ACCC.¹⁵ That a substantial proportion of Australians knew the names of two prior ACCC Chairmen was also a striking finding.¹⁶ Few competition heads around the world could lay claim to such high levels of public awareness.¹⁷

The ACCC's branches reach into every sector of the Australian economy, with functions and powers extending to every entity and individual engaged in business and encompassing almost every aspect of commercial activity. Its reach and scope are in large part a function of its status as a national agency with responsibilities for enforcing not just competition but also fair trading and consumer laws. In addition to taking action to enforce the prohibitions under those laws, the ACCC has adjudicatory functions in relation to clearances, notifications and authorisations that provide for exemptions from liability under the prohibitions. The ACCC also administers codes of conduct and has price surveillance powers and regulatory functions in specific utility sectors, as well as under the general infrastructure access regime. Moreover, from time to time, the government calls upon the ACCC to assist in monitoring compliance with new and often controversial or politically sensitive initiatives. The government's recruitment of the ACCC to monitor implementation of the GST and, more recently, to monitor the effects of the carbon tax scheme are cases in point.¹⁸ Finally, the ACCC has a general educative role intended to ensure that business, consumers and others are aware of their rights and obligations under the CACA.

¹¹ This is not to say that members of the public do not experience frustration that the ACCC is not 'doing more' or is not more effective in addressing issues such as petrol prices. Often such frustrations are borne of a misunderstanding of the ACCC's role and powers. At times they may also be attributable to the fact that the ACCC is generally very wary of publishing information about investigations, a matter commented on recently in Senate Economic References Committee, 'The impacts of supermarket price decisions on the dairy industry Final report', September 2011, pp81-88.

¹² See, eg, the criticisms in 'Allan Fels a "smiling assassin", says Harvey Norman boss', AAP Financial News Wire, 29 June 2003; 'ACCC slammed over tough merger rules', *Australian Financial Review*, 16 January 2007; 'Business wary of ACCC', *Australian Financial Review*, 7 November 2013.

¹³ Over the 39 months from January 2011 to March 2014 inclusive, the ACCC received 7,488 media inquiries, that is, an average of 192 per month, 48 per week and 9.6 on a daily basis. Source: data provided to the author by the ACCC media unit.

¹⁴ In 2012-2013 the ACCC maintained a high level of media contacts and releases contributing to between 30 and 60, and not infrequently much higher, mentions in the print media and the broadcast media on a daily basis. In the period from January 2012 to March 2014 inclusive the ACCC issued 668 media releases (an average of 25 per month), as well as making use of social media such as Facebook (in March 2014, the ACCC Consumer Rights Facebook page had 2379 likes) and Twitter (as at March 2014, the ACCC had 2297 followers). Source: data provided to the author by the ACCC Media Unit.

¹⁵ See C Beaton-Wells and C Platania-Phung, 'Anti-Cartel Advocacy: How Has The ACCC Fared?' (2011) 33(4) *Sydney Law Review* 735, 761-2.

¹⁶ 35.7% of survey respondents had heard of or read about Allan Fels, and 20% of Graeme Samuel.

¹⁷ Other perhaps than in the exceptional case in which competition heads are alleged to have engaged in criminal activity: see eg 'Competition Commission boss quits over porn', *IOL News*, 20 October 2013.

¹⁸ An interesting account of the politics behind the government's decision to hand GST monitoring to the ACCC in the late 1990s is given in F Brenchley, *A Portrait of Power*, 2003, ch 6.

The breadth of the ACCC's reach is attributable also in part to the fact that, while determination of liability and the imposition of penalties and other orders remains formally a judicial function in this country, the agency has powers and has developed generally accepted practices that allow it to act as the de facto decision-maker in many instances, including without any statutory basis for its decisions. Its practice relating to informal clearance of merger proposals is a long-standing and, to many international observers, striking example of this. Its policies relating to the grant of full immunity from proceedings to the first-to-report cartel party and to bargaining on discounts and other rewards for subsequent cooperating parties that make admissions are also illustrative of ways in which the ACCC in effect usurps the judicial role.¹⁹ More recently, under the Australian Consumer Law, the ACCC has been given the power to impose substantiation, public warning and infringement notices - yet further means by which it is able to address or dispose of potential breaches of the law without reference to the courts.²⁰ The consequence of such powers and practices is that, in a growing number of contexts, the ACCC performs the roles of investigator, prosecutor and (at least de facto) adjudicator and, in many instances, without effective avenues of review and appeal by affected parties.²¹

Finally, the ACCC's branches extend beyond Australia's borders, having an impact on business transacted in other countries and the global economy. While there are constraints on extra-territorial jurisdiction curtailing the extent to which the agency can proceed against foreign businesses and individuals,²² ACCC decisions relating to international mergers and cartels that have operations or effects in Australia can still influence the degree to and way in which such activity proceeds in other places.²³ In addition, the agency is part of an increasingly organised network of competition authorities around the world that act in a cooperative and coordinated fashion in responding to anti-competitive conduct that has transnational implications.²⁴ Moreover, it plays an active, even leadership, role in international fora (particularly, in recent years, in the Asia-Pacific region) through

¹⁹ Pursuant to the *Immunity Policy on Cartel Conduct* 2009 and the *Cooperation Policy on Enforcement Matters* 2002. For a critique of the ACCC's approach to 'settlements', see C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, 2011, ch 11, section 11.3. ACCC practices relating to submissions on agreed penalties have come under renewed judicial scrutiny following the High Court's decision in *Barbaro v The Queen* (2014) 88 ALJR 372: see *Australian Competition and Consumer Commission v Flight Centre Limited (No 3)* [2014] FCA 292 at [56]; cf *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2014] FCA 336 (4 April 2014) at [113]-[152].

²⁰ The ways in and extent to which it is using the infringement notice power has attracted criticism from the Law Council of Australia. See Letter from the Deputy Secretary-General of the Law Council to the ACCC Executive General Manager, Enforcement and Compliance dated 20 May 2012, at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2592%20-%20Proposed%20Infringement%20Notice%20Guide.pdf>.

²¹ These issues have been canvassed elsewhere and are not the subject of this paper. For example, the growth in administrative power and extra-curial enforcement mechanisms at the expense of the judicial role was a theme in the keynote address at the CLC in 2013: see D Heydon, 'Is the Competition and Consumer Act 2010 (Cth) in competition with itself?', Competition Law Conference, 4 May 2013.

²² See s 5 of the CACA.

²³ Moreover, it appears there is no requirement to establish a 'market' for the purposes of a cartel provision pursuant to Div 1, Part IV of the CACA. See *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235. This is controversial (see M O'Bryan SC, 'Issues arising from the extraterritorial reach of Australian cartel laws', Paper at Federal Court of Australia – Law Council of Australia International and Commercial Law Arbitration Conference, August 2013) and it is unfortunate that the issue as it arose in *Norcast* did not have the benefit of a Full Court assessment (the appeal having been settled).

²⁴ See the International Competition Network (ICN) at <http://www.internationalcompetitionnetwork.org/>.

which it is able both to learn from and assist in developing the capacity and experience of its overseas counterparts.²⁵

Questions

This paper poses two questions:

1. how can the ACCC's roots be strengthened?
2. how can the ACCC's branches be better connected?

These questions are timely.

The terms of reference of the Competition Policy Review (CPR) direct the review panel to examine the effectiveness of relevant agencies and institutional arrangements²⁶ and correspondingly, the CPR Issues Paper identifies a series of key questions bearing upon the 'Administration of Competition Policy'.²⁷ In particular, the Issues Paper poses the questions:

- *Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?*²⁸
- *What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?*²⁹

Moreover, in the last decade, the design of institutions and the assessment of their performance and effectiveness have emerged as significant issues in international discourse relating to competition policy, law and enforcement.³⁰ As the scholar who has led these developments, former US Federal Trade Commissioner Bill Kovacic, has observed:

*In competition policy, grounding theory in practice is effectively the daily work of competition agencies. In recent years, the global competition community has gained a deeper appreciation of what engineers have understood for ages: brilliant theory without skilful implementation is a bad match. Great ideas from economics, law or other disciplines require equally great implementing institutions to move a system of competition policy forward.*³¹

²⁵ The importance of contributing to capacity-building in the Asia-Pacific region is regularly emphasised by Chairman Sims: see, eg, R Sims, 'Chairman's address: Law Council of Australia', Law Council of Australia AGM, 9 August 2013; R Sims, 'Looking back, looking forward – the ACCC's approach to making markets work for Australian consumers' Law Council of Australia Competition and Consumer Workshop, 25 August 2012.

²⁶ See CPR Terms of reference, [2], [3].

²⁷ See CPR Issues Paper, 14 April 2014, ch 6.

²⁸ See CPR Issues Paper, 14 April 2014, p44.

²⁹ See CPR Issues Paper, 14 April 2014, p44.

³⁰ For literature reflecting this emphasis, see eg D Crane, *The Institutional Structure of Antitrust Enforcement*, 2011; M Trebilcock and E Iacobucci, 'Designing Competition Law Institutions: Values, Structure and Mandate' (2010) 41 *Loyola University of Chicago Law Journal* 455; W Kovacic, 'Achieving Better Practices in the Design of Competition Policy Institutions' (2005) 50(3) *Antitrust Bulletin* 511; W Kovacic, 'Rating Competition Agencies: What Constitutes Good Performance?' (2009) 16 *George Mason Law Review* 903. These developments have spurred the ICN to establish an 'Agency Effectiveness' working group: see <http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx>.

