



Law Council  
OF AUSTRALIA

*Business Law Section*

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# **Submission on the Australian Government Competition Policy Review**

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**Submission by the Competition and  
Consumer Committee of the Business Law  
Section of the Law Council of Australia**

**27 June 2014**

## SUMMARY

1. The Competition and Consumer Committee of the Law Council of Australia's Business Law Section (**Committee**) strongly supports an effective competition policy framework for the Australian economy, which is underpinned by effective laws and institutions.
2. In the Committee's opinion, the current provisions of the Competition and Consumer Act (**CCA**) and their administration have served Australia well, but there are areas for improvement or further analysis identified in this submission.
3. The Committee supports a principled basis to apply competition policy generally across the economy, with exceptions being permitted only after due and transparent consideration of other public benefits. The legislation should be capable of being understood and applied in a consistent and predictable manner by businesses and their advisers, in evolving and changing markets. In a number of respects parts of the CCA have become too complex and unwieldy; for example the cartel provisions and those concerning price signalling.
4. Small and medium sized business participation in markets is best facilitated by a combination of simple, principles-based regulation through the CCA and the Australian Consumer Law (**ACL**), and targeted industry codes where there is a need for greater regulation in particular industries. The Committee considers that the unconscionable conduct provisions should be allowed to develop further through the Courts rather than being rewritten at this stage.
5. The Committee's view is there is not a compelling case for an effects test to be added to section 46; however the section could be simplified and strengthened. The Committee does not believe any case has been made out to demonstrate that adding a divestment remedy to section 46 would generate any benefits for small business or other parties injured by abuse of market power. The so-called Birdsville amendments in sec 46 (1AA) are at odds with competition principles and similar laws in other jurisdictions and should be repealed.
6. The Committee supports the ACCC retaining its dual roles for competition and consumer law enforcement and its support of the AER.
7. The merger clearance regime - there are concerns about timeliness, transparency and difficulties with the more complex matters considered under the informal merger clearance regime. However, the Committee supports the informal clearance regime being retained and advocates improved processes in a redesigned formal clearance system.
8. The cartel laws are too complex and are likely to overreach; the laws should be reviewed and simplified in a number of respects.
9. Price signalling - the current provisions in Division 1A, which apply only to declared sectors (currently banking) should be repealed, because they are too complicated and are unlikely to achieve their objective. The Committee would not be opposed to an alternative regime being developed after proper consultation which addresses the problem of information exchange and concerted practices for their impact on competition in markets; noting there are such laws in other leading jurisdictions such as the UK and the European Union.
10. Section 47(6)- third line forcing- the Committee believes these provisions are outmoded and should be repealed; but if retained, the related body exception must also be retained.
11. The Committee has identified a number of other areas where further analysis would be warranted to test whether the CCA is effective, such as in the areas of private enforcement, resale price maintenance and exemptions under the CCA.

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## 1. INTRODUCTION AND OVERVIEW OF SUBMISSION

### 1.1 The role of the CCA in driving continued growth in productivity and living standards

The Overview of the Terms of Reference for the Competition Policy Review states: “An effective competition framework is a vital element of a strong economy that drives continued growth in productivity and living standards. It promotes a strong and innovative business sector and better outcomes for consumers.” The competition provisions of the CCA play a vital role in providing an effective framework for competition in Australia.

Improved productivity and living standards come from continuous innovation – from experimentation with and the adoption of new products, services and ways of organising enterprises. Valuable innovation occurs when an economy has structures that reward businesses which offer new products and services and best serve the developing needs of consumers. The economy should be structured to reward productive activities that create value.

Good competition law (as reflected, for the most part, in the CCA) directs economic rewards away from entrenched positions of market power and towards persons and enterprises that create value for consumers. It allows those who innovate with value-creating new products, services or methods to be rewarded for their enterprise. This means that temporary positions of market power should not be attacked by the law, because they may be the reward for successful innovation. Rather, the law should proscribe efforts to entrench already-established positions of market power. This was explained by Maureen Brunt as follows:

*Competition is a process rather than a situation. Dynamic processes of substitution are at work. Technological change in products and processes, whether small or large, is ongoing and there are changing tastes and shifting demographic and locational factors to which business firms respond. Profits and losses move the system: it is the hope of supernormal profits and some respite from the “perennial gale” that motivates firms’ endeavours to discover and supply the kinds of goods and services their customers want and to strive for cost efficiency. Such a vision tells us that **effective competition is fully compatible with the existence of strictly “limited monopolies”** resting upon some short run advantage or upon distinctive characteristics of product (including location). Where there is effective competition, it is the ongoing substitution process that ensures that any achievement of market power will be transitory.<sup>1</sup> (emphasis added)*

Similar views have been expressed by John Fingleton a former head of the UK Office of Fair Trading<sup>2</sup>. Key decisions of the High Court of Australia, the Australian Competition Tribunal and the Federal Court reflect exactly this attitude to “limited monopolies”<sup>3</sup>, while prohibiting corporations with substantial market power from using that market power to gain further competitive advantage.<sup>4</sup>

Although the competition provisions of the CCA and its administration have served to promote continued growth in productivity and living standards in Australia, some aspects could be improved. This submission devotes much of its attention to suggestions for improvement, which in no way detract from the great contribution that the administration and enforcement of the CCA and their predecessors have made to economic growth and prosperity in Australia.

To assist the Review Panel, outlined below in summary form are the key propositions put forward by the Committee in this submission, and the Chapter of the Issue Paper to which they

<sup>1</sup> Maureen Brunt, “Market Definition” issues in Australian and New Zealand trade practices litigation’ ch 5 of Economic Essays on Australian and New Zealand Competition Law, Kluwer (2003) p 198.

<sup>2</sup> See “Economics in the design and implementation of competition policy”, Fifth Baxt Lecture, 19 May 2014.

<sup>3</sup> See, for example, *Re Queensland Independent Wholesalers Limited* (1995) ATPR 41-438; *AGL v ACCC (No 3)* [2003] FCA 1525; *Queensland Wire Industries v BHP Co Ltd* (1989) 167 CLR 177 and *Re Qantas Airways Ltd* [2004] ACompT 9.

<sup>4</sup> See, for example, *ACCC v Australian Safeway Stores Pty Limited* (2002) ATPR (Digest) 46-215; and *ACCC v Visy Holdings Pty Ltd (No 3)* [2007] FCA 1471.

relate. Each section of this submission also contains a summary of the key points in that section. Recommendations of the Committee are contained in boxed and highlighted text for ease of reference.

## 1.2 **Chapter 1 - Competition Policy Principles and Chapter 2 – Regulatory Impediments to Competition (refer section 2 of this submission)**

The following international best practice principles of competition policy should inform the priorities for this Review:

- public welfare is best promoted through competitive markets, and governments should only interfere with these markets where necessary and proportionate;
- competition policy should promote and protect the process of vigorous competition rather than individual competitors;
- competition policy should apply across all sectors of the economy and to all forms of enterprise;
- competition is best served by a general law that prohibits certain conduct that substantially lessens competition, only prohibits such conduct *per se* when it is anti-competitive in the overwhelming majority of cases, and only permits such conduct through a clear process of review on public benefit grounds;
- competition law should be clear in its application and intended effect, and its enforcement should be independent, transparent, consistent and proportionate.

Government regulation should also reflect the public benefit that arises from competition itself and a preference for market-driven solutions in the absence of clear market failure or other clearly articulated public benefits justifying intervention in the competition process.

The Review Panel should accordingly institute a process by which the specific impediments to competition identified in the Issues Paper are addressed according to these principles:

- any remaining import restrictions should be examined carefully to minimise any negative effect on domestic welfare through the reduction of competition;
- international pricing differentials should be addressed by removing parallel import restrictions rather than by prohibiting price discrimination by international suppliers; and
- exemptions for intellectual property protection should be considered in light of recent changes to the relevant industries and other potential reforms of the competition law, and to ensure that exemptions are consistent and proportionate.

In relation to identifying regulatory impediments to competition, current approach of *ex post* assessment of regulation is not effective to limit regulatory burdens and is applied too late in the process to improve regulatory design. A forward looking (cost-benefit) approach to regulatory impact statements should be adopted.

## 1.3 **Chapter 3 – Government-Provided Goods and Services and Competitive Neutrality (refer section 3 of this submission)**

Competition-related regulation in infrastructure sectors should continue to be based on the foundation principles articulated in the 2006 Competition and Infrastructure Reform Agreement between the Commonwealth and the States and Territories, with greater emphasis on consistency both within sectors and between sectors.

Overall, Australia's competitive neutrality system has been effective in setting government policy and shaping government activities. However, the current system has limited visibility in

the legal and business community, and lacks the machinery to enforce a complaint and incentives for ongoing compliance.

A more effective system for dealing with specific complaints would need to involve formal obligations and enforceable adjudication by an independent body such as the Australian Competition Tribunal. Because most complaints would be likely to involve competing public policy objectives, any claim based on non-adherence to a competitive neutrality principle would need to be subject to an overall assessment as to whether the conduct had a net public benefit.

However, before deciding whether resources should be allocated to the introduction of a formal system to deal with specific complaints, the Review Panel is encouraged to investigate the true level of concern in the business community regarding competitive neutrality.

#### 1.4 **Chapter 4 – Potential Reforms in Other Sectors**

The Committee makes no submissions on the matters identified in **Chapter 4 – Potential Reforms in Other Sectors**.

#### 1.5 **Chapter 5 – Competition Laws**

##### ***Overall form and structure of the legislation (refer section 4 of this submission)***

The suitability of Australia's highly codified competition law to work effectively to promote competitive markets is open to debate.

This legislation must be capable of being understood and applied in a consistent and predictable manner by businesses and their advisers, in evolving markets. This does not necessarily mean that the competition laws in Part IV of the CCA can readily be made "simple", but needless complexity and inconsistency must be avoided.

The legislation has operated most effectively when a balance has been struck between principles and prescription, with the legislature prescribing that which is prohibited in clear language, but leaving the implementation and interpretation of those laws to the Courts.<sup>5</sup> Several amendments have upset this balance as a result of needlessly convoluted drafting.

Given its history, a wholesale re-writing of the statute, with a view to adopting a high level set of "principles", is probably unrealistic and not necessarily desirable. There is, however, a need for a simplification program, targeting specific areas that are identified by this Review as being inconsistent or unnecessarily complex.

In relation to the definition of "market", the Committee believes the definition of this term in section 4E of the CCA, when read alongside previous Court and Tribunal decisions, does not require further amendment although as noted below (section 4.2), section 4E adds little to the case law on the principles of market definition.

##### ***Misuse of market power and remedies (refer section 5 of this submission)***

Broadly speaking, the misuse of market power prohibition contained in section 46(1) of the CCA is appropriate and effective.

It is the view of the Committee (consistent with that of many previous reviews) that there is not a compelling case for amending section 46 to add an "effects test". Particularly, in the ten years since the last review of this issue, the Federal Court and High Court have clarified the meaning of section 46 significantly, with economically sound analysis of the "take advantage" test. Proof of purpose has not been an obstacle to development of the law or enforcement of section 46 in the Courts.

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<sup>5</sup> See for example, s 18 of the CCA and its predecessor s 52 of the *Trade Practices Act 1974*.

Over the last decade or more, sectoral concerns in relation to ostensibly "predatory" or "abusive" conduct in concentrated industries has resulted in suggestions to expand section 46 to "do something" to "help small business". This has resulted in ill-considered amendments to section 46, such as the "Birdsville amendments" in sections 46(1AA) and (1AB). Consistent with the OECD's views, the Committee submits that subsections 46(1AA) and (1AB) should be repealed on the basis that the provisions are likely to constrain vigorous (and beneficial) competition from firms with high market share, but no ability to behave anti-competitively (that is, without substantial market power). In the seven years since its introduction, the provision has never been litigated. No other established competition law regime, such as the European Union or the United States, has a prohibition in similar terms to section 46(1AA). The provision is a clear outlier which invites inefficient outcomes, protecting only the interests of smaller firms at the potential expense of higher costs to consumers.

The Committee also encourages the Review Panel to consider simplifying section 46 by the deletion of many of the "explanatory" sub-sections within the current form of the section. They are largely unnecessary and, in some cases, muddy, rather than clarify, the effect of the existing case law.

By way of example, the Committee recommends that the Review Panel consider the repeal of section 46(1AAA) which may have the effect of prolonging, or making more uncertain, litigation on predatory pricing claims. That subsection provides that a corporation may contravene section 46 when pricing below undefined "relevant cost" even when it cannot recoup resulting losses. Similarly the Committee does not support retaining section 46(6A)(d) which provides that a court may have regard to whether conduct of a corporation is "*otherwise related*" to its market power in determining if it has taken advantage of such power.

Finally, the Committee urges the Review Panel to be cautious about suggestions that a divestment remedy or break up orders be introduced in Australia. The issues involved are complex, with unpredictable economic and competitive impact and practical implications for enforcement. While a well-targeted divestiture order might be said to eliminate market power with "one cut" (thus, reducing the regulatory task for the future), there is a significant risk of creating two or more less efficient businesses, and it is likely that supervising on-going behavioural undertakings would accompany any divestiture order. In the United States, such a power exists but has been used only sparingly. Such a power also exists in the European Union and Canada – in neither case has it been used.

### ***Small and medium business participation in markets (refer section 6 of this submission)***

Small and medium sized business participation in markets is best facilitated by a combination of simple, principles-based regulation through the CCA and the ACL, and targeted industry codes where there is a need for greater regulation in particular industries.

The Committee supports the development of voluntary industry codes where distinguishable industry sectors exist, in order to promote best practice.

As a general proposition, the Committee considers that the unconscionable conduct provisions as currently drafted already provide adequate protection for small business and does not support wholesale changes to the existing unconscionable conduct regime. There are divergent views among Committee members as to whether the unconscionable conduct provisions have, historically, been interpreted and applied too narrowly by the judiciary to address the real or perceived type of conduct which the legislature considered appropriate to make unlawful and, now, punishable by pecuniary penalties of up to \$1.1M per contravention. The Committee will respond separately to the consultation paper released by the Treasury on 23 May 2014 which outlines proposals to extend unfair contract term protections to small businesses.

As part of simplification of the CCA, the Committee supports a rethinking of the approach to collective bargaining notifications and authorisations and recommends a number of changes (discussed in section 11) in order to make the system more workable and accessible to small and medium business.

***Recommendations in the Productivity Commission's report on the National Access Regime (refer section 7 of this submission)***

The Committee contributed extensively to the Productivity Commission's recent inquiry into the National Access Regime and refers the Review Panel to those submissions.

In relation to the following key recommendations of the Productivity Commission Report:

- Recommendation 8.1: the Committee supports the recommendation to amend criterion (a) to a comparison of competition with and without access through declaration.
- Recommendations 8.2 and 8.3:
  - (a) if a national monopoly test is preferred, criterion (b) will need to be amended given the High Court's decision in *Re Pilbara Infrastructure*;
  - (b) if a private profitability test is preferred, criterion (b) should be amended to clarify that "anyone" does not include the incumbent facility owner.
- Recommendation 8.4: the Committee supports the recommendation to amend criterion (f) so that it becomes a positive test of whether access through declaration promotes public interest.
- Recommendation 8.5: the Committee supports the introduction of a threshold clause stating that a service cannot be declared if it is subject to a certified access regime, together with a provision for revocation of certification in the event of substantive modifications to the regime.
- Recommendations 8.9 and 8.10: the Committee sees merit in the ACCC being required to propose guidelines on how it would implement the facility extension provisions. However, it expresses caution regarding the inclusion of an express power to require expansions of a facility.
- Recommendation 9.1: the Committee supports the recommendation that subsection 44H(9) be amended so that the default decision by the Minister is to follow the National Competition Council's recommendation.