³¹ W Kovacic, H Hollmann and P Grant, 'How Does Your Competition Agency Measure Up?' (2011) 7 *European Competition Journal* 25.

The paper makes two proposals to address the questions identified above, namely (1) that the ACCC engage in periodic ex post review and evaluation of the decisions made and processes employed in connection with its enforcement function, and (2) that the ACCC be given the powers and resources to undertake a consolidated program of regular wide ranging market studies.

STRENGTHENING THE ACCC'S ROOTS: EX POST REVIEW AND ASSESSMENT

In this section of the paper it is argued that the ACCC'S effectiveness would be strengthened by undertaking regular ex post review and assessment of its enforcement activities and processes.

The ACCC presumably undertakes some form of review when, in the relatively rare instance, it experiences what might be regarded as a major 'loss' in a case (the Metcash litigation, for example).³² The nature and extent of such reviews is largely unknown and nor is it clear to what extent they generate any meaningful change in ACCC policy or practice. From time to time the ACCC also conducts reviews of guidelines and policies (recently in relation to the informal merger review process and the immunity policy for cartel conduct).³³ However, these reviews appear reactive and ad hoc. By comparison, at least in recent years, the ACCC appears to be conscious of the need to critically review the effectiveness of its outreach and compliance activity,³⁴ as well as the clarity and impact of its communications strategies.³⁵ The Commission has also commenced a public annual review of its enforcement and compliance policy and priorities. These initiatives are to be commended.³⁶

However, contrary to international trends, the ACCC does not have a proactive, periodic and systematic approach to self-assessment of its enforcement function. Over the last ten years there have been increasing calls by government bodies and expert commentators for competition agencies to invest more in evaluating the impact of their decisions, actions and procedures.³⁷ Consistent with such calls, a growing number of competition agencies are engaging in ex post review and evaluation. The United States' Federal Trade Commission (**FTC**) and Department of Justice (**DOJ**) have a long history of such activity.³⁸ More recently, agencies such as the European Commission, the Canadian

³² At least media reports suggested that the ACCC would undertake some form of review following its failure to restrain the Metcash acquisition of Franklins. See, eg, 'ACCC rebuff on Metcash merger', *The Australian*, 1 December 2011.

³³ See ACCC, *Immunity Policy Review*, 2013: at <https://consultation.accc.gov.au/compliance-enforcement/immunity-policy-review>; ACCC, *Draft merger process review guidelines review*, 2013: at <https://consultation.accc.gov.au/mergers-and-adjudication/merger-process-guidelines>.

³⁴ The author understands that from time to time the ACCC conducts 'mini-surveys' to assess the effectiveness of these activities from the perspective of stakeholders.

³⁵ The author was contacted by a market research agency in 2012 on behalf of the ACCC as part of a project it was undertaking to review and assess stakeholder perceptions of its image and messaging. Neither the project nor its results have been made public.

³⁶ See <https://consultation.accc.gov.au/compliance-strategies/e-c-strategic-review-2013>.

³⁷ See, eg, W Kovacic, 'Using ex post evaluations to improve the performance of competition policy authorities' (2005) 31 *Journal of Corporate Law* 503 and the sources cited at n 37.

³⁸ The FTC's most significant self-assessment exercise to date was led by Bill Kovacic when he was a Commissioner: see W Kovacic, 'The Federal Trade Commission at 100: Into our 2nd Century: The Continuing Pursuit of Better Practices' (2009) at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>. For an earlier example of conduct, case and sector-specific ex

Competition Bureau, and the (former) United Kingdom Office of Fair Trading (**OFT**) have also initiated and conducted or sponsored others to conduct retrospective assessments of the impact and effectiveness of their enforcement programs.³⁹

Benefits of ex post review and assessment

A program of regular rigorous ex post analysis and assessment would produce important retrospective insights that would inform and improve the effectiveness of the ACCC's future enforcement decision-making and activity. It would assist the agency in setting its annual enforcement priorities and allocating its scarce resources between different types and areas of enforcement action. It would also assist the ACCC in securing the most effective balance between its enforcement activity and its outreach and compliance-related activity.

In addition, the insights yielded by such a program would assist in demonstrating the value and impact of the ACCC's work to key domestic constituencies, thereby assisting it in:

- arguing for more resources (or deflecting criticisms from the business sector of over-resourcing);⁴⁰
- advocating for law reform;⁴¹
- influencing competition-related government policies; and⁴²
- over the long term, effecting attitudinal and behavioural change within the business community in favour of voluntary compliance.⁴³

post evaluations (undertaken by or in conjunction with outside academics at the request of and sponsored by the FTC or DOJ), see, eg, R Lafferty et al (eds), *US Federal Trade Commission, Impact Evaluations of Vertical Restraints Cases*, 1984; T Bresnahan, 'Post-entry competition in the plain paper copier market' (1985) 75 *American Economic Review* 15; FTC Bureau of Competition, *A Study of the Commission's Divestiture Process*, 1999, at <http://www.ftc.gov/os/1999/08/divestiture.pdf>; G Werden et al, 'The effects of mergers on prices and output: two case studies from the airline industry' (1991) 12 *Managerial and Decision Economics* 341.

³⁹ See the examples given in W Kovacic, 'Using ex post evaluations to improve the performance of competition policy authorities' (2005) 31 *Journal of Corporation Law* 503. In Canada, see eg, Competition Bureau, 'Ex Post Merger Review: An Evaluation of Three Competition Bureau Merger Assessments', 1 August 2007. In the EU, see, eg, European Commission, 'Ex Post Review of Merger Control Decisions: A Study for the European Commission Prepared by Lear', 2006. In the UK, see, eg, Office of Fair Trading and Competition Commission, 'Ex post evaluation of mergers: A report prepared for the Office of Fair Trading, Department of Trade and Industry and the Competition Commission by PricewaterhouseCoopers LLP', March 2005.

⁴⁰ See, eg, 'Coalition puts regulators' performance under scrutiny', *The Australian Financial Review*, 10 March 2014.

⁴¹ The current Chairman has made it clear that the ACCC should play a role in advocating for legislative change: see R Sims, 'The ACCC: Future Directions', Law Council of Australia Competition and Consumer Workshop, 27 August 2011.

⁴² ACCC contribution to wider competition policy debates is also a theme of the current Chairman's approach: see R Sims, 'The ACCC: Future Directions', Law Council of Australia Competition and Consumer Workshop, 27 August 2011. See, eg, his comments as reported in '[Asset sales: essential but not the whole story](#)', *The Australian Financial Review*, 7 January 2014; '[ACCC boss says privatisation cuts power bills](#)', *The Australian Financial Review*, 10 August 2012.

⁴³ See C Beaton-Wells, 'Normative Compliance: The End Game?', *Competition Policy International, Antitrust Chronicle*, February 2012, at <https://www.competitionpolicyinternational.com/normative-compliance-the-endgame/>.

Moreover, the insights derived from ex post evaluations could be shared with and would bolster the ACCC's credibility in the international enforcement community and, in particular with new agencies in the region, consistent with the ACCC's commitment to international collaboration and its contribution to regional capacity-building.⁴⁴

Perhaps most fundamentally, commitment to ex post evaluation would be consistent with the fundamental values espoused by the ACCC as governing its work and, in particular, accountability, transparency and consistency, making decisions based on evidence and rigorous analysis and being strategic in the use of its resources.⁴⁵

It is true that the ACCC's performance in individual cases, its administrative processes and its effectiveness generally in its enforcement role are often the subject of assessment and critique by 'outsiders' - by judges in their decisions,⁴⁶ academics in scholarly and other publications,⁴⁷ lawyers and economists at conferences such as these,⁴⁸ bodies such as the Law Council Competition and Consumer Committee in public submissions,⁴⁹ individual politicians and parliamentary committees,⁵⁰ journalists and others. The ACCC's enforcement effectiveness may also be examined and evaluated by international agencies that conduct rankings such as GCR⁵¹ and in peer reviews by multinational governmental bodies such as the OECD.⁵² Moreover, ACCC decisions and practices are invariably a matter for consideration in the ad hoc independent reviews of competition policy and law

⁴⁴ R Sims, 'Chairman's address: Law Council of Australia', Law Council of Australia AGM, 9 August 2013; R Sims, 'Looking back, looking forward – the ACCC's approach to making markets work for Australian consumers' Law Council of Australia Competition and Consumer Workshop, 25 August 2012.

⁴⁵ ACCC, *Compliance and Enforcement Policy* 2014; ACCC and AER, *Corporate Plan & Priorities 2013-2014*.

⁴⁶ See, eg, *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151

⁴⁷ See eg C Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171; C Beaton-Wells and K Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35(3) *UNSW Law Journal* 650; C Richards et al, 'A toothless chihuahua? The Australian Competition and Consumer Commission, neoliberalism and supermarket power in Australia' (2012) 21(3) *Rural Society* 250; H Bloch and N Wills-Johnson, '[Appraising the ACCC's Caltex-Mobil Decision: An Alternative Measure of Competition Based on Networks](#)' (2011) 18(3) *Agenda: A Journal of Policy and Reform* 5; C Parker, 'ACCC's inquiry into supermarket bullying misses the real issue of duopoly power', *The Conversation*, 19 February 2013, at <http://theconversation.com/acccs-inquiry-into-supermarket-bullying-misses-the-real-issue-of-duopoly-power-12247>.