The Committee considers there may be merit in considering whether measures could be taken to improve the level of quality and consistency of State-based and sector specific regimes. Options include compliance with transparent best practice guidelines.

***Anti-competitive agreements:***

***Agreements between competitors: Cartel provisions, cartel enforcement and private enforcement of the CCA (refer section 8 of this submission)***

The cartel provisions in Division 1 of Part IV, price signalling provisions in Division 1A and the joint ventures exceptions in sections 44ZZRO and 44ZZRP do not work as effectively as they should and in some instances do not further the objectives of the CCA.

The cartel provisions in Division 1 of Part IV should be repealed and redrafted in language that is well understood, following the advice of the then Attorney General in the Second Reading Speech for the 1974 Bill. The provisions are confusing, prolix, densely worded, overly detailed, and in places unintelligible. Having regard to provision for jury trials of criminal cartel conduct, it is vital that the provisions be expressed in well understood language.

Division 1A, which deals with price signalling, should be repealed. The prohibitions impose an extensive regulatory burden, are over-reaching, and capture conduct that may be pro-competitive or welfare enhancing. As a matter of both established economic principle and

international practice, information disclosure should attract liability only insofar as it evidences explicit collusion or facilitates co-ordination of conduct between competitors in a market and implicit collusion. There is no equivalent to the prohibitions in Division 1A in the laws of the United States, Europe (at Community or national level), Canada or New Zealand.

Further, the fact that Division 1A only applies selectively, by regulation, to prescribed classes of goods or services is manifestly inappropriate. There is no principled justification for selective application of these prohibitions. Regulations are not subject to the same Parliamentary scrutiny to which legislation is subject. The criteria for determining which sectors should be prescribed have not been properly articulated and are likely to be difficult to formulate in practice.

To the extent that the Review Panel considers that Division 1A should or might be replaced by other provisions addressing concerted practices which fall short of arrangements or understandings between market participants, close attention should be given to the laws concerning concerted practices in other jurisdictions. In particular the Committee recommends an approach which focuses on the purpose or likely effects of conduct on competition in Australian markets, rather than *per se* treatment.

The joint venture exceptions under sections 44ZZRO and 44ZZRP are seriously flawed and should be repealed. Collaborations between competitors should qualify for exemption from *per se* liability if they are pro-competitive or efficient and whether or not they happen to be a "joint venture". Further, the current exclusion of joint ventures for the *acquisition* of goods or services is arbitrary and economically irrational. These exceptions should be replaced with a collaborative activity exemption, based on that included in recently proposed amendments to the *Commerce Act 1986* (NZ).

Greater incentives could be provided for immunity applications, and consideration should be given to the introduction of bar orders along the lines of those in Canada and the United States.

Section 5 of the CCA should be amended to broaden the CCA's extraterritorial operation, after consideration of the analogous provisions in Europe and the United States. The continuing growth in global commerce and international markets make it vital that international cartels affecting Australian markets and their participants are properly regulated by the Act. The "carrying on business" requirement could be reviewed, having regard to the globalization of commerce, and the increasing importance of ecommerce.

***Agreements between suppliers and customers and secondary boycotts (refer section 9 of this submission)***

*Third line forcing*

The *per se* nature of third line forcing should be removed, and the prohibition should be made subject to a competition test, as previously recommended by the Committee and the Dawson Committee. While vertical restraints may, in some cases, enable a corporation to extend its market power from one market to another, third line forcing is commonly pro-competitive and there is an ongoing risk that the *per se* prohibition stifles the delivery of substantial consumer benefits.

The current exemption for related bodies corporate should be retained as it is consistent with underlying economic principle (which should be focused on conduct by a single economic entity).

*Resale price maintenance*

Despite relaxation in other jurisdictions, resale price maintenance is subject to the same test for illegality as cartel conduct. The Committee believes this is incongruous. There is a strong case for relaxing the *per se* prohibition on resale price maintenance and prohibiting this conduct, like other forms of vertical restraint, only where it has the purpose, or is likely to have the effect, of substantially lessening competition. At the very least, there is a case for

permitting resale price maintenance to be capable of a simple notification procedure under section 93 of the Act, to give the ACCC the ability to assess the effect of such conduct on a case by case basis. The ACCC should publish guidelines on when notifications (ie. exemptions) may be set aside or allowed to stand.

#### *Secondary boycotts*

The Committee makes no comment at this time on the secondary boycott provisions to the extent they apply in an industrial context. In relation to secondary boycotts that substantially lessen competition (section 45DA) the Committee believes the prohibition should be retained, subject to aligning the test for illegality with section 45.

#### ***Merger provisions of the CCA and their application (refer section 10 of this submission)***

Whilst mergers and acquisitions can lessen competition in Australian markets, they are also a means by which competition can be increased and stimulated, and consumer welfare enhanced. The mechanisms used in Australia to draw the line between competitive mergers (or mergers with neutral or insignificant competitive impact) and mergers that are anti-competitive are, by and large, appropriate and effective as follows.

- No amendments are required to the current substantive competition test for mergers set out in section 50 of the CCA. The current test contained is effective and in line with international best practice;
- The existing informal merger clearance process adopted by the ACCC is effective for non-complex mergers, and should be retained;
- The existing merger authorisation process should remain in place. It is appropriate to defer a more comprehensive review of these processes until there have been sufficient merger authorisation applications against which to test the effectiveness of those processes;
- No further amendments are required to the CCA to deal with creeping acquisitions. The harm to competition that is said to arise from creeping acquisitions has not been clearly articulated. Unless there is a clear articulation of the competition harm which proposed amendments are intended to address, there is a significant risk that the amendments will not address that harm and could have negative implications for legitimate acquisitions that improve the efficiency of the Australian economy. In this context, it is notable that the competition laws in the United States and European Union do not recognise the creeping acquisition theory.

However, the Committee considers that the existing informal merger clearance process adopted by the ACCC is not as effective as it could and should be for complex or controversial mergers. For these matters, changes could be made to the merger review process to increase transparency and timeliness throughout the process, and to introduce a requirement for the ACCC to publish its reasons for decision. There are a number of ways in which this could be effected, including by introducing via legislation a new formal "second phase" review process. The Committee does not support abolition of the informal merger system, or its wholesale replacement with a formal process.

#### ***Exemptions, exceptions and defences under the CCA (refer section 11 of this submission)***

The operation of the CCA would benefit from a holistic review of current exemptions and exceptions, aimed at achieving a more principled (and less complex) drafting approach, including the introduction of a new efficiency defence for collaborative arrangements

There should be a principled review of the prohibitions, defences and exemptions to ensure that they are more clearly articulated, less complex and better reflect underlying economic principles.

The Committee recommends that any such review should involve:

- removing inconsistent or narrow exceptions in favour of broader more principled exceptions;
- ensuring that any Commonwealth or State legislation or regulation that authorises conduct under section 51(1) is aligned with the Competition Principles Agreement (and, if relevant, the National Reform Agenda);
- a new general "efficiency-based" defence akin to the US rule of reason doctrine, EU law and the recent collaborative ventures defence in New Zealand;
- repealing Part X of the CCA (Liner Shipping), which is no longer necessary or aligned with international practice; and
- consideration of amendments to Part XIB of the CCA to simplify the competition notice provisions and/or the repeal of some unused provisions. There should continue to be periodic reviews of Part XIC (such as that presently being undertaken by the Vertigan Review) to ensure that it operates in a manner that achieves the objects of the CCA.

While the authorisation and notification arrangements are generally operating well, the Committee recognises that the authorisation notification processes impose costs, delay and complexity on business and are a "second best" outcome compared with providing well designed and principled exemptions and defences which permit efficient or pro-competitive conduct without the need for administrative approval.

A more principled approach to defining the primary prohibitions, defences and exemptions including the addition of an "efficiency defence" as noted above would reduce the current over-reliance on authorisation, which is out of step with international practice.

Consideration should be given to the removal of the *per se* illegality threshold for collective bargaining conduct (as has been done in many overseas jurisdictions), as it is likely that in many cases the arrangements which would benefit from the collective bargaining regime are unlikely to have a substantial impact on competition in the respective markets in any event. If the collective bargaining provisions and the current notification system are to be retained, a number of changes are necessary.

***Remedies, powers, pecuniary penalties and private enforcement (refer section 12 of this submission)***

The role of the Courts as the principal decision-maker with regard to the imposition of remedies should be retained and that role should not be derogated to administrative processes. In the opinion of the Committee, retention of the Courts as the principal arbiter in competition law enforcement is critical to ongoing relevance, efficacy and fairness in the administration of competition law.

The current penalty regime is considered by the Committee to be adequate in achieving its objectives and the Committee believes there is no basis for extending or enhancing the portfolio of remedies available to the ACCC. The relatively small number of domestic cartel matters in recent times does not support a conclusion that the deterrent value of penalties awarded by the Courts has been insufficient.

Consideration should be given to promoting private enforcement as part of improving access to remedies for small businesses and consumers, but at the same time not interfering in the ability of the ACCC to enforce the CCA. Further consideration should be given to how to best promote both objectives although there may need to be a trade-off where the two objectives are in conflict - as for example, with suggestions allowing private litigants to access parts of the ACCC's investigative file in appropriate circumstances, or by requiring immunity and leniency

applicants to provide information and compensation to private litigants, or facilitating the use in private litigation of admissions made in regulatory actions.

There is no evidence apparent to the Committee suggesting that the remedies and powers of the ACCC need to be extended to provide for divestiture powers or cease and desist powers, or otherwise significantly enhanced.

Further consideration could be given to whether the ACCC should be granted more specific authority to undertake market studies. In the Committee's view, there is an open argument in favour of such market investigations, in the context of Australia's many concentrated industries. Carefully conducted inquiries may serve in "myth busting" where those industries are already competitive. However they come at a very significant cost to the companies concerned and the remedies and outcomes of such reviews need to be further evaluated before advocating change in this area.

#### 1.6 **Chapter 6 – Administration of Competition Policy (refer section 13 of this submission)**

The Committee considers that the ACCC has overall been an effective agency and should be retained as the principal national agency responsible for both competition and consumer law enforcement.

However, the effectiveness of the ACCC is likely to be significantly enhanced if it engaged in systematic and thorough retrospective review of its processes and decisions. Such a practice would bring it into line with equivalent overseas agencies.

On balance, the Committee considers that there are more advantages than detriments from the ACCC retaining its role in both consumer and competition law matters, and that there would be substantial benefits from introduction of an advisory body or ombudsman to provide guidance on, or deal with, complaints about the ACCC's decisions and actions.

The Committee further considers that:

- there would be benefits from introducing a specialist division for the hearing of competition and consumer law matters within the Federal Court, or that the role of the Australian Competition Tribunal as a body for the review of decisions of the ACCC should be expanded, subject to the relevant limitations under the Constitution;
- there is a clear need for an independent institution with responsibility for the ongoing development and reform of that law and policy; and
- the COAG competition agenda, as reflected in the Competition Principles Agreement and other agreements and initiatives, was effective in progressing achievement of competition policy objectives, at both the Federal and State levels. The Committee believes that there is an ongoing need for a scheme such as the competition reform payments, and has difficulty envisaging an alternate scheme that would be as effective.

2. **COMPETITION POLICY PRINCIPLES (CHAPTER 1) AND REGULATORY IMPEDIMENTS TO COMPETITION (CHAPTER 2)**

**Key points in this section:**

- (a) More than a century of competition policy, economics and jurisprudence worldwide shows a convergence towards certain international best practice principles of competition policy, including that:
- public welfare is best promoted through competitive markets, and governments should only interfere with these markets where necessary and proportionate;
  - competition policy should promote and protect the process of vigorous competition rather than individual competitors;
  - competition policy should apply across all sectors of the economy and to all forms of enterprise;
  - competition is best served by a general law that prohibits certain conduct that substantially lessens competition; only prohibits such conduct *per se* when it is anticompetitive in the overwhelming majority of cases; and only permits such conduct by means of a clear process of review, on public benefit grounds;
  - competition law should be clear in its application and intended effect, and its enforcement should be independent, transparent, consistent and proportionate.
- (b) A continued commitment to these principles will increase competition and efficiency in the domestic environment and recognise the increasingly international reach of markets.
- (c) These principles should inform the priorities for this Review. For example, the Committee considers that applying these principles to the impediments to competition identified by the Issues Paper would suggest that:
- any remaining import restrictions should be examined carefully to minimise any negative effect on domestic welfare through the reduction of competition;
  - international pricing differentials should be addressed by removing parallel import restrictions rather than by prohibiting price discrimination by international suppliers; and
  - exemptions for intellectual property protection should be considered in light of recent changes to the relevant industries and other potential reforms of the competition law, and to ensure that exemptions are consistent and proportionate.
- (d) In relation to the process for identifying regulatory impediments to competition, the Committee considers that the regulatory impact statement process is ineffective and should be overhauled.
- (e) A forward looking (cost-benefit) approach to regulatory impact statements should be adopted. The current approach of ex post assessment of regulation is not effective to limit regulatory burdens and is applied too late in the process to improve regulatory design.

## 2.1 Commitment to a principles-based approach

Section 1.16 of the Issues Paper recognises the fundamental role of principles in a competition policy framework:

*“An effective competition policy framework aims to address a wide range of behaviours by market participants in an ever-evolving economic environment. With this in mind, governments have often established competition policy frameworks built upon a set of overarching principles.”*

Reference to a core framework of coherent principles will ensure that competition law and policy can address the full range of actual and potential conduct by all manner of market participants in an economic environment that is constantly evolving and will continue to do so in ways we cannot predict or even imagine. Reacting to the immediate effects of these changes with piecemeal sectoral regulation will result in a fragmented, inconsistent and arbitrary regulatory environment and a drag on competitive efficiency and innovation. The application of a consistent framework of principles will promote regulatory certainty and confidence and increase competition and efficiency for the benefit of all Australians.

More than a century of competition policy, economics and jurisprudence worldwide shows a clear convergence towards certain principles increasingly recognised as the international best-practice principles for competition policy. Modern antitrust policy began as a relatively blunt instrument to address the threatening concentration of financial and even political power, but developed an increasingly sophisticated analysis of the benefits and limitations of competition and a sharpened focus on the consumer as its ultimate beneficiary.

The emergent principles of international best-practice competition policy have been documented and embodied in international agreements to which Australia is a signatory, in international policy guidelines and principles, in legislation, case law and regulatory decisions, and in reviews like this one.

A continued commitment to these principles at every level of decision-making is important not only to ensure the most efficient domestic environment, but to recognise the increasingly international reach of markets and Australia’s competitiveness within those markets. The US Antitrust Modernization Committee Report of April 2007 recognised both the emergence of these principles and the importance of continued convergence:<sup>6</sup>

*“Notwithstanding the large number of antitrust regimes worldwide, multinational antitrust enforcement generally has not generated significant inconsistencies or conflict among nations. Indeed, significant convergence based on sound principles of competition law has occurred and is continuing to occur on both procedures relating to multinational enforcement and the core substance (if not the details) of antitrust and competition law...”*

*Divergence can create problems of at least three types. First, companies may be subject to conflicting and inconsistent laws, creating uncertainty as to the legal standards applicable to their business arrangements. Second, companies must comply with the procedural requirements of multiple jurisdictions, potentially increasing their costs significantly, particularly with respect to notification requirements for mergers. Third, different countries may ultimately impose different, and inconsistent, remedies with respect to the same conduct or transaction.”*

The Minister for Small Business has also recognised the role of international best practice in informing this Review:<sup>7</sup>

*“We have taken on board some wise counsel from the Prime Minister’s Business Advisory Council to recognise that we are now part of a global economy and we*

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<sup>6</sup> At p 213.

<sup>7</sup> The Hon Bruce Billson MP, Competition Review Panel Press Conference, Parliament House, Canberra, 27 March 2014. <<http://bfb.ministers.treasury.gov.au/transcript/015-2014/>>.

*need to make sure that our laws are world's best practice. We need to ensure where other jurisdictions have seen and acquired insights that perhaps aren't embraced in our own policy approach, that we at least make sure we are world's best practice...*

*So it is a broad piece of work and includes the law itself, how it is operating, what insights we can gain from our experience. What we can learn from international best practice. What we can do to make sure our law is world's best practice and fit for purpose for today's economy and the economy that is emerging."*

A commitment to the international best practice principles of competition policy will ensure that Australian markets and businesses are as competitive as possible and that Australian customers receive the full benefits of competition.

## 2.2 Outline of key competition policy principles

The Committee has identified the following key principles of international best-practice competition policy, and recommends that they inform the priorities and focus of the Review:

- (a) **Public welfare is best promoted through competitive markets, which generally deliver the most efficient use of society's scarce resources and protect the interests of consumers.**

This principle is now explicit in section 2 of the CCA:

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

It has been reiterated with increasing precision by successive reviews of Australia's trade practices law, culminating in the Dawson Report:<sup>8</sup>

*"Competitive markets make an important contribution to increasing efficiency and productivity in the economy, thereby improving the welfare of Australians."*

It has also been stated by the European Commissioner for Competition:<sup>9</sup>

*"Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources."*

- (b) **Government action should not interfere with the operation of a competitive market unless it is justified on clear public benefit grounds or to address a clear and ongoing market failure. Any such intervention should be proportionate and least distortive to market incentives.**

Competition policy seeks to reduce excessive government regulation that may otherwise reduce competition or distort market incentives. A role for government exists, given that market failures do occur, including via imperfect competition. Competition policy therefore endorses minimalist regulation, via competition law and appropriate sectoral regulation where necessary to address market failures.

These principles were adopted by the Agreed Principles for a National Competition Policy (1992), the Hilmer Report and the Competition Principles Agreement (1995). They are also reflected in the World Trade Organisation's *Fundamental Principles of Economic Policy*:<sup>10</sup>

*"A fundamental principle or premise that permeates the application of competition policy is the belief that, in most circumstances, the free operation of competitive*

<sup>8</sup> At p 5.

<sup>9</sup> Neelie Kroes, "European Competition Policy – Delivering Better Markets and Better Choices", 15 September 2005.

<sup>10</sup> WT/WGTCP/W/127, 7 June 1999, at pp 7-9.

*markets, undistorted by government intervention, will generate economically and socially efficient outcomes...*

*The efficient operation of competitive markets can be affected by various kinds of market failures which may necessitate some form of government intervention...*

*[Governments should] reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests."*

- (c) **The process of competition is inherently rivalrous and challenging, as firms seek to succeed at the expense of their rivals. Competition policy should promote and protect the process of competition rather than individual competitors. It should not undermine the achievement of the efficient use of society's resources or be contrary to the interests of consumers.**

The challenging nature of the competitive process was acknowledged in the often-cited case of *Queensland Wire v The Broken Hill Proprietary Company*:<sup>11</sup>

*"Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way."*

The corollary principle that competition policy should protect the process of competition rather than individual competitors was affirmed by the US Court of Appeals in *Ball Memorial Hospital v Mutual Hospital Insurance*,<sup>12</sup> cited with approval by the High Court in *Boral*:<sup>13</sup>

*"Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals — sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balms for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors."*

The crucial principle that competition policy should not undermine efficiency or be contrary to the interest of consumers was recognised by the Hilmer Report:<sup>14</sup>

*"The Committee does not believe that it is the role of the competitive conduct rules to protect any particular sector of society, and does not believe that the competition rules should be used to achieve objectives contrary to economic efficiency."*

- (d) **Competition policy should apply across all sectors of the economy and to all forms of business enterprise, whether governmental, corporate or non-corporate.**

The need for competition policy to apply to all forms of business enterprise was recognised by the Swanson Report:<sup>15</sup>

*"We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise. Only in this way will the law be fair, and be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its standards."*

The principle was reiterated by the Agreed Principles for a National Competition Policy that fed into the Hilmer Report and the Competition Principles Agreement:<sup>16</sup>

<sup>11</sup> (1989) 167 CLR 177 per Mason CJ & Wilson J at 191.

<sup>12</sup> 784 F.2d 1325 (1986).

<sup>13</sup> *Boral Besser Masonry Limited v ACCC* [2003] HCA 5 per McHugh J.

<sup>14</sup> at p 74.

<sup>15</sup> at p 84.

*“As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership.”*

(e) **Competition is best promoted by a general law that prohibits certain identified forms of conduct that substantially lessen competition.**

The earliest antitrust laws in both the US and Australia were based on a broad and strict prohibition on monopolies and attempts to monopolise.<sup>17</sup> Later approaches began to identify certain forms and categories of conduct that would be prohibited, either absolutely or where their impact on competition met certain thresholds.<sup>18</sup>

Australian law and commentary have converged on a test of “substantial lessening of competition” in preference to higher thresholds such as dominance or control, and lower thresholds such as *per se* liability.

Attempts have been made to exhaustively enumerate the conduct that should be addressed by the competition law,<sup>19</sup> or to remove any reference to forms of conduct and rely on a general test of conduct that substantially lessens competition,<sup>20</sup> but a middle ground has emerged in which categories of conduct are identified and judged according to their effect on competition.

(f) **Conduct should only be prohibited *per se* where in the overwhelming majority of cases it will substantially lessen competition without any redeeming public benefit. Conduct that substantially lessens competition should only be permitted by means of a clear process of review, on public benefit grounds.**

As competition policy has moved towards the promotion of public welfare and consumer benefit as its overriding goal, it has re-examined *per se* prohibitions where evolving economic theory has revealed potential public benefits in previously prohibited conduct.

For example, the Swanson Report considered that third line forcing “*will, in virtually all cases, have an anti-competitive effect.*”<sup>21</sup> The Hilmer Report disagreed,<sup>22</sup> but in relation to resale price maintenance noted that “*The Committee has not been presented with convincing evidence that efficiency-enhancing RPM occurs with such frequency that the *per se* prohibition should be relaxed.*”<sup>23</sup> In 2007 the US Supreme Court held that resale price maintenance, which had been prohibited *per se* for almost a century, should now be judged according to the rule of reason—that is, according to its impact on competition.<sup>24</sup>

The US Antitrust Modernization Commission noted the move away from *per se* prohibitions:<sup>25</sup>

*“[P]er se rules that deem specified conduct automatically illegal are clear, predictable, and administrable. Yet the Courts, scholars, and antitrust practitioners have reached consensus that—although appropriate in particular limited circumstances—per se rules can all too often condemn business conduct that actually benefits, not harms, consumers...”*

*Over time, new economic learning has brought to the fore procompetitive explanations for certain business practices previously condemned outright... New anticompetitive theories have also emerged. Given the potential for either*

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<sup>16</sup> Agreed Principles for a National Competition Policy (1992), principle (b).

<sup>17</sup> See the US Sherman Antitrust Act of 1890 and the Australian Industries Preservation Act 1906.

<sup>18</sup> See the US Clayton Antitrust Act of 1914 and the Restrictive Trade Practices Act 1965.

<sup>19</sup> See the Swanson Report at p 32: “*The Committee was initially quite attracted by the idea of an exhaustive list of specific matters, and spent a great deal of time examining lists of descriptions of types of agreements or practices for possible inclusion in the Act. Reluctantly we came to the conclusion that this approach was not feasible on an exhaustive basis.*”

<sup>20</sup> See the Hilmer Report at p 30: “*The TPC has proposed that the competitive conduct rules could be more simply expressed by a single provision that ‘all conduct which substantially lessens competition is prohibited unless authorised.’ While seeing some merit in the idea behind this proposal, the Committee has come to the view that such a sweeping simplification would not be appropriate.*”

<sup>21</sup> At p 30.

<sup>22</sup> At p 52.

<sup>23</sup> At p 57.

<sup>24</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007).

<sup>25</sup> At p 29.

*procompetitive or anticompetitive explanations for business conduct, antitrust analysis needed to move away from per se rules of automatic illegality.”*

Where conduct is found to substantially lessen or hinder competition, it should only be permitted where it delivers objectively identifiable and widely available efficiencies or on public benefit grounds. Public benefit is currently reviewed in Australia through the authorisations and notifications process, but the Committee suggests that the Review Panel recommend that Parliament introduce a “rule of reason” or “efficiencies” defence that could be raised in court proceedings as an alternative to seeking administrative authorisation (see further section 11.5 below).<sup>26</sup>

**(g) Competition law should be sufficiently clear in its application and intended effect that it can be understood and complied with.**

The US Antitrust Modernization Commission notes:<sup>27</sup>

*“The rules also should be clear, predictable, and administrable, so that businesses can comply with them and Courts can administer them.”*

**(h) The application and enforcement of competition law and sectoral regulation should be politically independent, transparent, consistent, and of a high quality. Regulators should take into account the costs that their processes impose. Decisions by regulatory authorities should be subject to appropriate levels of accountability.**

The World Trade Organisation recommends that governments:<sup>28</sup>

*“Ensure that procedures for applying regulations are transparent, non-discriminatory, contain an appeals process, and do not unduly delay business decisions”.*

The ASEAN Regional Guidelines similarly provide that:<sup>29</sup>

*“Sound institutional framework and due process are fundamental in ensuring the effective application of competition law. In particular, procedures should be transparent, certain, accountable and not unduly burdensome or prohibitive. Transparency is also fundamental in order to support the credibility of the competition regulatory body (or other law enforcement authority)”.*

### 2.3 Identified regulatory impediments to competition

The principled approach to competition policy applies both to the primary competition law and to wider questions of government regulation of economic activity.

The Committee considers that all kinds of regulation that potentially impede competition should be regularly reviewed in light of their intended and actual effects on competition and the public benefits they provide. The review begun after the Hilmer Inquiry remains incomplete, and many new regulations have been introduced since. Accordingly, a new and complete review is now appropriate.

<sup>26</sup> See eg the direct application of Article 101(3) in Europe, and its member states. Article 101(3) provides that the prohibition contained in Article 101(1) may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford the parties to the arrangement the possibility of eliminating competition in respect of a substantial part of the products concerned. This provision is mirrored not only in the EU member states laws, but in many laws of Asian jurisdictions as well. See also s 4(1) of the *Competition Act 1998* (South Africa) which provides a defence if a party to a horizontal agreement can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs the alleged substantial lessening of competition. s 5(1), s 8 and the assented but not yet commenced s 10A(1) provide a similar defence for vertical arrangements, exclusionary acts by dominant firms, and complex monopoly conduct respectively.

<sup>27</sup> At p 29.

<sup>28</sup> At p 14.

<sup>29</sup> *ASEAN Regional Guidelines on Competition Policy* at p 34.

The fundamental principle applied by the post-Hilmer review and reform programme was consistent with the established principles of competition policy identified above and should be applied again, with some clarification. Moreover, in the last two decades a body of international best practice has arisen that informs how such principles should be identified and applied.

That is, government regulation should not restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs, and there is no other way to achieve these benefits that is less restrictive of competition, recognising:

- the public benefit that arises from competition itself;
- the preference for market-driven solutions in the absence of a clear market failure or other clearly articulated public benefit grounds;
- the need to protect the competitive process rather than individual competitors or classes of competitor; and
- the need for competition policy to apply consistently across sectors and business types.

As far as possible, review of these regulations should be prioritised according to their impact on competition and the potential economic benefits of reform.

Consistent with previous approaches, incentive payments should ideally be made to State and Territory governments to reflect the benefit of the reform that accrues to the Commonwealth through greater productivity and resulting revenues.

The Committee does not propose to address each of the specific impediments to competition identified in Chapter 2 of the Issues Paper, but recommends that the Review Panel institute a process by which these impediments are addressed according to the established principles of competition policy.

For example, an application of these principles might suggest the following approach to certain of the impediments identified by the Issues Paper:

(a) **Import Restrictions**

Australia is subject to a range of international legal obligations in the form of the World Trade Organisation, various free trade agreements, and a number of other international treaties. Pursuant to those agreements, Australia has already achieved one of the most open economies in the world.

Any remaining border measures should be consistent with the general principles of competition policy identified above to minimise any negative effect on domestic welfare.

To the extent any future new border measures are imposed, they should remain consistent with Australia's international obligations and should be subject to the same competition policy analysis as purely domestic regulatory measures.

(b) **International Price Discrimination**

Both international and domestic price discrimination should be treated according to the competition principles identified above. Application of these principles supports that international pricing differentials should be addressed by removing parallel import restrictions rather than by prohibiting price discrimination by international suppliers.

As recognised by the Swanson, Hilmer and Dawson Reviews, price discrimination is not inherently anti-competitive and can often promote economic efficiency and maximise welfare.

The removal of the price discrimination prohibition from the then *Trade Practices Act 1974 (Cth)* (**TPA**) was consistent with the competition principles identified above.

The 2013 Senate Inquiry into IT Pricing recommended against a prohibition on international price discrimination, noting the reasons for removing the former price discrimination prohibition from the TPA and drawing no distinction between domestic and international price discrimination.

An attempt to privilege Australian consumers over international suppliers by dictating local prices would distort the competitive process and have unpredictable consequences. The public benefit of any such attempt is far from clear and there is no evidence that the relevant markets are operating inefficiently. Moreover, Australia could place itself in contravention of its international trade obligations if it sought to apply price discrimination obligations only to cross-border trade.

The IT Pricing Inquiry instead recommended a range of measures designed to improve the Australian public's access to IT products through alternative channels, including by repealing parallel import restrictions. This recommendation would be more consistent with the principles of competition policy principles as it removes rather than imposing regulatory impediments, and promotes rather than restricting competition.

(c) **Intellectual Property Protection**

IP laws are a form of government regulation that at the same time promote economic activity (by creating valuable new rights to be exploited) and restrict competition (by granting a limited monopoly over those rights).

IP laws accordingly represent a unique challenge for regulatory policy, which must seek to balance the rights and freedoms of intellectual property holders and users.

These issues were investigated in 2000 in the Ergas Report. The Law Council would propose to provide a supplementary submission addressing the exemption which currently appears in section 51(3) of the CCA.

This is noted as well in section 11 of this submission.

2.4 **Process for identifying regulatory impediments to competition**

Effective competition in markets is often influenced as much by direct regulatory intervention and industry policy as through formal competition laws. The Committee welcomes a wider perspective from the Panel.

The Committee wishes to bring to the Committee's attention two areas that impact on regulatory development and competition in markets in Australia, being:

- the regulatory impact statement process; and
- the application of the Competition Principles Agreement (**CPA**) principles and Competition and Infrastructure Reform Agreement (**CIRA**) principles.

*Regulatory Impact Statement (RIS) process*

The Committee considers that a forward looking and robust (cost-benefit) approach to regulatory impact statements with increased and more timely industry consultation and improved transparency is desirable.