⁴⁸ See, eg, P Armitage, 'Some reflections on informal merger clearance in Australia', Paper at Law Council of Australia Competition and Consumer Committee Conference, 2012.

⁴⁹ See eg, Law Council of Australia, Business Law Section, Competition and Consumer Committee, 'Informal merger clearance – public competition assessments', 3 July 2013, at <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2739%20-%20Informal%20merger%20clearance%20-%20public%20competition%20assessments.pdf>; Business Council of Australia, *Submission to the Dawson Review of the Trade Practices Act 1974 and its Administration*, 9 July 2002 at http://tpareview.treasury.gov.au/content/subs/071_Submission_BCA.pdf.

⁵⁰ See, eg, 'Barnaby Joyce attacks ACCC over supermarkets', news.com.au, 17 July 2009, at <http://www.news.com.au/news/barnaby-joyce-attacks-accc-over-supermarkets/story-fna7dq6e-1225751192416>; Senate Economic References Committee, 'The impacts of supermarket price decisions on the dairy industry Final report', September 2011, pp81-88, regarding the approach that the ACCC takes to transparency in its investigations and initiation of enforcement proceedings.

⁵¹ See n 5 above.

⁵² See OECD Peer Reviews of Regulatory Reform, *Competition Policy in Australia*, 2010.

commissioned by government – as they were in the case of the Dawson review,⁵³ and will be (albeit possibly to a lesser extent) in the current CPR.⁵⁴

However, irrespective of the volume and quality of these external evaluations, and no matter how unstintingly the ACCC may have regard to and implement any recommendations for improvement, there remains a strong case for the agency self-assessment. The reasons for this are perhaps self-evident. The ACCC will be the primary, if not the only, source of information about why and how it makes enforcement decisions and engages in particular processes. In many instances, it will also be the best placed to collect information about the effects of its enforcement activity and procedures. External analysts will generally lack access to agency records and personnel. In addition, the conclusions and recommendations of such analyses may be affected in scope or perspective by the individual reviewer's research agenda and/or funding conditions or, in some cases, by their desire to maintain a future working relationship with the agency. What is more, a routine of thorough inscrutable ex post assessment by an agency of its own decisions and actions is conceivably more likely to have meaningful and sustainable effect on its internal processes and practices than are the assessments of onlookers. This is particularly as the latter may too readily be dismissed by the agency as either uninformed, incomplete or distorted by the assessor's own agenda, capacity or interests.

The reasons as to why to date the ACCC has not undertaken ex post review of its decisions, particularly in the mergers area, can only be speculated upon. The author understands that this type of activity has at least been considered internally. It also has been recommended by at least one Parliamentary committee.⁵⁵ It may be that ACCC staff consider there to be insufficient data for the purposes of such studies. However, at least in retail markets where scanning data exists, this reservation is implausible.⁵⁶ It may be that they are sceptical as to robustness of the methodologies employed in such studies and/or the likely validity of the results. However, clearly any such scepticism is not shared by several of its key overseas counterparts and even if challenging, the very process of devising a methodology is likely to be valuable in exposing aspects of the ACCC's decision-making processes that are under-developed, opaque or capable of improvement in some

⁵³ See Trade Practices Review Committee, *Report*, April 2003, ch 11.

⁵⁴ This is given the breadth of its terms of reference and, in particular, the emphasis given to wider policy issues; by contrast, the Dawson review was very much focussed on the law and its administration.

⁵⁵ See Report from the House of Representatives Standing Committee on Financial Institutions and Public Administration March 1998, Review of the ACCC Annual Report 1996-1997, [2.33]-[2.34]; Recommendation 4. The author is grateful to Hank Spier for drawing this to her attention.

⁵⁶ Such data would facilitate ex post review of ACCC decisions regarding supermarket acquisitions, for example – a major area of focus for the Commission in recent years. For a recent example, of ex post review of a merger of two large book chains, see D Tomaso et al, 'Ex-post Merger Evaluation in the UK Retail Market for Books' (2013) Beiträge zur Jahrestagung des Vereins für Socialpolitik 2013: Wettbewerbspolitik und Regulierung in einer globalen Wirtschaftsordnung - Session: Mergers and Competition Policy, No. B13-V2, at http://econstor.eu/bitstream/10419/80025/1/VfS_2013_pid_134.pdf. The ACCC could undertake a similar review of its decision to clear the acquisition by Borders Australia of Angus Robertson (see <http://www.accc.gov.au/media-release/accc-not-to-oppose-the-proposed-acquisition-of-borders-australia-by-angus-robertson>). The author is grateful to Stephen King for the latter suggestion.

other respect. It may be that the agency leadership has the view that the resources that would be deployed in ex post review exercises are better used in other aspects of the ACCC's daily work, or that the agency does not have the relevant skills (although skill gaps or shortages can be overcome by contracting out part or all of a study).

Some agencies may be reluctant to engage in ex post review because they fear the results. However, as Kovacic has pointed out:

*'If the institution's discomfort with conducting evaluations is based on a strong sense that rigorous measurement will reveal serious error, that, by itself, is reason for an institution to perform such assessments.'*⁵⁷

Scope of ex post review and assessment

Ex post evaluations should focus both on:⁵⁸

- substantive interventions and non-interventions;⁵⁹ and
- operational and administrative policies and processes.

In terms of substantive interventions / non-interventions, the focus of ex post evaluation should be on the effects or results of the intervention or non-intervention. Competition agencies often point to the volume of their activity (number of investigations initiated, cases brought and closed, quantum of penalties collected, etc) as a measure of their performance.⁶⁰ An activity-based approach to evaluation is reflected in the ACCC's annual reports⁶¹ and other publications.⁶²

However, while it may be important to know that the ACCC has been 'busy' in its enforcement role, this type of information reveals little, if anything, about the effectiveness or impact of its activity. More salient performance measures are those that would provide information about the consequences of ACCC decisions and actions on the functioning of the market/s that they affected – relevantly, the degree of market competitiveness, as reflected in structural features such as level of concentration and

⁵⁷ W Kovacic, 'Using ex post evaluations to improve the performance of competition policy authorities' (2005) 31 *Journal of Corporate Law* 503, 508.

⁵⁸ W Kovacic, 'Using ex post evaluations to improve the performance of competition policy authorities' (2005) 31 *Journal of Corporate Law* 503.

⁵⁹ As in the context of informal merger clearances.

⁶⁰ In disparaging this approach Kovacic observes:

'This is akin to measuring the effectiveness of commercial airlines solely by the number of departures. Imagine going to an airport and seeing a series of screens, all of which are labeled "Departures." When the passengers ask about arrivals, the airlines reply that they do not track those events. Nobody runs a commercial airline company in this manner. For competition policy, we should be concerned not only with how many cases an agency launches, but also with where and how they come to earth.'

See W Kovacic, 'Rating Competition Agencies: What Constitutes Good Performance?' (2009) 16 *George Mason Law Review* 903, 919.

⁶¹ See, eg, the account given by the ACCC of its 'performance' in Part 3 of its 2012-2013 annual report, an account that is largely limited to a description of the cases it has brought and the quantum of penalties it has secured over the previous year: ACCC & AER, *Annual Report, 2012-13*, Part 3.

⁶² See, eg, the quarterly ACCC publication, *ACCCount*, at <http://www.accc.gov.au/publications/acccount>.

condition of entry, and the conduct of its participants relating to price and non-price terms and conditions. In the case of merger matters, this necessarily would involve testing the accuracy of the ACCC's hypotheses about the future 'with and without' the merger. In the case of non-merger matters, it could involve examining whether the practice in question ceased following ACCC action and/or whether the firms previously engaged in the practice subsequently adopted alternative measures or developed other practices directed at having the same effect.

There is a large literature that explores at length the methodological design and empirical techniques that may be employed in such studies, particularly as they relate to mergers.⁶³ Many of the techniques used by competition authorities to assess mergers ex ante can also be used ex post. In general terms, such techniques include structural models and simulations, evaluation methods (such as natural experiments), event studies and surveys.⁶⁴ Clearly these techniques vary both in terms of their data requirements, their relevance in the context of particular markets and sectors and their robustness in terms of the validity of their results. For this reason, competition authorities are encouraged to use more than one technique, combining quantitative and qualitative approaches, in ex post review.

In terms of operational or administrative policies or processes, the focus of ex post evaluations should be on how the ACCC makes and implements enforcement-related decisions. Evaluative criteria could include:

- the inputs to decision-making (eg what information was it based on, who was involved in the decision-making process);
- efficiency (eg how long did it take, could and should the process be simplified);
- conformity with agency values (eg was it transparent, was it consistent); and
- alignment with the expectations or requirements of external stakeholders (eg did the legal profession support it, have recent judicial comments been critical).

⁶³ See, eg, European Commission, 'Ex Post Review of Merger Control Decisions: A Study for the European Commission Prepared by Lear', 2006; O Ashenfelter and D Hosken, 'The effect of mergers on consumer prices: Evidence from five mergers on the enforcement margin' (2010) *Journal of Law & Economics* 417; O Ashenfelter and D Hosken and M Weinberg, '[Generating Evidence to Guide Merger Enforcement](#)' (2009) 5 *CPI Journal*, *Competition Policy International*; D Breen, 'The Union Pacific/Southern Pacific rail merger: A retrospective on merger benefits' (2004) 3(3) *The Review of Network Economics*, 283; D Carlton, D, 'Why we need to measure the effect of merger policy and how to do it' (2009) 5(1) *Competition Policy International* 76; J Farrell, P Paulter and M Vita, 'Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals' (2009) 35(4) *Review of Industrial Organization* 369; D Haas-Wilson and C Garmon, 'Two hospital mergers on Chicago's North Shore: A retrospective study' (2008) Bureau of Economics, Federal Trade Commission, Working Paper # 294; G Hunter, G Leonard, and G Olley, 'Merger retrospective studies: A review' (2008) 23(1) *Antitrust* 34; C Peters, 'Evaluating the performance of merger simulations: Evidence from the US airline industry' (2006) 49 *Journal of Law & Economics* 627; R Prager and T Hannan, 'Do substantial horizontal mergers generate significant price effects? Evidence from the banking industry' (1998) 46 *Journal of Industrial Economics* 433; L Schumann, R Rogers and J Reitzes, 'Case studies of the price effects of horizontal mergers' (1992) Federal Trade Commission, Bureau of Economics.

⁶⁴ For a brief explanation of each of these categories, see European Commission, 'Ex Post Review of Merger Control Decisions: A Study for the European Commission Prepared by Lear', 2006, pp7-17. A useful summary of the literature relating to ex post merger review is also available in T Duso, 'A Decade of Ex-post Merger Policy Evaluations: A Progress report' in Dan Sjöblom (ed), *More Pros and Cons of Merger Control*, Swedish Competition Authority, pp125-187.

The range of policies or processes that can and should be subject to such assessments is potentially very broad. As previously mentioned, the ACCC does review some of its guidelines and policies. However, it is not clear how the subjects of such reviews are chosen. The timing of reviews that have been conducted is irregular and the impetuses appear largely reactive to external events (for example, a change in legislation or stakeholder feedback).⁶⁵ Moreover, there are some policies that are long overdue for review – the *Cooperation Policy in Enforcement Matters 2002* is a case in point.

Relevant considerations in ex post review and assessment

Formulating a robust approach to and methodology for ex post evaluation is unquestionably challenging. Relevant considerations would include:⁶⁶

- whether the agency's budget can fund such exercises and if not, how a case may be put to government for funding;
- whether the agency has the necessary in-house skills to undertake evaluations and if not, how expert outsiders may be drawn on;
- how relevant matters, or groups of matters, and policies or processes are to be selected for review and what evaluative criteria are to be used;
- what data is required for evaluation and the processes for and costs of obtaining it;
- where outsiders are to be involved, whether and how confidential records may be drawn on; and
- whether and to what extent the results of evaluative exercises are to be disseminated inside and beyond the agency.

That said, there is no shortage of precedents from the experience of other competition agencies and guidance from expert commentators on which the ACCC can and should draw for this purpose.⁶⁷

CONNECTING THE ACCC'S BRANCHES: MARKET STUDIES

It is argued in this section of the paper that the ACCC would be more effective if it had a consolidated program of regular self-initiated wide-ranging market studies.⁶⁸ Such studies enable competition

⁶⁵ For example, the ACCC's 2013 review of its immunity policy was in part triggered by practitioner feedback regarding uncertainty and delay in connection with the dual process for seeking civil and criminal immunity. The last review of the policy was triggered by the introduction of cartel offences and criminal sanctions in 2009 and the need to reflect the role of the Commonwealth Director of Public Prosecutions.

⁶⁶ It is beyond the scope of this paper to examine these issues in detail.

⁶⁷ See the references in nn 34, 35 and 59.

⁶⁸ Other terms for this activity include: market inquiries, sector inquiries, research and development, market scans and fact-finding surveys.

bodies to study in-depth the performance of markets, but particularly market failures where the failure is not necessarily caused by anti-competitive structures or conduct.

The list of functions allocated to the ACCC under s 28 of the CACA conceivably includes some types of market studies. That section relevantly provides:

(1) In addition to any other functions conferred on the Commission, the Commission has the following functions:

...

(b) to examine critically, and report to the Minister on, the laws in force in Australia relating to the protection of consumers in respect of matters referred to the Commission by the Minister, being matters with respect to which the Parliament has power to make laws;

(c) to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;

(ca) to conduct research and undertake studies on matters that are referred to the Commission by the Council and that relate to the Commission's other functions;

...'

These provisions appear to contemplate some types of market studies.⁶⁹ Further, market studies could possibly be performed pursuant to a Ministerial direction under subs 29(1) of the CACA.⁷⁰ However, that provision expressly excludes directions that relate to Parts IIIA, IV, VII, VIIA, XIB or XIC.⁷¹ In addition, under subs 29(3), the ACCC may be required to furnish either House of Parliament with information concerning the performance of its functions.

There appear to have been a number of studies conducted pursuant to one or more these provisions over the years relating, for example, to private health insurance,⁷² consumer credit insurance,⁷³ and grocery wholesaling,⁷⁴ amongst others.⁷⁵ These studies appear to have been conducted in accordance

⁶⁹ The addition of paragraph (ca) coincided with the establishment of the ACCC (previously the Trade Practices Commission and incorporating the Prices Surveillance Authority) and the National Competition Council, pursuant to the recommendation of the Hilmer review. It may have been intended to be linked to the possibility of the Council having additional functions under the Competition Principles Agreement. However, the Council does not appear to have been given any additional functions. The purpose of the provision may have been to enable the Council to refer an issue or part of an issue on which its advice was sought by governments which was more closely aligned to the functions and expertise of the ACCC. It might also have been seen as enabling the Council to refer potentially anti-competitive conduct it observed in the course of its work to the ACCC, although presumably the Council could do so without a specific statutory power.

⁷⁰ Subs 29(1) provides: 'The Minister may give the Commission directions connected with the performance of its functions or the exercise of its powers under the Act.'

⁷¹ See subs 29(1A).

⁷² See <http://www.accc.gov.au/publications/private-health-insurance-reports/private-health-insurance-report-2012-13>.

⁷³ See, eg, ACCC, *Consumer Credit Insurance Review: Final Report*, July 1998.

⁷⁴ See ACCC, *Report to the Senate by the Australian Competition and Consumer Commission on prices paid to suppliers by retailers in the Australian Grocery Industry*, September 2002.

⁷⁵ References to studies in relation to self-regulation in industry and the professions, supermarket scanning and electronic funds transfer systems can be found in other sources. See, for example, S Coronos, D Merrett and D Round, 'Building an Effective Trade Practices Commission: The Role of Professor Robert Baxt AO' (2009) 49(2) *Australian Economic History Review* 138, 153. However, copies of these reports have been difficult to track down in the time available for preparing this paper.

with a Ministerial direction or Senate order, and hence are distinguishable from market studies conducted by many other jurisdictions where the studies are initiated and the terms of reference devised independently by the competition authority.⁷⁶

The ACCC also has powers to hold price-related inquiries where required by or with the approval of the Minister,⁷⁷ as well as price monitoring powers pursuant to Ministerial directions.⁷⁸ These powers enable the ACCC to undertake studies and report on certain price-related aspects of particular sectors. It was pursuant to its price inquiry powers that the ACCC conducted its 2007 inquiry into unleaded fuel prices and its 2008 inquiry into grocery retail prices.⁷⁹ The ACCC uses its price monitoring powers in monitoring of the prices of airport facilities, for example.⁸⁰

There may also be a view that in assessing authorisation applications the ACCC in effect undertakes a market study of the market/s in question, particularly having regard to the scope of the ‘public benefit’ test and the emphasis that the ACCC places on considering whether the propose conduct should be authorised in light of market failure or market imperfections.⁸¹ However, in the case of authorisation matters, the ‘study’ undertaken by the ACCC is again not of its own initiative and is limited in scope by the parties to and nature of the conduct that is the subject of the application.

The ACCC may not favour instigating a more independent periodic market studies program because it may regard such activity as politically hazardous, carry a risk of regulatory capture, and/or have the potential to interfere with or distort or at least appear to distort its enforcement priorities and activities. It may also consider that it simply does not have the resources for such activity. Furthermore, the ACCC may regard market studies activity, beyond that which it is currently authorised to and does undertake, as straying into the policy arena. The ACCC has long emphasised

⁷⁶ Cf a study into the cinema industry in 1998 authored by Ross Jones for the ACCC: *Developments in the cinema distribution and exhibition industry: Report to the Australian Competition and Consumer Commission*, March 1998. It is possible that this study was conducted pursuant to subs 28(1)(c).

⁷⁷ See CACA, Part VIIA, Division 3 (see ss 95G, 95H) providing for the circumstances under which the ACCC must or may hold inquiries).

⁷⁸ See s 95ZE of the CACA.

⁷⁹ ACCC, [Petrol prices and Australian consumers—report of the ACCC inquiry into the price of unleaded petrol](#), 2007; ACCC, *Report of the ACCC into the competitiveness of retail grocery prices*, 2008.

⁸⁰ See the reports prepared in accordance with this monitoring role at <http://www.accc.gov.au/regulated-infrastructure/airports-aviation/airports-monitoring>. It had a similar role under the former *Price Surveillance Act* (s 27A). See, for example, its report into the milk industry prepared in accordance with this power: ACCC, *Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits*, 2001, at <http://www.accc.gov.au/system/files/Impact%20of%20farmgate%20deregulation%20on%20the%20Australian%20milk%20industry.pdf>.