An effective RIS process "identifies the problem the regulation seeks to address, outlines the objectives of government action, and assesses the impacts of a range of feasible options for

addressing the problem".<sup>30</sup> It should document community consultation, propose a recommended option and outline implementation and review mechanisms.<sup>31</sup>

The process has been acknowledged as an important one in order to avoid poorly designed and ineffective regulation, which results in unnecessary costs or unintended side effects, and in some cases, does not even satisfactorily meet its primary objectives.<sup>32</sup>

The effectiveness of Australia's RIS process to date is disappointing. This has been in part recognised by the Productivity Commission and OECD. A 2009 review by the Productivity Commission found that business had significant concerns about the RIS process. Namely that the process was not comprehensive, did not allow for adequate consultation and the RIS documents were neither readily available nor accessible.<sup>33</sup> There are also concerns that RISs are prepared late in the policy development process, resulting in industry consultation being of limited assistance and the RIS effectively operating as an "ex post" justification for regulation, rather than a genuine assessment of its design and likely effectiveness.

In addition, there are concerns that the RIS process lacks rigorous assessment of the cost and benefits of proposed options. A report prepared for the Victorian Department of Treasury and Finance found that "*too much emphasis is placed on preparing the RIS document rather than the appropriateness of regulatory outcomes*" and "*often departments begin the RIS process with a predetermined regulatory outcome in mind and too little consideration is given to viable alternative options, particularly non-regulatory options*".<sup>34</sup> These concerns are not limited to Victoria's RIS process and exist across the board in Australia.

The Committee agrees with these concerns and supports an overhaul of the manner in which RIS processes currently operate. A more effective, forward looking approach to regulatory assessments would involve the following:

- before any decision to regulate is made, the Government conducts an assessment of whether regulation should be adopted. This should incorporate an assessment of the economic risks and consequences of regulation versus not regulating;
- the options proposed should be assessed as to whether they are proportionate to the policy problem identified, taking into account the costs and benefits of the options (and these costs and benefits should be validated);
- there needs to be scope for industry consultation at various stages of the process, including the initial stage of assessing whether regulation should be adopted and in considering and assessing alternatives; and
- improved transparency and accountability in the process, including a central register which would open up RISs to more public scrutiny and enable comparison between agencies.

Where relevant, as part of the RIS process, the Government should also be required to assess and explain how any proposed regulatory intervention is consistent with national competition policy principles, including any principles for good regulatory practice agreed by COAG as part of the National Reform Agenda and/or any updated CIRA or CPA arrangements.

The Australian Government's *Best Practice Regulation Handbook* (July 2013) does not specifically address the need for clarity in legislation. In contrast, the Office of Parliamentary

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<sup>30</sup> Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services (Productivity Commission Research Report, 15 September 2009), p 331; see also Professor Frederick G Hilmer AO, "*National Competition Policy: Coming of Age*" (2014) 42 ABLR 36.

<sup>31</sup> Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services (Productivity Commission Research Report, 15 September 2009), p 331; see also Professor Frederick G Hilmer AO, "*National Competition Policy: Coming of Age*" (2014) 42 ABLR 36.

<sup>32</sup> Banks, G The good, the bad and the ugly: economic perspectives on regulation in Australia (Paper presented to the Conference of Economists, Business Symposium, Hyatt Hotel, Canberra, 2 October, Productivity Commission, Canberra 2003).

<sup>33</sup> Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services (Productivity Commission Research Report, 15 September 2009), p 334.

<sup>34</sup> Access Economics Pty Limited, Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria (Report by Access Economics Pty Limited for Department of Treasury and Finance, 23 December 2010), pp 2-3.

Counsel's *Developing Clearer Laws Quick Reference Guide* urges that the clarity of a proposed law be continually assessed. The *Best Practice Regulation Handbook* should be revised to incorporate the principles and criteria specified in the *Developing Clearer Laws Quick Reference Guide*.

### 3. GOVERNMENT PROVIDED GOODS AND SERVICES AND COMPETITIVE NEUTRALITY (CHAPTER 3)

#### Key points in this section:

- (a) Competition-related regulation in infrastructure sectors should continue to be based on the foundation principles articulated in the 2006 Competition and Infrastructure Reform Agreement between the Commonwealth and the States and Territories, with a greater emphasis on consistency both within sectors and between sectors.
- (b) Overall, Australia's competitive neutrality system has been effective at the level of setting government policy and in shaping of government activities. However, the competitive neutrality system has limited visibility in the legal and business community and the current system lacks both the machinery to enforce a complaint, and incentives for ongoing compliance.
- (c) A more effective system for dealing with specific complaints would need to involve formal obligations and enforceable adjudication by an independent body such as the Australian Competition Tribunal. Because most complaints would be likely to involve competing public policy objectives, any claim based on non-adherence with a competitive neutrality principle would need to be subject to an overall assessment as to whether the conduct had a net public benefit.

However, before deciding whether resources should be allocated to the introduction of a formal system to deal with specific complaints, the Review Panel is encouraged to investigate the true level of concern in the business community regarding competitive neutrality.

#### 3.1 Competition in infrastructure sectors with a history of government involvement

In the 20 years since the Hilmer Review there has been a significant shift in Australia away from Government ownership and operation of infrastructure across a range of sectors including telecommunications, energy and transport. This has seen the vertical disaggregation of a number of government owned monopolies as well as greater private sector involvement.

In 1995 the CPA between the Commonwealth and the States and Territories (provided an important roadmap for those reforms. Both access and economic regulation have been used at the Federal, State and Territory level to address the risk that owners of such infrastructure may not be subject to sufficient competitive constraints to prevent them from engaging in anti-competitive behaviour.

In 2006, the Commonwealth and the States and Territories entered into the CIRA to affirm their commitment to a simpler and consistent national approach to economic regulation of significant infrastructure (clause 2.1 of the CIRA). While the CIRA specifically touched upon the regulation of electricity, gas, rail and port infrastructure it also records in clauses 2.2 to 2.4 agreement that:

- in the first instance the terms and conditions of access to infrastructure should be commercially agreed between the owner of the infrastructure and the access seeker;
- the object of any access regimes should be to promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets; and
- the basis upon which regulated access prices should be set.

Competition-related regulation in infrastructure sectors should continue to be based on these foundation principles with a greater emphasis on consistency both within sectors and between sectors.

Lack of consistency within infrastructure sectors such as rail (eg. in NSW different rail infrastructure is subject to multiple rail access undertakings which are State and Commonwealth based) not only adds unnecessary transaction costs to infrastructure owners and operators, but is inconsistent with our goal of promoting the efficient use of infrastructure.

Lack of consistency across sectors, such as the disparate approaches to the pricing of access to road and rail infrastructure, can have significant impact on the ability of different services such as rail transport services and road transport services to compete with each other in some parts of the country.

While some aspects of the CIRA agenda have been progressed such as the review of regulation of ports, others such as a consistent national system of rail access regulation have stalled. Similarly, the regulation of other types of infrastructure such as those relating to rural and urban water storage and delivery have developed on a more ad hoc basis unlike mainstream infrastructure regulation which can incorporate the developments of markets such as the overarching regulation of the east coast wholesale electricity market and electricity networks.

The value of a common economy-wide set of principles for competition-related infrastructure becomes even greater in the current environment of asset recycling by all levels of government, whether by way of outright privatisation, long-term lease or other financial and structural arrangements facilitating greater public sector involvement in infrastructure development and operation. Existing regulatory regimes need to be tested and sometimes modified to ensure that they:

- provide incentives for new investment with the highest cost-benefit ratios;
- provide the right price signals and incentives to make the most efficient use of existing and new infrastructure;
- aim to remove impediments to competition at least in the medium term; and
- are able to work together with regulatory regimes for related infrastructure.

### 3.2 **Competitive neutrality**

"Competitive neutrality" is the notion that government business activities should not enjoy a net competitive advantage over their private sector competitors simply by virtue of public sector ownership.

### 3.3 **Current Arrangements**

Competitive neutrality principles are applied in Australia under arrangements which can be broadly summarised as follows:

- a series of competitive neutrality principles agreed between the Commonwealth, States and Territories;
- implementation of the principles in each jurisdiction by reference to guidelines;
- exclusions which result in the principles not being applicable to all government business activities;
- a non-statutory complaints mechanism in each jurisdiction. In the event that a complaint is upheld, there is no binding enforcement mechanism (whether for structural or behavioural remedies) or procedure for compensation, and no express

role for the ACCC. There are currently no sanctions or incentives for jurisdictions to ensure compliance with the principles.

The basis for Australia's competitive neutrality arrangements is set out in the CPA, agreed between the Commonwealth and States in 1996, and the CIRA.

Compliance with competitive neutrality principles used to be encouraged by a system of payments made via the National Competition Council. However, that system ceased in 2005-6.

The Commonwealth and State and Territory governments have set out their approaches to the implementation of competitive neutrality in Competitive Neutrality Policy Statements and Competitive Neutrality Guidelines for Managers. Broadly speaking, the policies and guidelines require government enterprises to:

- charge prices that fully reflect costs;
- pay, or include an allowance for, government taxes and charges such as Goods and Services tax, payroll tax, stamp duties and local government rates;
- pay commercial rates of interest on borrowings;
- generate commercially acceptable profits;
- comply with the same regulations that apply to private businesses (such as the Competition and Consumer Law and planning and environmental laws).

While some government business activities in the nature of government business enterprises are automatically subject to competitive neutrality requirements, other government business activities are only subject to the requirements if the benefits outweigh the costs.

At the Commonwealth level, a separate unit within the Productivity Commission (the Australian Government Competitive Neutrality Complaints Office (**AGCNCO**)) operates as the Australian Government's competitive neutrality complaints mechanism. It receives and assesses complaints, conducts investigations and provides non-binding advice to the Treasurer.

The AGCNCO reports that complaints generally fall into one of three groups:

- an Australian Government business is not complying with the competitive neutrality arrangements that apply to it;
- those arrangements are ineffective in removing competitive advantages arising from government ownership;
- an Australian Government business not subject to competitive neutrality arrangements should be.

The Productivity Commission website cites some examples of investigations conducted by AGCNCO including in relation to forestry, the Sydney and Camden airports, Defence Housing Australia and NBN Co. Similar (although in some cases less visible) arrangements are in place at the State level.

In 2006, the Committee of Australian Governments agreed that operation of the competitive neutrality principles would be monitored by the Heads of Treasury for each of the Commonwealth, State and Territories, and that they would publish an annual report of the extent to which each government has complied with competitive neutrality principles. These reports serve to maintain a degree of focus on competitive neutrality principles, as well as provide a degree of transparency about the extent to which those principles are being applied by governments.

### 3.4 **Does competitive neutrality policy function effectively?**

The current framework for implementing competitive neutrality policy in Australia relies on the spirit of the arrangements, and the flexibility afforded to governments in meeting their commitments to the policy. Some commentators have described this as a major strength of the system.

Conversely, other commentators have noted that a major impediment to the effectiveness of the policy is that there are no formal obligations capable of forming the basis of legal proceedings. At present, if there is a complaint to a government, the complaint will be investigated and recommendations made, but there is no machinery for the complainant to obtain compensation or compel the adoption of the recommendation.

As noted above, compliance with competitive neutrality principles used to be encouraged by a system of payments made via the National Competition Council. However, that system ceased in 2005-6. Accordingly, the current system lacks both the machinery to enforce a complaint, and incentives for ongoing compliance.

A complainant might consider whether a claim could be made under one or other of the provisions in Part IV of the CCA; most likely, misuse of market power (section 46) or provisions having the purpose or likely effect of substantially lessening competition (section 45). However, while any claim would have to be assessed on its own facts, it may be anticipated that a complainant would have considerable difficulty in bringing a claim based on non-compliance with competitive neutrality principles within the provisions in Part IV.

At an international level, Australia's arrangements have been described as the most complete framework for competitive neutrality, albeit that it is entirely policy based. By comparison, the EU has enforceable rules which apply to cases where subsidies or state aid are provided to state owned enterprises. The competition legislation in several Scandinavian countries includes provisions which are intended to achieve competitive neutrality, including in Finland, where the competition authority has recently been given powers to investigate the economic activities of public entities, and can intervene when a government structure or practice connected to economic activity actually or potentially distorts or prevents competition in supply markets. The US does not have a coherent competitive neutrality framework.

Overall, it is open to conclude that Australia's competitive neutrality system has been effective at the level of setting government policy and in shaping of government activities. It has coincided with an era where governments have generally sought to reduce their involvement in business activities.

However, the competitive neutrality system has limited visibility in the legal and business community, and there is little cause for optimism that the current system would operate effectively in the case of a specific complaint.

### 3.5 **What would a more effective system involve?**

A more effective system for dealing with specific complaints would need to involve formal obligations and enforceable adjudication by an independent body such as the Competition Tribunal.

Because most complaints would be likely to involve competing public policy objectives, any claim based on non-adherence with a competitive neutrality principle would need to be subject to an overall assessment as to whether the conduct had a net public benefit.

A threshold test would also be required, for example, limiting the system to government activities that had, or would have, a significant impact on a relevant market.

The Committee also suggests that a mandatory arbitration or mediation stage would be likely to resolve many complaints without any need to progress to enforceable adjudication.

Before deciding whether resources should be allocated to the introduction of a formal system to deal with specific complaints, there should be some investigation of the true level of concern in the business community regarding competitive neutrality.

#### 4. COMPETITION LAWS (CHAPTER 5): OVERALL FORM AND STRUCTURE OF LEGISLATION

##### Key points in this section:

- (a) The suitability of Australia's highly codified competition law is open to debate.
- (b) This legislation must be capable of being understood and applied in a consistent and predictable manner by businesses and their advisers. This does not necessarily mean that Part IV can be made "simple", but needless complexity and inconsistency must be avoided.
- (c) The legislation has operated most effectively when a balance has been struck, with the legislature setting down rules of conduct that are clear and capable of general application, and the Courts giving meaning to those rules in their application to specific circumstances. Several amendments have upset this balance as a result of needlessly convoluted drafting.
- (d) Given its history, a wholesale re-writing of the statute, with a view to adopting a high level set of "principles", is probably unrealistic and not necessarily desirable. There is, however, a need for a simplification program, targeting specific areas that are identified by this review as being inconsistent or unnecessarily complex.

##### 4.1 Guiding principles to achieve the objectives of the CCA

The achievement of the objects in section 2 of the CCA requires legislation that is capable of being understood and applied in a consistent and predictable manner by businesses and their advisers. This does not necessarily mean that the competition provisions in Part IV of the CCA can be readily made "simple", but needless complexity and inconsistency must be avoided.

The three key competition policy principles identified in section 2 of this submission that are particularly relevant to a consideration of our current competition laws are that:

- (a) competition is best promoted by a general law that prohibits certain identified forms of conduct that substantially lessen competition;
- (b) conduct should only be prohibited *per se* where in the overwhelming majority of cases it will substantially lessen competition without any redeeming public benefit. Conduct that substantially lessens competition should only be permitted through a clear process of review on public benefit grounds; and
- (c) competition law should be sufficiently clear in its application and intended effect that it can be understood and complied with.

The Committee believes that Part IV of the CCA has operated most effectively when a balance has been struck, with the legislature setting down rules of conduct that are clear and capable of general application, and the Courts giving meaning to those rules in their application to specific circumstances. More recent amendments have, in places, upset this balance by adopting a convoluted style that seeks to anticipate and address each potential mischief in the text of the statute.

Given the history of Part IV, including its judicial consideration and commercial use over the last 40 years, a wholesale re-writing of the statute, with a view to adopting a high level set of "principles" is probably unrealistic and not necessarily desirable. There is, however, a need for a simplification program, targeting specific areas of Part IV that are identified by the review panel as being inconsistent or unnecessarily complex. We discuss this in more detail below.

## 4.2 The "highly codified" style of the legislation

Paragraph 3.1 of the Terms of Reference asks the Review Panel to consider whether "Australia's highly codified competition law is responsive, effective and certain in support of its economic policy objectives".

While it is self-evident that Part IV is complex, competition law is, in many respects, a complicated field. This is not necessarily a body of laws that can be made "simple".