⁸¹ See ACCC, *Authorisation Guidelines*, June 2013, [6.2]-[6.10]. ‘Public benefit’ has been broadly defined as:

‘... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress’. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society’s resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass “progress”; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency’ (Re 7-Eleven (1994), ATPR 41-357 at [42,777]. See also Queensland Co-operative Milling Association Ltd (1976), ATPR 40-012, at 17,242 and VFF Chicken Meat Growers’ Boycott Authorisation (2006) AcompT 9 at [75]).

that it is an enforcement body, with the necessary implication that ‘policy’-making falls outside its mandate and within the province of other agencies of government.⁸² However, there is arguably something of a policy vacuum in this field in Australia in that there is no dedicated mechanism for regular periodic reviews of competition policy - a matter that the CPR should address.⁸³ Irrespective of whether there is consideration given to creating an additional policy-making agency, however, the ACCC does and should be seen to have an important contribution to make to competition policy debates. Evidently, this is something that the current Chairman understands.⁸⁴

Yet, as in the case of ex post review, the ACCC lags behind international trends relating to market studies. While 20 years ago very few competition authorities had market study powers, currently more than 45 authorities can now perform this function,⁸⁵ and the number is likely to increase. International bodies such as the Organisation for Economic Cooperation and Development (OECD) and International Competition Network (ICN) have examined and promoted market studies amongst competition authorities in recent years.⁸⁶ The market study power and experience in some jurisdictions, such as the US, EU, UK and Japan, is long-standing.⁸⁷ In other instances, while having been available for some years, market study powers have only been applied in recent times,⁸⁸ and in some jurisdictions, market study powers are still relatively new.⁸⁹ A wide range of markets and sectors have been the subject of market studies conducted by overseas authorities, including fuel, health care, financial services, groceries, energy, telecommunications, transport, the professions, construction, tourism, defence and real estate.⁹⁰ In broad terms, the outcomes of such studies have

⁸² As recorded in one Parliamentary report:

In evidence, and in all of its public documents, the ACCC stresses that it is a law enforcement agency, a regulator, and its central role is to ‘...apply the law in a straightforward manner without fear or favour to anyone...’

The ACCC is not a policy advisory or policy advocacy body, although it notes ‘... We do some work in that area but not a great deal, and most often it is where government or someone wants to know a bit more about a market where they may be thinking of taking action.’

See Report from the House of Representatives Standing Committee on Financial Institutions and Public Administration March 1998, Review of the ACCC Annual Report 1996-1997, [1.6]-[1.7].

⁸³ Consideration could be given to allocating the National Competition Council such a role or providing a more regular systematic function for the Productivity Commission in this regard.

⁸⁴ R Sims, ‘The ACCC: Future Directions’, Law Council of Australia Competition and Consumer Workshop, 27 August 2011, and his regular statements in the media on policy issues such as the NBN, energy reform, privatisation, amongst others. See, eg, his comments as reported in ‘[Asset sales: essential but not the whole story](#)’, *The Australian Financial Review*, 7 January 2014; ‘[ACCC boss says privatisation cuts power bills](#)’, *The Australian Financial Review*, 10 August 2012.

⁸⁵ T Indig and M Gal, ‘New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities’ in D Porto and M Drexler (eds), *Competition Law as Regulation*, 2013, 2. The citations of this paper are from the SSRN version: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333068.

⁸⁶ See OECD, *Market Studies*, OECD Policy Roundtables, 2008; ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009; ICN, *Market Studies Good Practices Handbook*, 2012.

⁸⁷ In the US market studies were initiated at the beginning of the 20th century and in Japan, market studies go back as far as 1947. In the EU, market studies (referred to as sector inquiries) were provided for in the first regulation implementing Articles 85 and 86 of the Treaty in 1962 (Council Regulation (EEC) No 17, OJ 13, 21.2)). Market study powers were introduced in the UK in 1973.

⁸⁸ For example, in Spain market study powers have existed since 1989 but resources have only been allocated to their exercise since 2007.

⁸⁹ For example, market study provisions were introduced in Ireland in 1997.

⁹⁰ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, 87-88.

included a change in the law and/or policy, the instigation of enforcement action, change in industry rules or practice, and action taken by a sectoral regulator.⁹¹ Specific outcomes aside, a common theme throughout international practice is that market studies ‘can help to build authorities’ capacity and can, if done well, both enhance their reputation and promote better market outcomes.’⁹²

Definition and purposes of market studies

The ICN’s definition of market studies is as follows:

‘Market studies are research projects conducted to gain an in-depth understanding of how sectors, markets, or market practices are working.

They are conducted primarily in relation to concerns about the function of markets arising from one or more of the following: (i) firm behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention in markets (whether by way of policy or regulation, or direct participation in the supply or demand side of markets); and (vi) other factors which may give rise to consumer detriment.

The output of a market study is a report containing findings based on the research. This may find that the market is working satisfactorily or set out the problems found. Where problems are found the market study report can include: (i) recommendations for action by others, such as legislatures, government departments or agencies, regulators, and business or consumer bodies; and/or (ii) commitments by the competition (or competition and consumer) authority itself to take advocacy and/or enforcement action.’⁹³

This definition is widely accepted amongst competition authorities.⁹⁴

There is also a high degree of consensus as to the main purposes of market studies, namely to inform and support the authority’s functions in:

- (1) enforcing the competition rules; and
- (2) undertaking competition advocacy.⁹⁵

The ICN defines ‘advocacy’ as referring to:

‘...those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition.’⁹⁶

While the value and significance of the enforcement role of the ACCC is incontrovertible, traditionally its role in advocacy has been less well-defined. Yet the current Chairman has shown a

⁹¹ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, 88-89.

⁹² ICN, *Market Studies Good Practices Handbook*, 2012, 2.

⁹³ ICN, *Market Studies Good Practices Handbook*, 2012, 5. The use of the term ‘market’ in this context is not generally intended to denote a relevant market as defined in the context of assessing conduct for competition violations: ICN, *Market Studies Good Practices Handbook*, 2012, [1.4].

⁹⁴ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [4.5].

⁹⁵ ICN, *Market Studies Good Practices Handbook*, 2012, [1.6]; OECD, *Market Studies*, OECD Policy Roundtables, 2008, 7.

⁹⁶ International Competition Network, *Advocacy and Competition Policy*, Report prepared by the Advocacy Working Group, ICN’s Conference, Naples, Italy, 2002, 25. See further Allan Fels, ‘Frameworks for Advocacy’, Paper at OECD Latin American Competition Forum, San-Jose, Costa Rica, September 2010.

particular interest in and capacity for contributing to policy debates by way of competition advocacy.⁹⁷ It is notable that, despite the value of such contributions (at least, in the view of author), there is not a clear legislative basis for the ACCC's advocacy role. The CPR presents an opportunity to remedy this. That said, and contrary to a possible apprehension on the part of the ACCC, it should be clear that market studies are not about making policy and nor are they a substitute for enforcement and/or advocacy. They are instead intended to act as a supportive adjunct to these functions. In particular, while acknowledging their complementarities, many competition authorities stress the distinction between their market study and enforcement activities.⁹⁸ This distinction is then reflected in the scope, powers, conduct and outcomes of market studies (see further the discussion of relevant considerations below).

Benefits of market studies

Market studies are regarded as a highly valuable tool in a competition authority's portfolio - increasing relevant expertise and building capacity in a way that bolsters their enforcement and advocacy functions. The key characteristic of market studies in facilitating these functions is that, unlike enforcement or advocacy activities which are specific to an individual firm or firms or a particular type of conduct or policy (in the case of government restrictions), market studies allow authorities to take a much more holistic and multidimensional approach. Market studies involve the study of markets as whole, from demand and supply side perspectives, and having regard to the conduct of all participants and a wide range of factors, public and private, that may be affecting market performance. Moreover, the authority is able to take a broad view in defining the criteria by which it evaluates such performance.⁹⁹ It is also able to use a much greater range of tools by which to collect information than would be available in an enforcement setting, including existing market research, in-depth qualitative interviews, large statistical surveys, public hearings and focus groups.¹⁰⁰

In addition, the following important benefits of market studies have been identified:

⁹⁷ See R Sims, 'The ACCC: Future Directions', 27 August 2011, and his regular statements in the media on policy issues such as the NBN, energy reform, privatisation, amongst others. See, eg, his comments as reported in '[Asset sales: essential but not the whole story](#)', *The Australian Financial Review*, 7 January 2014; '[ACCC boss says privatisation cuts power bills](#)', *The Australian Financial Review*, 10 August 2012.

⁹⁸ T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexel (eds), *Competition Law as Regulation*, 2013, 4.

⁹⁹ Indeed, in some jurisdictions, the competition authority may be authorised to consider criteria that extend far beyond any competition or efficiency standard. In the UK there is power in the Competition and Markets Authority, on referral from the Secretary of State, to conduct market studies that include specified public interest considerations such as national security: see Competition and Markets Authority, *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*, 2014, [2.18]-[2.21]. Some may question whether a competition authority should be given such a mandate and whether it is well placed to consider non-competition-related questions. That said, the 'public benefit' test in the Australian authorisation provisions enables the ACCC to consider the widest possible range of factors in deciding whether or not to exempt conduct from the competition prohibitions. See n 76 above and the analysis of the types of public benefits to which the ACCC has had regard in the context of authorisations in V Nagarajan, *Discretion and Public Benefit in a Regulatory Agency: The Australian Authorisation Process*, (ANU epress, 2013).

¹⁰⁰ In similar fashion, the ACCC uses a wide range of information sources for the purposes of holding price inquiries. See, eg, the approach taken in the ACCC's 2008 grocery prices inquiry: ACCC, *Report of the ACCC into the competitiveness of retail grocery prices*, 2008.

- market studies provide opportunities for increasing the integration of and highlighting the synergies between competition and consumer policies and enforcement programs;¹⁰¹ and
- market studies may provide the theoretical and empirical bases for making changes to the long-standing status quo in regulated industries.¹⁰²

These benefits are particularly pertinent for an agency such as the ACCC given that it has dual responsibilities in competition and consumer law enforcement and indeed is a vociferous advocate of such dualism.¹⁰³ Equally the ACCC has significant powers and functions in utility regulation and similarly promotes the synergies and cross-overs between this role and its competition mandate.¹⁰⁴

There are some who question whether the ACCC should be confined to competition law enforcement, leaving consumer law enforcement and sectoral regulation to other agencies.¹⁰⁵ The pros and cons of having an integrated body responsible for these functions was debated at the time of the Hilmer review and the review committee determined in favour of a single enforcement / regulatory body. The arguments made in favour of such a body by the committee related essentially to the value in pooling of expertise, cross-fertilisation and consistency of approaches, avoiding regulatory capture and administrative efficiencies.¹⁰⁶ These arguments are as persuasive today as they were then (indeed conceivably more so given the current government's approach to agency resourcing).¹⁰⁷ Moreover, the Productivity Commission recently endorsed the benefits of housing competition and consumer law

¹⁰¹ See OECD, *Market Studies*, OECD Policy Roundtables, 2008, 7. See to similar effect, OFT, *Market Studies: Guidance on the OFT approach*, 2010, [2.16]. This is exemplified by the studies that have been undertaken by several competition authorities in relation to the professions: see eg Competition Bureau (Canada), *Self-regulated professions: Balancing competition and regulation*, 2007; OFT (UK), *Competition in professions*, 2000; European Commission, *Professional Services – Scope for More reform* (2005).

¹⁰² T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexel (eds), *Competition Law as Regulation*, 2013, 8. For example, in the US the DOJ has compiled a number of in-depth studies of the competitive performance of various regulated industries including airlines, insurance, milk marketing and ocean shipping, as well as numerous energy industries. The purpose of these reports has been seen as to increase awareness of the costs of regulation and encourage consideration of the benefits of competition and market-based solutions when devising regulatory regimes: See eg *Competition in the Oil Pipeline Industry: A Preliminary Report* (1984); *Competition in the Coal Industry* (1983); *Antitrust Advice on the License Application of the Texas Deepwater Port Authority* (1979) (pursuant to s 7 of the *Deepwater Port Act* 1974); *Outer Continental Shelf Federal/State Beaufort Sea Oil and Gas Lease Sale No. BF* (1980); *Report of the Department of Justice to Congress on the Airline Computer Reservation System Industry* (1985). Studies undertaken by the ACCC in regulated industries pursuant to its price monitoring role could be seen to perform a similar function.

¹⁰³ See R Sims, 'Keynote Address: RBB Economics Conference', 29 November 2013.

¹⁰⁴ See R Sims, 'Keynote Address: RBB Economics Conference', 29 November 2013.

¹⁰⁵ See 'Agenda for the National Competition Policy Inquiry', Monash Business Forum, November 2013, 18 (recommending that the CPR consider whether the consumer law functions of the ACCC and ASIC should be jointly administered by a single separate body that would also take over the functions and operations of the various State consumer protection agencies, and whether the AER and other regulatory functions of the ACCC should be separated into a specialised infrastructure regulator); A Fels, 'The Harper review must choose its targets well', *The Australian Financial Review*, 1 April 2014 (questioning whether the ACCC should retain sectoral regulatory functions).

¹⁰⁶ *National Competition Policy*, 1993, ch 14.

¹⁰⁷ The National Commission of Audit has made a series of recommendations to this end. See National Commission of August, *Towards Responsible Government: Phase One*, Report, April 2014, Part B, Section 9, at <http://www.ncoa.gov.au/report/phase-one/part-b/9-rationalising-streamlining-government-bodies.html>. Consistent with these recommendations, the recently handed down budget for 2014-15 will see ACCC funding and staff levels reduced.

enforcement functions in a single body.¹⁰⁸ The Commission pointed out the complementarities in these functions, both being directed at achieving the same goal, namely enhancing consumer welfare through well-functioning markets. Its view that there should be a single national competition and consumer enforcement body is supported by a substantial body of literature on the subject of the competition-consumer policy interface¹⁰⁹ and is consistent with the international trend towards competition authorities having a multiplicity of functions.¹¹⁰

This is not to say that the ACCC necessarily always strikes the right balance in terms of the volume of its consumer law enforcement activities vis-vis-à-vis competition law enforcement activities¹¹¹ or that it could not possibly adjust its annual enforcement priorities to ensure a more integrated approach in selecting the markets and matters on which it focuses from both competition and consumer protection perspectives. A market study program of the kind proposed here would have the potential to assist in both these respects. By deepening the ACCC's expertise in particular markets and sectors it could inform enforcement choices, as well as possibly reduce the need for enforcement activity by sending strong signals to market participants that the ACCC is aware of conduct that may give rise to competition or consumer law violations, thereby spurring greater voluntary compliance with the law.

Further, there are educative and reputational advantages that flow from market studies. In terms of educating important stakeholders, including government and the general public, it has been pointed out that market studies:

*'... serve an important function for society by refuting claims of anticompetitive conduct when, for example, prices rise as a result of supply disruptions and not because of anticompetitive conduct. Absent such refutation, governments may be inclined to apply anticompetitive restrictions on competition that will harm consumers and degrade future market responses to supply or demand shocks.'*¹¹²

In terms of reputation, much like in the case that can be made for ex post review and assessment, market studies provide competition authorities with a valuable opportunity to demonstrate the

¹⁰⁸ Productivity Commission, *Review of Australia's Consumer Policy Framework*, 2008, pp63-69.

¹⁰⁹ See, eg, OECD, *The Interface between Competition and Consumer Policies*, OECD Roundtables, 2008; OFT, 'Joining up Competition and Consumer Policy The OFT's approach to building an integrated agency', December 2009; M Armstrong, 'Interactions between Competition and Consumer Policy' (2008) 4 *Competition Policy International* 97; L Sylvan, 'The Interface between Consumer Policy and Competition Policy' (Speech delivered at the 2006 Consumer Affairs Victoria Lecture, 2006) 8-9.

¹¹⁰ See 'Benchmarking Competition Systems: A Global Survey of Major Institutional Characteristics', George Washington University, Presentation to UNCTAD RRP Meeting, July 2013.

¹¹¹ There can be no argument that the ACCC launches more investigations and brings more consumer cases than competition cases, as acknowledged by the Chairman: see R Sims, 'Keynote Address: RBB Economics Conference', 29 November 2013.

¹¹² OECD, *Market Studies*, OECD Policy Roundtables, 2008, 8. The value of market studies in this respect is often highlighted by studies into fuel and gas markets. Similar benefits are associated with inquiries conducted pursuant to the prices surveillance powers of the ACCC. In its inquiry into retail grocery prices, for example, the ACCC concluded that 'the vast majority of grocery price increases in Australia are attributable to other factors, such as supply and demand changes in international and domestic markets, increases in the costs of production and domestic weather conditions'. See ACCC, *Report of the ACCC into the competitiveness of retail grocery prices*, 2008, 2.

authority's significance to, expertise in and capacity to contribute to economic policy development.¹¹³ It goes without saying that the extent to which this benefit is realised, and indeed the potential for negative reputation effects to be minimised, depends on the way in which competition authorities scope, structure and conduct market studies and the way in which they communicate and use their results. The value of engagement with stakeholders, public and private, both in advance of and at all stages of the market study process cannot be understated.¹¹⁴ Such engagement not only maximises positive and minimises adverse reputational effects, but just as much if not more importantly, facilitates the voluntary participation of stakeholders in the study and increases the likelihood that its findings and recommendations will be implemented.¹¹⁵

It is inevitable that at least some businesses and representative organisations would regard market studies as yet another unwarranted increase in ACCC power and having the potential to cause unwanted disruption to and intervention in legitimate and productive business activity. The force of any such view would again depend on the way in which the market study power was defined and used. However, subject to that caveat, the benefits of market studies for business also should not be overlooked.

Market studies provide business with an opportunity to improve the competition authority's understanding of how their market/s work, to do so in a non-adversarial setting and in a way that may reduce the likelihood of future enforcement action. They allow businesses to put forward their own proposals to improve market performance, including proposals that may lead to policy or legislative changes that benefit business, such as deregulation. Further, market studies may assist business in identifying areas or aspects of their operation that fall into grey zones or are otherwise vulnerable in terms of their legality and in that way may assist in improving internal education, training and compliance programs.¹¹⁶ The Canadian Competition Bureau has identified additional distinct benefits for market participants as follows:

*'Market studies also give market participants contacts within the Bureau, which may result in case leads or facilitate future interactions with the Bureau. ... market studies also give market participants advance notice of how the Bureau views their sector, which can be helpful in developing a complaint and anticipating the Bureau's reaction to a particular merger or other proposal.'*¹¹⁷

¹¹³ T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexler (eds), *Competition Law as Regulation*, 2013, 9.