When Part IV is compared with corresponding legislation in other jurisdictions the contrast is, at first glance, stark. Part IV is often compared unfavourably to sections 1 and 2 of the US *Sherman Act* or the relevant articles of the *Treaty on the Functioning of the European Union*. However, in both the US and Europe, these high level prohibitions are supplemented by other legislative instruments that proscribe anti-competitive conduct in greater detail.

A principles-based approach to drafting will inevitably give the judiciary a greater role in the interpretation and application of the law to specific circumstances. This is not problematic of itself, but can cause difficulties if taken to extreme lengths. In *R v O'Connor*<sup>35</sup>, the Full Court of the Victorian Supreme Court made these observations in a decision relating to the interpretation of Victoria's sentencing legislation:

*"If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow."* (at p 499)

*"In drawing attention to the problems created by legislation of this kind we do not wish to be understood as being critical of the draftsman of the legislation. We recognise the difficulties involved: but we do wish to draw attention to the consequences of drafting in general terms. No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should be answered and when dealing with legislation the court's only task is to interpret and apply the law laid down by Parliament. The courts cannot be legislators."* (at p 500)<sup>36</sup>

However, when taken to the other extreme, a "belts and braces" approach to legal drafting can be equally problematic, the difficulty being summarised in these terms:

*"certainty is often attained at the cost of intelligibility. The immediate response to such all encompassing legislation is bewilderment, not comprehension. The contorted complexities of the common law style with its interlocking clauses and cross referencing produces laws which, it is argued, are beyond the grasp of the citizens whose conduct they are meant to facilitate and control. So severe is this phenomenon that it can bring the law into disrepute.*

*Further, no matter how detailed the provisions, the attempt to cover all likely circumstances may not have the desired comprehensiveness. The more specific a set of provisions the more likely that something relevant is left out. Not every eventuality can be foreseen. This in itself generates uncertainty about whether the omitted circumstance was intended to be covered or not."*<sup>37</sup> [footnotes omitted]

The Committee believes Part IV of the CCA has worked most effectively when it has struck a balance between principles and prescription, with the legislature prescribing that which is prohibited in clear language, but leaving the implementation and interpretation of those laws to the Courts. This balance can be illustrated in a number of ways. For example, section 46

<sup>35</sup> [1987] VR 496.

<sup>36</sup> Quoted in *Plain Language and Drafting in General Principles*, by Ian Turnbull QC, Office of Parliamentary Counsel, Canberra (1993), p 12.

<sup>37</sup> L Campbell, *Legal Drafting Styles: Fuzzy or Fussy?*, (1996) MurUEJL at 17 at [13]-[14].

requires that a corporation must "take advantage" of its market power if it is to contravene the prohibition on the misuse of market power. The High Court in *Melway* articulated its views as to the nature of this requirement.<sup>38</sup> The Committee believes most practitioners would find the observations of the High Court in *Melway* and subsequent decisions more useful in understanding and applying this provision than section 46(6A) of the CCA.

In a similar vein, while a non-exhaustive definition of "market" was inserted into the CCA in 1977, the explanation most often cited in understanding this concept is that given by the Tribunal in *Re Queensland Co-operative Milling Association Limited*.<sup>39</sup> It is doubtful that the legislature could, through further amendment to the CCA, improve upon the understanding of this term as it was articulated by the Tribunal in 1976.

The Committee notes that the Issues Paper asks, at paragraph 5.6, whether the definition of "market" in the CCA works effectively. As a general drafting approach, the Committee believes the definition of this term in section 4E of the CCA, when read alongside previous Court and Tribunal decisions, is appropriate and does not require further amendment. The Committee comments separately on issues of market definition in the context of particular provisions in other parts of this submission .

One of the difficulties with the CCA in recent years is that this balance has, in some areas at least, been lost, the most glaring example being the provisions relating to cartel conduct in Division 1 of Part IV. Beaton-Wells and Fisse argue that the black-letter style adopted in drafting these provisions has resulted in prohibitions that are:

*"excessively prescriptive, attempting to define minutely all possibilities and close off an escape routes. In consequence, most of the provisions are replete with double negatives, proliferating alternatives, multiple cross-references, extensive qualifications and complex statutory interrelationships. As with the artificial distinction drawn between competition and efficiency, the drafting style reflects shallow faith in judiciary's capacity to characterise and assess conduct as being harmful or not harmful in terms of competition or consumer welfare."*<sup>40</sup> [footnotes omitted]

The Committee shares these concerns and recommends, in section 8 of this submission, that Division 1 be re-drafted.

If the Review Panel was starting afresh, with a mandate to create a new set of competition laws, there would be a case for taking a less prescriptive drafting approach across the entirety of Part IV of the CCA, although to embark on such an exercise now, given almost 40 years of judicial history and commercial usage, is probably not a realistic option. However, the Committee believes there is a need for a more targeted program of simplification, focusing on those provisions of the CCA that are unnecessarily complex or inconsistent.

While the drafting of specific amendments may be beyond the scope of this review, the Committee submits that it is appropriate for the Review Panel to identify areas to be addressed by the Government through a simplification program, possibly assisted by a suitably qualified expert panel.

In other parts of this submission, the Committee has made recommendations about reforms in areas where the legislation is unnecessarily complex (eg. Division 1 of Part IV). In a similar vein, the Committee believes that it would be appropriate to consider whether the highly prescriptive prohibitions in section 47 should be replaced with a revised set of rules that apply to "vertical" restraints, where those restraints would have the purpose or be likely to have the effect of substantially lessening competition (and should, as a consequence, be subject to a competition test rather than a *per se* prohibition).

<sup>38</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 at [51].

<sup>39</sup> (1976) ATPR 40-012.

<sup>40</sup> C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, (2011), p 88.

In relation to inconsistency, the Committee believes a list of issues for further review as part of a simplification program should include:

- the *per se* prohibition on exclusionary provisions alongside the cartel provisions in Division 1;
- the two different joint venture exceptions (ie. sections 44ZZRO/44ZZRP and 76C) both of which must sometimes be satisfied in order for a bona fide joint venture to proceed;
- the different standards that apply to addressing conduct that is said to substantially lessen competition under different provisions in Part IV, ie.:
  - sections 45 and 47 prohibit conduct that has the purpose, **or** is likely to have the effect, of substantially lessening competition;
  - section 45DA prohibits conduct that has the purpose, **and** is likely to have the effect, of substantially lessening competition; and
  - section 50 prohibits certain acquisitions that are likely to have the effect of substantially lessening competition, but not the purpose;
- the structure of section 45 (ie. whether it would be clearer if the prohibitions relating to purpose were separated from the prohibitions relating to effect);
- a review of the third line forcing prohibition;
- a review of the price signalling prohibitions; and
- a review of the exemptions processes (discussed further in Chapter 11).

While it might be argued that none of the issues identified above, viewed in isolation, would justify a separate study, the Committee believes that, viewed as a whole, these issues demonstrate that there is a need for a targeted simplification program, designed to improve the clarity and accessibility of the CCA as a whole.

## 5. COMPETITION LAWS (CHAPTER 5): MISUSE OF MARKET POWER AND REMEDIES

### Key points in this section:

- (a) The Committee considers the prohibition contained in section 46(1) to be appropriate and effective.
- (b) It is the view of the Committee (consistent with that of many previous reviews) that there is not a compelling case for amending section 46 to add an "effects test" in some way.
- (c) Over the last decade or more, much of the broader, public policy debate in Australia in relation to ostensibly "predatory" or "abusive" conduct in Australia's concentrated industries has resulted in suggestions to amend and expand section 46, so as to "do something" to "help small business". This has resulted in ill-considered amendments to s46, such as the "Birdsville amendments".
- (d) Birdsville provisions - Consistently with the OECD's views, the Committee submits that sections 46(1AA) and (1AB) should be repealed.
- (e) The recoupment element in predatory pricing actions - the Committee is concerned that, absent section 46(1AAA), there would be available to the Australian Courts, via the High Court reasoning in *Boral*, a reliable basis on which to determine most predatory pricing claims, by reference to the prospect of recoupment (as an indicium of market power). Section 46(1AAA) throws this into doubt<sup>1</sup>, and may have the effect of prolonging, or making more uncertain, litigation on predatory pricing claims.
- (f) The Committee recommends that the Review Panel consider repeal of sections 46(1AAA) and 46(6A)(d).
- (g) The Committee urges the Review Panel to consider simplifying section 46 considerably by the deletion of many of the "explanatory" sub-sections within the current form of the section. They are largely unnecessary and, in some cases, muddying, rather than clarifying, the substance and effect of the existing case law.
- (h) Divestment remedy/ break up orders - The Committee urges the Review Panel to be cautious about suggestions that such a power be introduced in Australia. The issues involved are complex and potentially span from unpredictable economic and competitive impact to practical implications of enforcement.

### 5.1 Section 46

Section 46(1) of the CCA sets out the primary prohibition of misuse of market power under the Australian competition law. In short, it prohibits a corporation with substantial market power, from taking advantage of that market power, for the purpose of:

- eliminating or damaging a competitor;
- preventing entry into a market;
- deterring or preventing competitive conduct in a market.

Section 46(1) is reasonably settled, having endured in largely the same form since 1986.<sup>41</sup> It is supported by a growing body of case law, including authoritative guidance from the High

<sup>41</sup> The words "in that or any other market" were introduced in 2007 – largely to settle uncertainty as to whether market power had to be taken advantage of in the same market from which it had sprung.

Court on several occasions. The ACCC has achieved, ultimately by consent, several recent successful prosecutions under the provision.<sup>42</sup>

The Committee considers the prohibition contained in section 46(1) to be appropriate and effective.

Much of the remainder of section 46 (other than sections 46(1AA) and (1AB)) is explanatory of section 46(1). In each case, the statutory provision has picked up or expanded upon the prevailing case law (in relation to issues such as factors relevant to a finding of market power<sup>43</sup>, the necessity of a finding of "recoupment" and the sale of products at prices below cost in a predation case<sup>44</sup>, in what circumstances a corporation may take advantage of market power<sup>45</sup>, and the purpose of the corporation<sup>46</sup>). Sections (5) and (6) set out limited and sensible exceptions.

Broadly, in line with suggestions that the form and expression of the CCA could be substantially simplified, so this is also the case with section 46. In addition to particular recommendations or concerns discussed below, the Committee urges the Review Panel to consider simplifying section 46 considerably by the deletion of many of the "explanatory" sub-sections within the current form of the section. They are largely unnecessary and, in some cases, muddly, rather than clarify, the substance and effect of the existing case law.

## 5.2 "Birdsville amendments"

Sections 46(1AA) and (1AB) were introduced in 2007 after concerns were expressed, on behalf of small business, that section 46(1) did not offer sufficient protection from predatory behaviour by more powerful competitors. Section 46(1AA) prohibits a corporation with a substantial **share** of a market from supplying products at a price below the "relevant cost" for a "sustained period", with one or more of the purposes set out in paragraph 5.1 above. Section 46(1AB) provides, frankly, obvious guidance on the application of section 46(1AA).

The Committee has several serious reservations in relation to the prohibition in section 46(1AA):

- Market **share** is not a reliable indicator of a firm's ability to engage in anti-competitive conduct.<sup>47</sup> As a result, the provision is likely to constrain vigorous (and beneficial) competition from firms with high market share, but no ability to behave anti-competitively (that is, without substantial market power).
- This is of particular concern in the context of low pricing (to which ss46(1AA) is addressed). In a price war, several firms may each have a substantial market share and be supplying their products for a sustained period at prices below cost.<sup>48</sup> Absent any one of them having substantial market power, such pro-consumer behaviour should not be discouraged by the prohibition in subsection 46(1AA).

<sup>42</sup> ACCC v Ticketek Pty Ltd [2011] FCA 1489; ACCC v Cabcharge Australia Ltd [2010] FCA 1261.

<sup>43</sup> ss 46(2), (3), (3A), (3B), (3C), (3D) and (4).

<sup>44</sup> ss 46(1AAA) and (4A).

<sup>45</sup> s 46(6A).

<sup>46</sup> s 46(7).

<sup>47</sup> "... a large market share does not necessarily mean that there is a substantial degree of market power. ... A large market share may well be evidence of market power, but the ease with which competitors would be able to enter the market must also be considered," Mason CJ and Wilson J, *Queensland Wire Industries v BHP Co Ltd* (1989) 167 CLR 177 at p 189 (**Queensland Wire**). See also Gleeson CJ and Callinan J in *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 (**Boral**) at [137], "A large market share may, or may not, give (market) power." A finding of substantial market power has been made in the context of market shares as low as 15-20% (*Universal Music Australia Pty Ltd v Australia Competition and Consumer Commission* (2003) 131 FCR 529), and the ACCC has identified a situation where a company possessing 100% of domestic manufacturing capacity in an Australian market open to strong imports lacked any sustainable market power (*Caroma informal merger clearance* 1997, <http://www.accc.gov.au/media-release/accc-not-to-oppose-caromas-fowler-acquisition>).

<sup>48</sup> See for example *Boral* at [137].

- While it may be possible to construe section 46(1AA) so as to limit its reach only to appreciably anti-competitive conduct<sup>49</sup>, there is no judicial consideration of the question. Indeed, in the seven years since its introduction, the provision has never been litigated.
- No other established competition law regime, such as the European Union or the United States, has a prohibition in similar terms to section 46(1AA). The provision is a clear outlier and has generated criticism by the OECD that the "market share" threshold invites inefficient outcomes, offering protection of the interests of smaller firms but potentially resulting in higher costs to consumers.<sup>50</sup>

Consistently with the OECD's views, the Committee submits that sections 46(1AA) and (1AB) should be repealed.

### 5.3 Other concerns – recoupment and taking advantage

#### *Recoupment*

Section 46(1AAA) provides that a corporation may contravene section 46(1)<sup>51</sup>, where it sells products for a sustained period at prices below the "relevant cost", notwithstanding that the corporation may "not ever be able to recoup losses incurred by supplying" those products.

Very briefly, the US jurisprudence in relation to predatory pricing involves two critical "prerequisites": first, that the dominant firm has priced its products below "an appropriate measure of ... costs", and secondly, that there be a "reasonable prospect" or "dangerous probability, of recouping its investment in below cost prices", upon having driven out or disciplined its rival(s).<sup>52</sup>

Antitrust economists may contend that a clear prospect of recoupment (as understood in the *Brooke* case) is not a necessary feature of a rational predation strategy. However, the US Supreme Court in *Brooke*, has required the prospect of recoupment as an element of a predatory pricing case on the basis of consumer interest:

*"Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers."*<sup>53</sup>

Section 46(1AAA) was introduced in 2008. It responds to concerns expressed in a Senate Economic References Committee Inquiry report in March 2004<sup>54</sup> that a predatory pricing claim may not succeed in light of the obiter remarks in the High Court's decision in *Boral* in 2003, adopting to some extent at least, the "recoupment" element in the US jurisprudence.<sup>55</sup> The provision has not been judicially considered since its introduction.

<sup>49</sup> This may be possible where the expression "at a price that is less than the relevant cost", is construed as referring to pricing below a level of cost from which one may infer an appreciably anticompetitive outcome.

<sup>50</sup> The Organisation for Economic Co-operation and Development has stated that the provision "add(s) uncertainty to the law applied to predatory pricing" in Australia; see *OECD, Reviews of Regulatory Reform: Australia 2010*, p 164. More pointedly, at p180, it is stated that "Replacing a market power criterion with a market share threshold invites inefficient outcomes, promising protection of the interests of smaller firms but potentially resulting in higher costs to the consumer. ... The government should take advantage of future opportunities to remove at least the market share aspect of the "Birdsville amendment". "

<sup>51</sup> Note that it does not apply to the prohibition in s 46(1AA).