¹¹⁴ See ICN, *Market Studies Good Practices Handbook*, 2012, ch 4.

¹¹⁵ On the emphasis given to stakeholder engagement, see, eg, OFT, *Market Studies: Guidance on the OFT approach*, 2010, [4.3].

¹¹⁶ See ICN, *Market Studies Good Practices Handbook*, 2012, [2.5]

¹¹⁷ OECD, *Market Studies*, OECD Policy Roundtables, 2008, 20.

Relevant considerations in conducting market studies

As in the case of a program of ex post review and assessment, properly designing and conducting a market study program would be a substantial undertaking and would raise a similar set of considerations outlined below.¹¹⁸

Funding

The ACCC would require an increase in its budget to carry out a market study program in addition to its other responsibilities. Admittedly, achieving the necessary increase is likely to be challenging in the current tight fiscal climate and particularly so in light of the recent scrutiny and reduction of ACCC expenditure.¹¹⁹ The extent of the increase would depend on whether the ACCC retains all of its current functions (a matter that may be considered by the CPR) and on how many studies per annum are seen as necessary or desirable and how many additional staff such studies would warrant. The majority of respondents to an ICN survey reported conducting less than five studies per year.¹²⁰ However, there was large variation in the number of full-time equivalent (FTE) staff allocated to such work on an ongoing basis. The largest teams comprised 15-25 FTEs and the smallest, one member of staff; there appears to be considerable variation also depending on the nature of the study being undertaken.¹²¹

In considering the budgetary implications of such a program, it would be sensible to consider consolidating the current melange of study / inquiry-related powers currently available under the CACA and providing for a single broad market study power, with provisions addressing triggers, processes and powers. It should also be borne in mind that market studies may make both enforcement and advocacy activity more targeted and efficient. In prompting voluntary compliance or in the case of a supervisory or remedial model (see below), a market study may even make enforcement action or advocacy unnecessary.¹²² As Gal has observed: ‘...even if diluting the

¹¹⁸ A far more detailed consideration of these and other issues is available in OECD, *Market Studies*, OECD Policy Roundtables, 2008; ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009; ICN, *Market Studies Good Practices Handbook*, 2012.

¹¹⁹ See ‘Cassidy retires as broke ACCC faces revamp’, *Australian Financial Review*, 24 January 2014. In the last financial year the Commission received an additional funding contribution of \$23.8m, on top of the 2013-14 budgeted amount and, as at February 2014, was in discussions with the government about a ‘top-up of funding’ to address its strained financial position. See Senate Economics Legislation Committee, *Transcript*, 23 February 2014, 72-3. The Budget 2014-2015 will see ACCC staff levels reduced. However, it has received additional funding for monitoring the repeal of the carbon tax scheme and its overall funding (\$173,433m) is higher than in previous years (\$150,228m in 2012-13; \$151,275m in 2011-12). See <http://www.budget.gov.au/2014-15/content/bp4/html/index.htm>; P Durkin, ‘Agencies slashed and abolished’, *The Australian Financial Review*, 14 May 2014, p8.

¹²⁰ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [7.35].

¹²¹ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [7.36]-[7.37].

¹²² T Indig and M Gal, ‘New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities’ in D Porto and M Drexler (eds), *Competition Law as Regulation*, 2013, n 66.

resources vested in each task, [market inquiries] may still enrich the Authority's expertise and compensate for dividing the resource pie into smaller pieces'.¹²³

Skills and resources

It is unlikely that a market studies function would require the ACCC to acquire a substantially different skill set to that which currently exists in-house.¹²⁴ However, there would be a question as to whether a dedicated market study unit should be created which again would depend on the scale of the market study program that was projected.¹²⁵ Furthermore, the possibility of 'contracting out' parts or even the whole of a market study could be considered.¹²⁶ Depending on the topic of study, joint studies with other regulatory, enforcement or research bodies (including the Productivity Commission) should also not be discounted.

Study triggers and selection

There appears to be no reason why a market study power should not be defined in such a way as to enable the ACCC to determine the subject and timing of its studies (as currently under subs 28(1)(c)), as well as requiring it to conduct market studies on referral by the government or other body (as currently under subs 28(1)(b)(ca)). However, restricting the ACCC to market studies on referral by the Minister would arguably be inconsistent with agency independence and in the case of Ministerial referrals could have the effect of adding an unfortunate political dimension to the market study role. It would also be inconsistent with the concept of market studies as being a function that a competition authority is uniquely placed to perform, the logical extension of that proposition being that the authority is also best placed to decide which markets to study and when. Moreover, it would be inconsistent with overseas practice – most competition authorities that have this function are empowered to choose their own studies.¹²⁷ Nevertheless, in selecting and scoping its market studies, the ACCC should consider proposals from government, as well as the private sector, business groups, consumer bodies and others. For this reason, amongst others, it would be useful for the ACCC to have a set of published criteria and prioritisation principles relevant to its market studies program

¹²³ T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexl (eds), *Competition Law as Regulation*, 2013, 10.

¹²⁴ Most authorities that responded to the ICN survey indicated that market study teams comprise either economists or a combination of economists and lawyers: ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [7.36]. Presumably, amongst team members, it would be valuable to have people with research skills - depending on the study, these might include skills relating to empirical research.

¹²⁵ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [2.4]-[2.6]. ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [7.38].

¹²⁶ See ICN, *Market Studies Good Practices Handbook*, 2012, [2.28]-[2.29]. The ACCC contracted out a cinema study in 1998, for example: see *Developments in the cinema distribution and exhibition industry: Report to the Australian Competition and Consumer Commission*, March 1998 (by Ross Jones). Presumably, this was done pursuant to subs 28(1)(c).

¹²⁷ See ICN, *Market Studies Good Practices Handbook*, 2012, [5.8]

(similar to the criteria that guide its enforcement work in the ACCC's *Compliance and Enforcement Policy*).¹²⁸

Information collection and use

In exercising its powers under subs 28(1)(b) and (c), the ACCC would have recourse to its powers under s 155 provided there is reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of the CACA. Notably, in its 2002 study into grocery wholesaling the ACCC did not use this power and relied on voluntary responses and submissions.¹²⁹ For the purposes of its price inquiry and monitoring powers the ACCC has powers to obtain information or documents that are specific to those powers and there is no 'reason to believe' criterion equivalent to that in s 155.¹³⁰ The ACCC should have similar powers for the purposes of its more general study powers and without any condition relating to an apprehended contravention of the CACA. Such a condition arguably blurs the distinction between market study and enforcement activity (see further below).

An ICN survey has shown that most competition authorities that conduct market studies have formal powers to compel the supply of information for the purposes of the study, including the power to sanction for non-compliance.¹³¹ Such powers have obvious benefits in ensuring that the authority has sufficient information, and that it is provided with information that is both accurate and made available in a timely way. However, they are also likely to raise concerns about additional burdens for the recipients of information requests. Such concerns may be addressed in part by legislative constraints on the types of and triggers for the use of formal powers,¹³² as well as the availability of ex ante administrative and/or judicial review of the proportionality and reasonableness of information requests.¹³³ Provision should also be made for protection of the confidentiality of information supplied pursuant to a compulsory information request.¹³⁴ As a further, if informal, constraint the authority's

¹²⁸ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, ch 5. In the UK, for example, the authorities assess market study proposals against their prioritisation principles, namely: impact, strategic significance, risks and resources, as well as any other relevant factors. See OFT, *Market Studies: Guidance on the OFT approach*, 2010, [3.5]-[3.6]

¹²⁹ The ACCC also excluded from its report information that was designated as confidential by the party supplying it. See ACCC, *Report to the Senate by the Australian Competition and Consumer Commission on prices paid to suppliers by retailers in the Australian Grocery Industry*, September 2002, 10.

¹³⁰ See s 95ZK, CACA. It is an offence not to comply with a notice under s 95ZK (see subs (4)), except where the person concerned has a 'reasonable excuse' (including self-incrimination) (see subs (5)-(7)).

¹³¹ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009; T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexel (eds), *Competition Law as Regulation*, 2013, 5. In the UK, for example, see *Enterprise Act 2002*, s 174(1)(a).

¹³² The conferral of search and seize powers, for example, may be a bridge too far. Dawn raids by the EC in the context of its sector inquiries have attracted particular criticism: see H Andersson and E Legnerfaldt, 'Dawn raids in sector inquiries – fishing expeditions in disguise?' (2008) 29(8) ECLR 439.

¹³³ For example, the US regime incorporates in the process of crafting a mandatory information request both an opportunity for comment on draft requests and the need to obtain clearance from the independent Office of Management and Budget: OECD, *Market Studies*, OECD Policy Roundtables, 2008, 146-151.

¹³⁴ As for example applies to information supplied pursuant to a notice under s 95K of the CACA in the context of the ACCC's price inquiry and monitoring powers (see s 95ZN).

consciousness of the need to maintain the confidence and good will of stakeholders in relation to the market study process should also not be discounted.¹³⁵

It is noteworthy that many of the competition authorities that do not have formal powers for the conduct of market studies do not necessarily see this as a problem. As one authority has commented:

*'Having formal powers to compel the supply of information would fundamentally change the nature of [the Authority's] market studies work. [The Authority] sees market studies as a flexible tool of advocacy, rather than a means of taking enforcement action. In practice, this lack of formal powers has not been a problem. Many businesses want the [Authority] to understand their perspective, whether motivated by self-interest or otherwise, such that they will readily answer questions and consider and present their views.'*¹³⁶

Furthermore, amongst those authorities that have formal powers to obtain information for market studies, there are those that choose not to use them either because they find it unnecessary to do so and/or because they regard such formality as inconsistent with the purpose of market studies. Comments by competition authorities reported in the ICN survey bear this out:

'In general it is not necessary to have formal powers to compel the supply of information because the investigation of the [Authority] has the objective to increase the general knowledge of a market and the factors which limit its functioning, not to acquire specific evidence of antitrust infringements. In this view, it constitutes a tool of advocacy, not a means to take antitrust action. For this reason, the supply of information by the requested subject (generally undertakings, but not only) has generally a voluntary character... there is awareness that the request of information is intended to guarantee the institutional mission of the [Authority] (not to collect evidence to enforce the law); this facilitates the cooperation and data collection.

...

*Our powers as they are now are very useful and are used cautiously. We prefer to encourage firms to comply with our requests, stressing confidentiality and transparency in the conduct of investigations and research work; and relying on our history of independence and integrity to preserve the information. This has worked well for us.'*¹³⁷

A further potentially sensitive issue concerns the use of information gathered for a market inquiry in subsequent enforcement action. While it should be seen as legitimate for an authority to draw on information provided for a market study to commence an investigation,¹³⁸ use of such information as evidence in subsequent proceedings may be more problematic. This issue may be seen as particularly acute where the information is voluntarily supplied and hence provided to the authority in the absence of any procedural safeguards such as warnings as to subsequent use and the privilege against self-incrimination.

¹³⁵ That said, such considerations do not appear to have given the ACCC pause in using its s 155 powers in the context of informal merger reviews – a matter on which the Law Council of Australia has raised concerns.

¹³⁶ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, 42.

¹³⁷ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, 42.

¹³⁸ Consistently with the rationale for market studies, the majority of respondents to the ICN survey report confirmed 'that they had used information obtained during a market study to inform enforcement work': ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [7.9].

Again, overseas experience is instructive in managing this issue. In the EU, the Commission cannot use information collected in its inquiries in subsequent litigation unless it requests it again from the parties using its specific investigative powers.¹³⁹ In the US, the FTC cannot base enforcement solely on information gathered in a market study and must open a separate investigation.¹⁴⁰ The ultimate safeguard, however, is likely to lie in the authority's robust understanding of and respect for the legitimate purpose and value of the market study function as distinct from its enforcement function. That most competition authorities understand and respect this is reflected in the fact that market studies do not generally lead to litigation alleging breach of the competition rules.¹⁴¹ The Competition Bureau of Canada has made it clear, for example:

*'The Bureau does not use industry or market studies as a means to obtain evidence for enforcement. Nor has the Bureau inadvertently come across evidence of anti-competitive activity that raises issues under the provisions of the Competition Act during the course of either a broad industry study or a market study. If the nature of the market problem is most appropriately considered under one of the enforcement provisions, the Bureau will deal with the issue as an enforcement matter and will not commence a market study with respect to the same matter. This situation does not arise as market studies are focused on market or industry-wide conditions or practices and on advocating the benefits of competition to regulators. Market studies and industry studies are not meant to address the anti-competitive activities of specific firms or individuals, which are best addressed by the enforcement provisions of the Competition Act.'*¹⁴²

To facilitate this separation, some authorities ensure a strict division of staff undertaking the relevant market study and staff who may be working on enforcement matters in the same market or sector. It has been found that this also increases the willingness of firms to supply information to the agencies.¹⁴³

Possible outcomes

It would be consistent with international practice for market study provisions to require the ACCC to report on the findings of any market study and to provide for the ACCC to make recommendations based on its findings. Of course, it is also possible that a market study may result in no recommendations. In the UK this market study outcome is referred to as giving the market 'a clean bill of health'.¹⁴⁴ The vast majority of competition authorities that engage in market studies produce recommendations that are advisory only¹⁴⁵ and only in a very few instances is government is required

¹³⁹ OECD, *Market Studies*, OECD Policy Roundtables, 2008, 212, n 7.

¹⁴⁰ OECD, *Market Studies*, OECD Policy Roundtables, 2008, 146.

¹⁴¹ T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexl (eds), *Competition Law as Regulation*, 2013, 11.

¹⁴² OECD, *Market Studies*, OECD Policy Roundtables, 2008, 21. See to similar effect, OFT, *Market Studies: Guidance on the OFT approach*, 2010, [2.14]-[2.15].

¹⁴³ This was the experience, for example, in the FTC/DOJ joint study into the real estate brokerage industry: FTC and DOJ, *Competition in the real estate brokerage industry*, April 2007.

¹⁴⁴ See Competition and Markets Authority, *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*, 2014, [1.6].

¹⁴⁵ T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexl (eds), *Competition Law as Regulation*, 2013, 5.

to respond to the recommendations,¹⁴⁶ and in even fewer required to act on them.¹⁴⁷ This should not be taken as an indication that authority recommendations carry little weight. According to the ICN survey, it appears that as a matter of practice both government and business tend to implement such recommendations, albeit the satisfaction by authorities as to the level of implementation underscores the importance of follow up advocacy, engagement and compliance work.¹⁴⁸

By comparison it is rarer for competition authorities to have powers which enable them to take active remedial steps, whether structural or behavioural, to address market failures identified through market studies.¹⁴⁹ Powers of this nature present a host of challenging issues, not least of which is the potential for blurring of the line between the authority's market study and enforcement functions, with the potential for a shift in the authority's focus and *modus operandi*.¹⁵⁰ It is not proposed that remedial powers (such as enforceable undertakings pursuant to s 87B) be contemplated in the context of any Australian market study model.

CONCLUSION

As far as tree analogies go, the ACCC could be depicted as a *General Sherman* (pun unintended).¹⁵¹ Given this, there are serious questions whether the ACCC's roots are sufficient to support it and whether its branches are sufficiently connected. In this paper two proposals have been made to address these questions and with the more general aim of enhancing the ACCC's effectiveness, namely that:

1. the ACCC initiate regular ex post review and evaluation of its enforcement decisions and processes; and
2. the ACCC be given the explicit powers and resources to develop a consolidated program of market studies.

¹⁴⁶ Cf the situation in the UK where the government has undertaken to consider the advice in an OFT market study report and respond within 90 days: See to similar effect, OFT, *Market Studies: Guidance on the OFT approach*, 2010, [2.17].

¹⁴⁷ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [8.13]-[8.16].

¹⁴⁸ ICN, *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [8.18]-[8.24].

¹⁴⁹ The UK is an example of a remedial model, where one outcome of a market study may be a reference for a market investigation. A reference may be made where the CMA has reasonable grounds for suspecting that any feature or combination of features of a market or markets prevents, restricts or distorts competition. If a competition problem is identified as a result of a market investigation, the CMA can impose a wide range of legally enforceable remedies. See Competition Commission, *Guidelines for market investigations: Their role, procedures, assessment and remedies*, April 2013 (updated in Competition and Markets Authority, *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*, 2014).

¹⁵⁰ This risk may be accentuated in a jurisdiction such as Australia where enforcement action can be protracted, risky and expensive. See the discussion in T Indig and M Gal, 'New Powers-New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities' in D Porto and M Drexel (eds), *Competition Law as Regulation*, 2013, 10-11.

¹⁵¹ [http://en.wikipedia.org/wiki/General_Sherman_\(tree\)](http://en.wikipedia.org/wiki/General_Sherman_(tree)).

Such initiatives would contribute substantially to the ACCC's capacity to enforce the CACA effectively as well as to its capacity to have input to the ongoing development and implementation of Australian competition policy.

Investing in ex post evaluation would deepen the ACCC's roots. It would strengthen the agency's capacity to make a persuasive case for greater resources and powers and a penetrating case for legislative change, where necessary. It also would bolster the respect of the business community and the public for the ACCC as an agency that is demonstrably committed, not only to transparency, consistency and accountability, but also more generally to continuous self-improvement.

Undertaking a more regular wide ranging program of market studies would assist in better connecting the ACCC's branches. Such studies should be seen as an investment in research and development, an investment that would increase the ACCC's expertise and build its capacity in performance of both its enforcement and its advocacy functions. In relation to both functions, market studies would position the ACCC to ensure that competition, consumer and regulatory policies are formulated and applied through the law and its enforcement in a way that is integrated and mutually reinforcing. A program of market studies would also make a major contribution to the creation of a continual self-sustaining process for competition policy reform and review.¹⁵²

The challenges associated with either of these proposals are not underestimated. However, there is a wealth of international experience on which legislators and the ACCC can draw in adopting and implementing them. Having regard to this experience would be consistent with the CPR's exhortation and the ACCC's own aspirations that Australian competition policy, law and enforcement be consistent with world's best practice.¹⁵³

¹⁵² CPR Issues Paper, 14 April 2014, p44.

¹⁵³ CPR Terms of Reference, [2].