<sup>52</sup> See *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 US 209 (1993) (**Brooke**) at pp 222-224.

<sup>53</sup> *Brooke* at p 224.

<sup>54</sup> The Committee determined that: "...while evidence of a corporation's intention to recoup losses may well contribute to the proof of an allegation of predatory pricing, there is nothing in s 46 which makes recoupment an element necessary to prove predatory pricing. The Committee considers that the Act could be improved by stating that recoupment is a factor which the Courts may examine when considering allegations of predatory pricing." *The effectiveness of the Trade Practices Act in protecting small business*, p xiii.

<sup>55</sup> These include references in *Boral* per Gleeson CJ and Callinan J at [130], "While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of s 46, it may be of factual importance.", and also per McHugh J at [278], "... to require recoupment as a necessary element of a predatory pricing claim fits in with the terms of s46. ... A firm does not

The provision may have the odd advantage of referring expressly to the concept of "recoupment" (whereas section 46 makes no other reference to it), which will invite the Australian regulator and judges to have some regard to the underlying economic principle and the US jurisprudence in relation to recoupment in the context of a predatory pricing allegation – a good thing, in the Committee's view – notwithstanding that section 46(1AAA) does not require a finding of recoupment to be made.

However, the Committee is concerned that, absent section 46(1AAA), there would be available to the Australian Courts, via the High Court reasoning in *Boral*, a reliable basis on which to determine most predatory pricing claims, by reference to the prospect of recoupment (as an indicium of market power). Section 46(1AAA) throws this into doubt<sup>56</sup>, and may have the effect of prolonging, or making more uncertain, litigation on predatory pricing claims.

#### *Taking advantage*

The introduction of section 46(6A) in 2008 was intended to address uncertainty as to when a corporation would be found to have "taken advantage" of market power, following the *Rural Press* decision by the High Court.<sup>57</sup>

Sections 46(6A) (a), (b) and (c) reflect the established case law in relation to "take advantage" – see decisions such as *Melway*, *Rural Press* and *Safeway*.<sup>58</sup> Each of these approaches to the "take advantage" element under ss46(1), involves an important, clear connection between the conduct and the market power that the corporation may enjoy.

Section 46(6A)(d) however, requires no such clear connection – instead, it provides that, in determining whether a corporation has taken advantage of substantial market power, its conduct need be (only) "otherwise related to the corporation's substantial" market power (emphasis added). The *eiusdem generis* rule of statutory construction could be invoked to argue that the phrase "otherwise related to" imports from the preceding paragraphs the requirement for a causal or connecting link between a corporation's conduct and its market power. However, this is not clear, and the alternative position would be a clear departure from the previous case law. Ideally, the Courts and Australian business should not be left to speculate about the meaning and application of this provision.

Some members of the Committee expressed concern that the "taking advantage" and "purpose" tests in s.46 unduly differentiate the approach in Australia from that of our major trading partners in Europe, China and the US (although not in NZ). If the section were to be recast, consideration might be given to adopting a formulation closer to that in Article 102 of the Treaty of Rome.

The Committee recommends that the Review Panel consider repeal of subsection 46(1AAA) and paragraph 46(6A)(d).

## 5.4 Effects test

The Committee understands that among a range of possibilities, there are two potential, and essentially different, proposals for amendment of section 46 encapsulated in the long-debated proposal to introduce an "effects test". They are:

- to introduce the words "or with the (likely) effect", after the words "for the purpose" in subsection 46(1) (the **purpose or effect approach**); or

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possess "substantial market power" if it does not have the power to recoup all or a substantial part of the losses caused by price-cutting by later charging supra-competitive prices. If it cannot successfully raise prices to supra-competitive levels after deterring or damaging ... competitors by price-cutting, the conclusion is irresistible that it did not have substantial market power at the time it engaged in the price cutting."

<sup>56</sup> See also the OECD's view that the introduction of s 46(1AAA) "aggravates the uncertainty" within s 46 caused by the introduction of the Birdsville amendments, *OECD Reviews of Regulatory Reform: Australia 2010* at p 164.

<sup>57</sup> See *Rural Press Ltd v ACCC* (2003) 216 CLR 53.

<sup>58</sup> *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 (**Melway**); *Rural Press Ltd v ACCC* (2003) 216 CLR 53 (**Rural Press**); *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339 (**Safeway**)

- to substitute the latter half of section 46(1) (after the words "or any other market") with words such as "with the effect, or likely effect, of substantially lessening competition in that or any other market" (the **SLC effect approach**).<sup>59</sup>

The ACCC has long argued for an "effects test" (along the lines of the purpose or effect approach), supported mainly by claims of difficulties in proof of the required purpose. Past reviews have considered whether to adopt an "effects test" but none has recommended it. The reasons are varied for the rejection of an "effects test" thus far.

Review	Summary view
Blunt Committee, 1979	Considered that inadvertent or efficiency-inspired conduct should not contravene section 46
Griffiths Committee, 1989	Observed that the debate was essentially one of claimed difficulties of proof against the risk of erroneously catching legitimate business conduct. It considered that an effects test would not distinguish between anticompetitive and procompetitive conduct.
Cooney Committee, 1991	Considered that proof of purpose by inference per section 46(7) adequately dealt with difficulties of proof of the required purpose and considered that an effects test would unduly widen the operation of section 46.
Hilmer Review, 1993	Considered that an effects test would not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct and, in particular, it might prohibit efficient conduct and give rise to business uncertainty.
Baird Committee, 1999	Considered that purpose was a means of ensuring that section 46 was not "carried too far" to deter genuinely procompetitive behaviour and that an effects test might have to be linked with some kind of authorisation provision.
House of Representatives Standing committee on Economics, Finance and Public Administration, 2001	Observed that the Federal Court in <i>Melway, Boral</i> and <i>Rural Press</i> had adopted a more expansive view of section 46, leading the Committee to prefer to await the outcome of further cases on section 46 before considering any change to the law.
Dawson Committee, 2003	Considered that the difficulties of proving purpose were overstated and that an effects test would not distinguish appropriately between procompetitive and anticompetitive behaviour.

There are a range of views among members of the Committee on these issues. However, the following perspectives may assist the Review Panel in considering submissions for the introduction of an "effects test" (to section 46(1)):

- "Purpose" in section 46 may be determined from the corporate record or the testimony of corporate executives, although it may be "a safer approach, consistent with section 46(7) of the Act, to ascertain (the corporation's) purpose by analysing the facts to see what they say about the likely purpose for which they were done".<sup>60</sup> The purpose need only be one of several purposes, provided it is a "substantial"

<sup>59</sup> This approach picks up the form of s 151AJ of the CCA, in relation to telecommunications markets. The statutory context of s 151AJ is complex and specific and thus it is difficult to draw any conclusions as to the potential efficacy of a remodelled s 46 along similar lines.

<sup>60</sup> *Safeway* at [343]. See also ss46(7) and *Dowling v Dalgety Australia Ltd* [1992] FCA 35.

purpose.<sup>61</sup> The lack of proof of a proscribed purpose has not been a common basis on which defendants have escaped liability.

- The adoption of the SLC effect approach is likely to make it much more difficult to prove a contravention of section 46. Proof of a substantially anticompetitive effect in a relevant market involves a broad inquiry – arguably well beyond the more focussed elements of whether the defendant enjoys substantial market power and has taken advantage of it.
- Whether a corporation has a particular "purpose" will (or should) be apparent to the corporation at the point in which it engages in impugned conduct. The likely "effect" of its conduct, especially in a broader market context, may be much less apparent. A "purpose" test may be preferred in the interests of effective corporate compliance management, as fulfilment of that criterion will be more apparent to the corporation concerned.
- Several section 46 cases have erred in inferring a taking advantage of market power from a corporation's actions undertaken for a proscribed purpose.<sup>62</sup> With the benefit of the developing jurisprudence in section 46 cases, these errors are unlikely to occur in the future. If so, the purpose element may fall back to operate simply to discriminate between dominant firm conduct (ie. that which takes advantage of substantial market power) which is intended to harm competitors or competition, and that which is not (for example, raising prices to supra-competitive levels – which will encourage a competitive response, rather than deter it).
- It is quite possible that an "effects test" along the purpose or effect approach will make little difference in the practical application of section 46. It may be entirely moot whether it is the corporation's purpose, or the effect of its conduct, to harm a rival (say), that makes out the final integer in proof of a contravention of section 46(1).
- It would be more consistent with United States jurisprudence in this field, to have less regard to a corporation's purpose (commonly to be found by trawling through discovered documents and email), than the likely or obvious effect of its conduct. At least one US commentator has pointed articulately to the inadequacy of the Australian position (on one view of it).<sup>63</sup>

For the present, it is the view of the Committee (consistent with that of many previous reviews) that there is not a compelling case for amending s46 to add an "effects test" in some way. Particularly, in the ten years since the last review of this issue, the Federal Court and High Court have clarified the meaning of section 46 significantly, with economically sound analysis of the "take advantage" test. Proof of purpose does not appear to have been a significant obstacle in the development of the law in this field nor in the enforcement of section 46 in the Courts.

## 5.5 Sanctions for misuse of market power – Divestiture orders

A contravention of section 46 may result in a wide variety of sanctions – including damages, injunctions, civil penalty, and others. However, neither the ACCC nor a private litigant may seek an order to break up a dominant firm which has misused its market power.<sup>64</sup>

<sup>61</sup> See s 4F CCA.

<sup>62</sup> See *Melway and ACCC v Boral Limited* (2001) 106 FCR 328 (Full Federal Court), for example.

<sup>63</sup> "Should the presence or absence of 'smoking' memos or emails really spell the difference between a possible prosecution and regulatory approval or acquiescence? Is the law more concerned with forcing large firms to watch their language or with having them consider the competitive impacts of their conduct? When powerful firms stop their use of anti-competitive language once and for all, will the ACCC close its doors? Of course not." Prof Michael Jacobs, "The Dawson Review and Section 46: The Good, the Bad and the Ugly" (2003) 26 UNSWLJ 233, p 236.

<sup>64</sup> The ACCC may seek orders for divestiture of shares or assets acquired by a corporation contrary to s 50 (which regulates anticompetitive mergers) – see s 81 of the CCA. There have been very few instances of such orders being made. Even in the context of divesting shares or assets recently acquired, there are considerable complexities in relation to efficacy and enforceability

Previous reviews have considered whether the Australian law should include a power to require divestiture by a firm which has misused substantial market power.<sup>65</sup> Each of the Dawson review, the Hilmer Review, the Cooney Committee and the Griffiths Committee came to the conclusion that no such power should be introduced. Several reasons underpinned this view:

- "Conceptually, divestiture is inappropriate in this context (a contravention of s46) because there is no clear nexus between the assets to be divested and the contravening conduct" – per Dawson Committee report of January 2003.
- "Structurally separating a corporation will not have a predictable result" – per Hilmer Committee report of 1993.

More broadly, while a well-targeted divestiture order might be said to eliminate market power with "one cut" (thus, reducing the regulatory task for the future), there is a significant risk of creating two or more less efficient businesses, and it is likely that supervising on-going behavioural undertakings would accompany any divestiture order (such as undertakings in relation to how those businesses may deal with one another).

In the United States, such a power exists. However, it has been used only sparingly, and (other than by consent) no such order has been made since the 1960's.<sup>66</sup> In 1982, AT&T was broken up into the "Baby Bells" by consent decree, to end long-running litigation with the US government. However, then followed years of litigation (over 900 petitions) in relation to the "line of business" restrictions in the consent decree. Such a power also exists in the European Union<sup>67</sup> and Canada<sup>68</sup> – in neither case has it been used.

The Committee urges the Review Panel to be cautious about suggestions that such a power be introduced in Australia. The issues involved are complex and potentially span from unpredictable economic and competitive impact to practical implications of enforcement.

## 5.6 Market power and unconscionability

Over the last decade or more, much of the broader, public policy debate in Australia in relation to ostensibly "predatory" or "abusive" conduct in Australia's concentrated industries has resulted in suggestions to amend and expand section 46, so as to "do something" to "help small business".

This has resulted in ill-considered amendments to s46, such as the "Birdsville amendments" referred to above.

More recently though, the debate on these issues has moved some of its focus to the unconscionable conduct provisions of the CCA. Critically, the ACCC also appears to have moved its enforcement agenda in a similar direction, in relation to matters which may involve disparity in bargaining position or power, and some form of (morally) reprehensible commercial conduct.

There is clearly a place for the vigorous enforcement of section 46 in relation to anticompetitive dominant firm conduct, but not all unfair unilateral conduct in concentrated industries will contravene that provision – and nor should it. A wider regulatory focus is a welcome

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of such orders, and the need for continuing supervision – see for eg *Australia Meat Holdings Pty Ltd v TPC* [1989] FCA 43, *WGSAL Pty Ltd v TPC* (1994) 122 ALR 673, *AG(Vic) v Walsh's Holdings Pty Ltd* (1973) VR 137.

<sup>65</sup> Such a power is not to be confused with the existing power, under s 81 of the CCA, of the Court to require divestiture (where relief is sought within 3 years) of shares or assets acquired in contravention of s 50 of the CCA.

<sup>66</sup> See *US v Grinnell Corp* 384 U.S. 563 (1966). In 1911, the US Supreme Court required Standard Oil to be broken up into 34 independent businesses, each a local geographic monopoly.

<sup>67</sup> Changes to the structure of a dominant firm may be applied where "there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking" at [12] of Council Regulation 1/2003.

<sup>68</sup> s 79 of the *Competition Act* prohibits dominant firm conduct and provides for the Competition Tribunal to "take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market", where an order prohibiting the illegal conduct is "not likely to restore competition".

development, in the interests of effective enforcement of the CCA, as well as in the interests of the public debate and effective prohibition of misuse of market power.

6. **COMPETITION LAWS (CHAPTER 5): SMALL AND MEDIUM BUSINESS PARTICIPATION IN MARKETS**

**Key points in this section:**

- (a) It is the Committee's view that small and medium sized business participation in markets is best facilitated by a combination of simple, principles-based regulation through the CCA and ACL, and targeted industry codes where there is a need for greater regulation in particular industries.
- (b) As noted earlier, the Committee supports the views expressed in the Hilmer Report (p 74):
- "The Committee does not believe that it is the role of the competitive conduct rules to protect any particular sector of society, and does not believe that the competition rules should be used to achieve objectives contrary to economic efficiency".*
- (c) The Committee supports the development of voluntary industry codes where distinguishable industry sectors exist, in order to promote best practice.
- (d) As a general proposition, the Committee considers that the unconscionable conduct provisions as currently drafted already provide adequate protection for small business and does not support wholesale changes to the existing unconscionable conduct regime. However, there are divergent views among Committee members as to whether the unconscionable conduct provisions have, historically, been interpreted and applied by the judiciary to address the real or perceived type of conduct which the legislature considered appropriate to make unlawful and, recently, punishable by pecuniary penalties of up to \$1.1M per contravention.
- (f) If the collective bargaining provisions and the current notification system are to be retained, the Committee believes that a number of changes are necessary in order to make the system more workable and accessible to small and medium business. These changes are set out in section 11 of this submission.
- (g) Care must be taken to avoid excessive layers of regulation. For instance, this review is occurring in the same or similar time frame as two other very important policy initiatives which involve issues linked to small business:
- on 23 May 2014, the Treasury released a consultation paper outlining proposals to extend unfair contract term protections to small businesses; and
  - on 2 April 2014, the Government released an Exposure Draft of the Competition and Consumer Amendment Bill 2014, which proposes to introduce a new Franchising Code of Conduct (to commence on 1 January 2015).
- (h) Steps need to be taken in the Committee's view to ensure that any overlap or other inconsistencies that may arise in these three areas are taken into account and "isolated". For instance, the proposed Franchising Code of Conduct will introduce a new statutory duty of "good faith", while many franchise agreements are also likely to be standard form contracts that may become subject to the unfair contract terms regime if it is extended to small business. The Committee's preferred approach would be that changes such as this were deferred, so that they can be properly considered as part of the overall ambit of the "root and branch" review. If that is not practical, however, then care must be taken not to add to the already significant regulatory and compliance burden that faces industries such as the franchise sector.

## 6.1 Overview

The object of the CCA and the consumer protection provisions contained in the ACL is *"to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"*.<sup>69</sup>

The CCA is not intended to protect competitors (big or small). Healthy markets are characterised by fierce competition between rival firms, in which there will always be winners and losers. Nor does the CCA contain any provisions which are specifically designed to protect small business (there is no concept or definition of a "small business" under the CCA). However, it is well recognised that businesses which lack resources or bargaining power relative to their competitors, customers or suppliers are more susceptible to falling victim to anticompetitive conduct.

An underlying principle of the CCA is to create a level playing field and appropriate rules of behaviour to enable competition on the merits. In assessing whether the needs of small and medium sized business are being met, the issue should therefore be whether the provisions of the CCA and ACL are achieving the objective of supporting and promoting small and medium business participation in markets.

In section 6, the Committee addresses some of the questions raised in the Issues Paper about the effectiveness of the CCA in meeting this objective.

## 6.2 Unfair and unconscionable conduct provisions of the CCA

As noted, the provisions of the CCA are not designed to protect small and medium businesses from competition from more efficient or innovative businesses. This balance between the need to ensure a level playing field and rules which may chill or prevent competition is an important one.

In this regard, the Committee notes that the unconscionable conduct provisions contained in Part 2-3 of the ACL import notions of "fairness", but require that there must be something more than the absence of fairness, such that the conduct is against good conscience. For instance, conduct which is engaged in by a party in good faith, but which results in an unfair outcome for one business, is unlikely to be considered unconscionable. This is the natural result of competition on the merits.

There are divergent views among Committee members as to whether the unconscionable conduct provisions have, historically, been interpreted and applied too narrowly by the judiciary to address the real or perceived type of conduct which the legislature considered appropriate to make unlawful and, now, punishable by pecuniary penalties of up to \$1.1M per contravention.

Some Committee members consider that the requirement to show moral obloquy (or perhaps some other aggravating feature beyond simple "unfairness") is an appropriate limitation on the matters in which a finding of unconscionable conduct should be made. Indeed, prohibiting all conduct which was considered (in all of the circumstances) "unfair" might result in, among other things, the setting aside of contractual obligations, thereby importing into all commercial supply relationships the added risk of uncertainty merely because a party considers the arrangement (often historically entered into) is or has become unfair.

However, other members of the Committee consider that the judiciary has historically interpreted the unconscionable conduct provisions in an unnecessarily narrow and restrictive way which the legislature had not intended. In particular, the extent that the judiciary has required the plaintiff in an action to establish that the defendant's conduct carried with it "moral

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<sup>69</sup> CCA, s 2.

obloquy<sup>70</sup> before such conduct might be considered unconscionable, is considered by some members to be an overly restrictive approach by the judiciary.

The Committee understands that the intention of the legislature was to make unlawful only such conduct that was considered to be more egregious than simply being "unfair". The Committee supports that intention, as consistent with the objective of facilitating fierce competition between rivals, which is the hallmark of effective markets. Markets that are working effectively drive better outcomes for consumers and Australia.

As a general proposition, the Committee considers that the unconscionable conduct provisions as currently drafted already provide adequate protection for small business. The provisions were amended in 2011 and a number of cases are directly before the Courts. As such, the Committee does not support wholesale changes to the existing unconscionable conduct regime.

### 6.3 Other practical considerations

Any further legislative amendment to the unconscionable conduct provisions, with a view to assist small and medium sized business participation, will necessarily involve a further round of uncertainty as to the scope and extent of the amended laws. That uncertainty will only be clarified by court cases being brought, and decided, under the new provisions. To the extent that small and medium businesses do not currently seek to enforce the existing unconscionable conduct provisions, it is not clear whether that reluctance arises from:

- (a) a lack of conduct being engaged in which is considered sufficiently egregious to amount to unconscionable conduct;
- (b) an overly restrictive judicial interpretation of the unconscionable conduct provisions limiting the availability of such actions;
- (c) uncertainty as to the scope of the existing legislative regime;
- (d) financial capacity and litigation risk; or
- (e) some other reason.

Uncertainty as to the scope and application of the legislative provisions will necessarily have an impact upon a party's willingness to invest in litigation where the outcome is uncertain (irrespective of whether the facts supporting the assertion are incontestable). This supports maintaining the current legislative provisions, where there is already developing case law, rather than seeking to introduce new (and untested) concepts.

### 6.4 Other measures that would support small and medium sized business

It is the Committee's view that small and medium sized business participation in markets is best facilitated by a combination of simple, principles-based regulation through the CCA and ACL, and targeted industry codes where there is a need for greater regulation in particular industries.

The Committee supports the development of voluntary industry codes where distinguishable industry sectors exist, in order to promote best practice. Where possible, increasing incentives for industries to self regulate is preferable to imposing proscribed industry codes under Part IVB of the CCA. The Government (through the ACCC) already provides informal support for industries to develop voluntary industry codes. However, such initiatives may be more effective if businesses were given some assurance that compliance with such a code would provide a defence to allegations of breach of the underlying provisions of the CCA.

<sup>70</sup> See the decision of Spigelman CJ in *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557. Note that this decision interpreted similar unconscionable conduct provisions within the *Retail Leases Act 1994* (NSW).

Care must be taken to avoid excessive layers of regulation. For instance, this review is occurring in the same/similar time frame as two other very important policy initiatives which involve issues linked to small business:

- on 23 May 2014, the Treasury released a consultation paper outlining proposals to extend unfair contract term protections to small businesses; and
- on 2 April 2014, the Government released an Exposure Draft of the *Competition and Consumer Amendment Bill 2014*, which proposes to introduce a new *Franchising Code of Conduct* (to commence on 1 January 2015).

Steps need to be taken in the Committee's view to ensure that any overlap or other inconsistencies that may arise in these three areas are taken into account and "isolated". For instance, the proposed *Franchising Code of Conduct* will introduce a new statutory duty of "good faith", while many franchise agreements are also likely to be standard form contracts that may become subject to the unfair contract terms regime if it is extended to small business. The Committee's preferred approach would be that changes such as this were deferred, so that they can be properly considered as part of the overall ambit of the "root and branch" review. If that is not practical, however, then care must be taken not to add to the already significant regulatory and compliance burden that faces industries such as the franchise sector.

Another option for the Review Panel is to consider the effects and benefits of legislation such as the *Contracts Review Act 1980* (NSW) for small business.

COAG objectives in creating a national consumer law should also continue to be a priority. Harmonized regulation of competition and consumer regulation across the Commonwealth and States reduces compliance costs for all businesses.

Aside from formal regulation, the Committee recommends a continued focus on education of small business as to the requirements and effect of the CCA and ACL (the ACCC has issued a number of helpful and informative guidelines in this regard).

## 7. COMPETITION LAWS (CHAPTER 5): RECOMMENDATIONS IN THE PRODUCTIVITY COMMISSION'S REPORT ON THE NATIONAL ACCESS REGIME

### Key points in this section:

- (a) The Committee contributed extensively to the Productivity Commission's recent inquiry into the National Access Regime and refers the Review Panel to those submissions.

### In relation to the following key recommendations of the Productivity Commission's Report

- (a) Recommendation 8.1: the Committee support the recommendation to amend criterion (a) to a comparison of competition with and without access through declaration.
- (b) Recommendations 8.2 and 8.3:
- If a national monopoly test is preferred, criterion (b) will need to be amended given the High Court's decision in *The Pilbara Infrastructure*;
  - If a private profitability test is preferred, criterion (b) should be amended to clarify that "anyone" does not include the incumbent facility owner.
- (c) Recommendation 8.4: the Committee supports the recommendation to amend criterion (f) so that it becomes a positive test of whether access through declaration promotes public interest.
- (d) Recommendation 8.5: the Committee supports the introduction of a threshold clause stating that a service cannot be declared if it is subject to a certified access regime, together with a provision for revocation of certification in the event of substantive modifications to the regime.
- (e) Recommendations 8.9 and 8.10: the Committee sees merit in the ACCC being required to propose guidelines on how it would implement the facility extension provisions. However, it expresses caution regarding the inclusion of an express power to require expansions of a facility.
- (f) Recommendation 9.1: the Committee supports the recommendation that subsection 44H(9) be amended so that the default decision by the Minister is to follow the National Competition Council's recommendation.
- (g) The Committee considers there may be merit in considering whether measures could be taken to improve the level of quality and consistency of State-based and sector specific regimes. Options include compliance with transparent best practice guidelines.

### 7.1 The Productivity Commission's Report

As the Review Panel may be aware the Committee contributed extensively to the Productivity Commission's recent inquiry into the National Access Regime (the Regime). Its submissions to the PC can be found [here](#). It also appeared at the PC's hearing in Melbourne. As a result the Committee will provide a fairly high level response to the Review Panel's question at this stage. However, it respectfully refers the Panel to its earlier submissions to the PC. It also adopts its earlier comments on the Productivity Commission's draft report including:

- acknowledging the Commission's careful consideration of the numerous issues and controversies that have arisen since the inception of the National Access Regime in 1997;

- recognising the merit in the Productivity Commission’s view that the recent High Court decision in *Pilbara Infrastructure*<sup>71</sup> and the 2010 amendments to the Regime may have addressed at least some of the problems with cost and delay; and
- observing that the Productivity Commission did not attempt a full cost-benefit analysis in relation to whether the Regime was meeting its objectives and generating a net benefit. While the Committee agreed this task would be “difficult”<sup>72</sup>, the Productivity Commission arguably had a unique opportunity to undertake a detailed review of the costs and benefits of the Regime, drawing on the experience, both in particular industries and more broadly, with access regulation in Australia since its introduction.

The Committee also observes that the Regime had its genesis in an economic policy inquiry which specifically addressed economic problems and was framed around economic concepts, such as competition, efficiency and monopoly (the **Hilmer Report**). This is reflected in the primary object of Part IIIA which is to:

*"promote the economically efficient operation of, use of and investment in the infrastructure by which the services are provided, thereby promoting effective competition in upstream and downstream markets".*

The declaration criteria include terms such as “material increase in competition”, “uneconomical for anyone to develop another facility”, most of which are either directly in the language of economics or have economic interpretations.<sup>73</sup> It seems appropriate therefore that economists and specialist regulators continue to play a key role in determining whether access should be granted to a particular facility.

The Committee makes the following submissions regarding key recommendations of the Productivity Commission.

## 7.2 Recommendation 8.1

*The Australian Government should amend paragraphs 44G(2)(a) and 44H(4)(a) of the CCA such that criterion (a) becomes a comparison of competition with and without access on reasonable terms and conditions through declaration.*

Recommendation 8.1 of the Productivity Commission’s Final Report (**Report**) recommends that criterion (a) be amended so that it is only satisfied where access through *declaration* would promote competition. This would, in effect, reinstate the assumed operation of these provisions prior to the decision of the Federal Court in *Sydney Airport*<sup>74</sup>. It would also entail an assumption on the part of the decision maker that the remainder of Part IIIA would provide for reasonable terms and conditions.

While noting that it may “raise the bar” for declaration in some circumstances, the Committee agrees in principle with the Productivity Commission’s proposal that criterion (a) be expressly directed at assessing whether a declaration (including reasonable terms and conditions of access as a result of negotiation or arbitration), as distinct from merely access, will result in an increase in competition. It considers that the amendment would be welfare enhancing, ensuring that a service is only declared where the processes that follow from declaration are likely to promote competition.

## 7.3 Recommendations 8.2 and 8.3

*The Australian Government should amend paragraphs 44G(2)(b) and 44H(4)(b) of the CCA such that criterion (b) is satisfied where total foreseeable market demand over the declaration period could be met at least cost by the facility. Total market demand should include the*

<sup>71</sup> *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

<sup>72</sup> See p 11 of the PC’s draft report.

<sup>73</sup> “Public Interest”, while having an economic interpretation, admits interpretations from other viewpoints.

<sup>74</sup> *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2007) ATPR 42-142.

*demand for the service under application as well as the demand for any substitute services provided by facilities serving that market. The assessment for costs under criterion (b) should include an estimate of any production costs incurred by the infrastructure service provider from coordinating multiple users of its facility.*

*If criterion (b) continues to be applied as a private profitability test, the Australian Government should amend the definition of "anyone" in paragraphs 44G(2)(b) and 44H(4)(b) of the Competition and Consumer Act 2010 (Cth) to exclude the incumbent service provider.*

The Committee considered the policy and economic underpinnings of criterion (b) at length in the Submission by the Committee dated 20 February 2013 (**First LCA Submission**). It also commented upon the respective merits of the net social benefit, natural monopoly and private profitability tests at some length.

Therefore it will limit itself here to a few conclusions and observations which reflect its earlier submissions.

First, the Committee considers there is a clear need for criterion (b) to be amended and clarified:

- if a natural monopoly test is to be preferred, then the criterion will need to be amended given the High Court's decision in the *Pilbara Infrastructure*<sup>75</sup>; and
- if a private profitability test is preferred, the Committee does not consider that "anyone" should include the incumbent owner of the facility to which access is being sought, and the criteria should be amended accordingly.

Without endorsing (or otherwise) the Productivity Commission's substantive recommendation that a natural monopoly test be preferred, the Committee submits that these conclusions remain apposite.

Secondly, in its submission on the Productivity Commission's draft decision, the Committee supported the proposal that, if a natural monopoly approach were to be adopted, compliance costs (such as scheduling costs) be taken into account. It continues to do so.

Thirdly, it also observed in its response to the draft decision that there were differing views regarding the relative ease and certainty of application of a natural monopoly test as compared with the private profitability test favoured by the High Court in *Pilbara Infrastructure*<sup>76</sup>. In any event, the Committee submits that constructing a workable test which is capable of ready application by parties and decision maker is key to the Regime's effectiveness.

#### 7.4 Recommendation 8.4

*The Australian Government should amend paragraphs 44G(2)(f) and 44H(4)(f) of the CCA such that criterion (f) becomes a test of whether access on reasonable terms and conditions through declaration promotes the public interest.*

Recommendation 8.4 of the Report recommends that criterion (f) become a test of whether access on reasonable terms and conditions through declaration promotes the public interest. This would result in criterion (f) becoming a positive test like the preceding criteria for declaration. Currently it is expressed in the negative – that access would not be contrary to the public interest.

The First LCA Submission argued that, given the significant and long-lasting impacts of a declaration decision, any assessment of public interest under criterion (f) should be a transparent, evidence-based cost-benefit analysis. It also expressed some concern that, if criterion (f) remained in its current form, the recent High Court decision in *Pilbara*

<sup>75</sup> *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

<sup>76</sup> *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

*Infrastructure*<sup>77</sup> may elevate the role of the Minister and correspondingly limit the role of the National Competition Council (NCC), adversely affecting decision-making transparency.

Having regard to these comments, and because it increases the level of consistency between the declaration criteria, the Committee sees merit in this recommendation.

7.5

### Recommendation 8.5

*The Australian Government should amend Part IIIA of the CCA to:*

- *remove paragraphs 44G(2)(e) and 44H(4)(e);*
- *introduce a threshold clause stating that a service cannot be declared if it is subject to a certified access regime;*
- *include provision for the Commonwealth Minister to revoke the certification of an access regime, following a recommendation from the National Competition Council (NCC), if there have been substantial modifications to the certified regime or the principles in clause 6 of the Competition Principles Agreement (CPA), such that the regime no longer meets the principles in clause 6 of the CPA; and*
- *enable infrastructure service providers covered by the certified regime, access seekers, or the relevant state or territory government to apply to the NCC to make a recommendation to the Commonwealth Minister for the revocation of certification. The NCC should also be able to initiate the revocation of certification (consistent with the current arrangements for revocation of declaration and ineligibility decisions).*

*The protection from declaration offered by certification should apply until the expiration of the certification, unless the certification is revoked by the Commonwealth Minister. Consequential amendments may be necessary to ensure that the designated Minister is able to revoke the declaration of a service if that service becomes the subject of a certified access regime.*

Recommendation 8.5 proposes that sections 44G(2)(e) and 44H(4)(e) be repealed and replaced by a threshold clause stating that a service cannot be declared if it is subject to a certified access regime and that substantial modifications should be dealt with directly as a ground for revoking certification.

The Committee welcomes these recommendations for the reasons set out at pages 32 and 33 of the First LCA Submission. The proposed changes are likely to promote consistency across access regimes and increase certainty.

Under the existing paragraph 44H(4)(e), the Minister may declare a service that is provided by a facility that is subject to a certified access regime if he or she is satisfied that, since certification, the access regime has been substantially modified. In circumstances where an access regime has been modified since certification, there is therefore an open question about whether services subject to that access regime are nevertheless capable of declaration (ie. because the changes to the access regime are substantial). As the law currently stands, this question is not resolved until such time as the Minister makes a declaration decision, after significant resources have been expended by access seekers, access providers and the NCC.

In this context, the proposed changes are likely to prevent or reduce uncertainty that may otherwise arise about whether a particular service is capable of declaration under Part IIIA and provide a mechanism by which the question of whether an access regime has been substantially modified can be resolved **before** stakeholders expend significant resources participating in the declaration process.

<sup>77</sup> *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

## 7.6 Recommendations 8.9 and 8.10

*As soon as practicable, the ACCC should develop and publish guidelines on how its power to direct facility extensions would be exercised in practice such that it is expected to generate net benefits to the community. The guidelines should be developed by the ACCC using a process that includes the public release of draft guidelines, and is informed by stakeholder consultation.*

*Parliament should amend the CCA to confirm the prevailing interpretation by the Australian Competition Tribunal that the terms "extend", "extensions" and "extending" in section 44V, 44W and 44X include expansions of a facility's capacity. The intent of this amendment is that when making an access determination, the ACCC can require a service provider to expand the capacity of its facility (in addition to being able to require a geographical extension) and that the safeguards in sections 44W and 44X apply to directed capacity expansions.*

*In framing the amendments, consideration should be given to the use of the terms "extend", "extensions" and "extending" in other provisions of the CCA, to ensure that the amendments do not give rise to any unintended consequences.*

In its submissions in response to the Productivity Commission's draft decision, the Committee expressed caution about including an express power to require expansions of a facility, given the level of uncertainty about how at a practical level, such a requirement would be implemented.

While the Committee sees merit in the legislative provisions in section 44V, 44W and 44X being clear and unambiguous, it may be preferable to wait until the issue arises at a practical level (ie. in an access arbitration) before considering further amendments. So far as the Committee is aware, the ACCC has not yet had recourse to the existing extension powers.

Irrespective of whether an express reference is made to expansions, the Committee sees merit in the recommendation that the ACCC be required to propose guidelines on how, in practice, it would look to implement the facility extension provisions. Ideally these guidelines would follow consultation with interested access seekers and access providers in affected industry sectors.

## 7.7 Recommendation 9.1

*Parliament should amend subsection 44H(9) of the CCA such that if the designated Minister does not publish a decision on a declaration recommendation within the 60 day time limit, this is deemed to be acceptance of the National Competition Council's recommendation.*

Recommendation 9.1 proposes to amend subsection 44H(9) so that, if the Minister does not publish a declaration decision within the period stipulated in the CCA the Minister is taken to have accepted the National Competition Council's recommendation not to declare the service.

On balance, the Committee supports this recommendation and has some sympathy for the view that the Productivity Commission's recommendation strikes a better balance between the desire, on the one hand, to preserve the right of the Minister to make an informed decision on a matter that gives rise to a significant intrusion on private property rights and, on the other hand, to ensure that the exercise of Ministerial discretion is transparent and based upon a consideration of the NCC's expert opinion.

The recommended amendment would also reduce the possibility of the Minister avoiding a difficult decision by allowing the time to elapse.

Key Ministerial decisions under Part IIIA should not occur by deeming rather than positive decision. This amendment ensures that a decision to declare (or not to declare) is, at the very

least, based on a positive decision by the NCC following consideration of the objects of Part IIIA.<sup>78</sup>

## 7.8 Other Issues

The Committee acknowledges that access regulation has been introduced across a number of sectors through specific, State-based regulatory frameworks, only some of which have been certified under Part IIIA.

While certification has played a useful role ensuring a general alignment of approach in some areas, in a number of sectors (such as rail, ports and water infrastructure), States have adopted very different approaches. The Committee does not wish to comment on specific strengths and weaknesses of any individual regime or approach. However, it makes the following more general observations:

- In relation to the specific telecommunications and liner shipping regimes in Parts X and XIB/XIC of the CCA, the Committee refers to its comments in section 11 of this submission.
- At a general level, the Committee supports the priority identified by COAG in the CIRA of achieving a simpler and more consistent approach to the regulation of economic infrastructure – including through use of the certification process.
- In doing so, however, the Committee notes that certification provides a "one off" mechanism for seeking consistency; it does not deliver ongoing transparency and accountability. In this regard, the Committee notes that Australian regulatory regimes can lack transparency and accountability around longer term development, and tend to evolve "reactively" to circumstances as they arise. In other jurisdictions, such as the United Kingdom, regulators are required to articulate a longer-term "vision" for the removal of regulatory burdens as markets mature. Examples from the UK about how regulatory practice might operate includes:
  - Ofgem, the energy regulator, has a duty to undertake impact assessments for every important policy proposal made, and publish an updated simplification plan on an annual basis. Ofgem also publishes a 5-year corporate strategy and plan (the current one was published on 30 March 2011 for 2011-2016).<sup>79</sup>
  - Under the UK Communications Act 2003<sup>80</sup>, Ofcom is subject to a duty to review regulatory burdens with a view to securing that regulation does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary.<sup>81</sup>
  - Ofwat is the economic regulator of the water and sewerage industry in England and Wales. Ofwat published a strategy document in 2008, setting out its long-term approach to regulating the water and sewerage sectors. This is continually reviewed to ensure it is fit for purpose.<sup>82</sup> Like others, Ofwat published a forward programme of work for the upcoming year.<sup>83</sup>

While the Council recognises the value of certification in achieving the COAG principles of simplicity and consistency, it would welcome the Panel considering whether there is scope for other, ongoing mechanisms that could be used to require State regulators to better articulate objectives and for accountability for how regimes are developed.

<sup>78</sup> s 44F(2)(b)(ii).

<sup>79</sup> <<https://www.ofgem.gov.uk/publications-and-updates/corporate-strategy-and-plan-2011-2016>>.

<sup>80</sup> <<http://www.legislation.gov.uk/ukpga/2003/21/contents>>.

<sup>81</sup> *Communications Act 2003*, s 6(1).

<sup>82</sup> <[http://www.ofwat.gov.uk/aboutofwat/reports/forwardprogrammes/rpt\\_fwd\\_20100303ofwatstrategy.pdf](http://www.ofwat.gov.uk/aboutofwat/reports/forwardprogrammes/rpt_fwd_20100303ofwatstrategy.pdf)>.

<sup>83</sup> <[http://www.ofwat.gov.uk/aboutofwat/reports/rpt\\_fwd\\_2014-15\\_fwdprog\\_draft.pdf](http://www.ofwat.gov.uk/aboutofwat/reports/rpt_fwd_2014-15_fwdprog_draft.pdf)>.

## 8. COMPETITION LAWS (CHAPTER 5): ARRANGEMENTS BETWEEN COMPETITORS

### *Cartel provisions, cartel enforcement and private enforcement of the CCA*

#### **Key points in this section:**

- (a) The cartel provisions in Division 1 of Part IV should be repealed and redrafted in language that is well understood, following the advice of the then Attorney General in the Second Reading Speech for the 1974 Bill. Without derogating from this fundamental submission, the Committee makes the following submissions on the cartel provisions:
- (b) The cartel conduct provisions are confusing, prolix, densely worded, overly detailed, and in places unintelligible. A glaring example the definition of “likely” in Division 1, which is at odds with judicial and dictionary definitions of the term, and contrary to the term’s commonly understood meaning. Having regard to the potential for jury trials of cartel conduct, it is vital that the provisions be expressed in well understood language.
- (c) The joint venture exceptions under section 44ZZRO and section 44ZZRP, should be repealed and replaced with a collaborative activity exemption, based on that included in recently proposed amendments to the Commerce Act 1986 (NZ).
- (d) The *per se* prohibition on exclusionary provisions is unnecessary as an addition to the cartel provisions and should be repealed.
- (e) Greater incentives could be provided for immunity applications, and consideration should be given to the introduction of bar orders along the lines of those in Canada and the United States.
- (f) Division 1A, which deals with price signalling, should be repealed. The prohibitions impose an extensive regulatory burden, are over-reaching, and capture conduct that may be pro-competitive or welfare enhancing.
- (g) Section 5 should be amended to broaden the CCA’s extraterritorial operation, after consideration of the analogous provisions in Europe and the United States. The continuing growth in global commerce and international markets make it vital that international cartels affecting Australian markets and their participants are properly regulated by the Act. The “carrying on business” requirement should be reviewed, having regard to the globalization of commerce, and the increasing importance of ecommerce.

#### 8.1 **Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA?**

This question raises issues of the underlying economic principles, as well as the drafting of the provisions themselves. The fundamental question is whether the cartel provisions promote competition and enhance consumer welfare within the section 2 objectives of the CCA.

Cartels, horizontal agreements, and primary boycotts are the antithesis of competition. Competition involves vigorous rivalry between competitors. When competitors are parties to cartels, horizontal agreements, or primary boycotts, they engage in conduct that is anti-competitive and damaging to consumer welfare, by fixing prices, rigging bids, allocating markets, or restricting output. These practices have the purpose or effect of increasing prices above a competitive level and restricting the availability of goods and services to consumers, thus harming consumer welfare and competition.

Having regard to these serious consequences of cartel behaviour, it is vital that the cartel conduct provisions be expressed in language that is clear, easily understood, and not overreaching. Division 1 of the CCA fails miserably to meet these objectives, because it is prolix, unclear or ambiguous in places, overly formalistic in its language, and overly broad in its potential application. It should be redrafted, preferably after the draftsman has considered analogous legislation in New Zealand, the United States, the European Union, and Canada.

In the Committee's view, section 44ZZRD's insistence on detailed subsections for the purpose/effect condition, the purpose condition, and the competition condition, is unlikely to achieve the CCA's objectives. Division 1 should be simplified, bearing in mind the observations of the Attorney General in the Second Reading Speech for the Bill of 1974:

*"... other provisions, particularly those describing the prohibited restrictive trade practices, have been drafted along general lines using, wherever possible, well understood expressions. ... it is questionable whether detailed drafting leads to more certainty. Often it does no more than obscure the broad purpose of a provision." (Australia, Senate, Parliamentary Debates (Hansard), 30 July 1974 at 542-543).*

The cartel provisions are unnecessarily complex and difficult to understand. They exemplify the mischief referred to by the Attorney General. Cartel conduct cases may involve jury trials, and this is a further reason why it is vital the provisions be cast in well understood expressions. As an example, the competition condition in section 44ZZRD(4) contains no less than ten distinct sub-provisions whose enlivening depends on several other subsections being satisfied. These should be drastically simplified into a single provision that succinctly identifies when two parties are in competition with each other.

As the relative simplicity of the United States legislation demonstrates, a simple prohibition striking at the core of the anticompetitive conduct is more effective than a complex series of interconnected provisions employing turgid prose. The provisions should be redrafted so as to clarify that a contract, arrangement or understanding between parties that are—or would be but for that conduct—in competition with each other, is prohibited if it has the purpose or effect of restricting output, fixing or raising prices, bid rigging or allocating customers or suppliers, or dividing markets. It should not require several pages of densely worded provisions to distil the essential features of the mischief the cartel provisions should address.

The definition of "likely" in section 44ZZRB is an example of bad drafting that is certain to give rise to confusion and overreach. In common usage "likely" does not mean or include a possibility that is not remote (and the Oxford English Dictionary defines it *inter alia* as "[p]robably, in all probability"). The word "likely" is not synonymous with a possibility that is more than remote. Aside from definitional difficulties, doubt exists whether the section 44ZZRB definition of "likely" extends to the reference to "likely" in section 44ZZRD(4). At the very least, the definition should be cast in positive terms to mean "a real chance or possibility." In this respect, in *Australian Gas Light Co v Australian Competition and Consumer Commission*<sup>84</sup>, French J (now CJ) said:

*"The meaning of "likely" reflecting a "real chance or possibility" does not encompass a mere possibility. ... The word "likely" has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration – Rural Press Ltd v Australian Competition and Consumer Commission."*<sup>85</sup>

In *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd*<sup>86</sup>, Bray CJ said:

*"Here we are concerned with the word "likely" in a statute. As I have said, the ordinary and natural meaning of the word is synonymous with the ordinary and natural meaning of the word "probable" and both words mean, to adopt the*

<sup>84</sup> (2003) 137 FCR 317 at [348].

<sup>85</sup> [2003] HCA 75; (2003) 216 CLR 53 at [41].

<sup>86</sup> (1976) 27 FLR 400 at 410.

*expression of Lord Hodson in the passage previously quoted, that there is an odds-chance of the thing happening. That is the way in which statutes containing the words have usually been construed".*

Parliament should adopt natural language that ordinary business people will understand in prohibiting cartel conduct. The fact that juries will be asked by a judge to consider whether certain conduct was "likely" in a sense that is contrary to the ordinary meaning of the term is disturbing.

In *Bradken*, the trial judge considered the OECD recommendations and Explanatory Memorandum in finding that the parties were likely to be competitors, and also applied section 44ZZRB, which defines "likely" to mean a "possibility that is not remote", in relation to the supply or acquisition or production of goods or services. Even if section 44ZZRB is relevant to determining whether parties are likely to be competitors—which is doubtful—the provision is a misconceived piece of drafting and is an example of over exuberant legislation which is misplaced in a law of this kind.

According to the Explanatory Memorandum, the definition of "likely" appearing in section 44ZZRB was included, ostensibly to clarify the position "following judicial observations made in the case law in relation to the term," citing *Tillman's Butcheries v. Australasian Meat Industry Employees Union*.<sup>87</sup> However, the Full Court judgment in *Tillman's* does not support the approach taken in section 44ZZRB. In that case, which concerned the secondary boycott provisions in section 45D, Chief Justice Bowen discussed the meaning of the word "likely" as covering a range of possible meanings from "probable" to "material risk" or "some possibility more than a remote or bare chance". His Honour did not need to decide which meaning was intended.

In the case, Deane J held that in the context of section 45D, where conduct was shown to have been engaged in for a purpose of causing loss or damage to a relevant company, it will be sufficient in the context of the section if that conduct was such that there was a "real chance or a possibility" that it would cause that loss or damage. However, section 44ZZRB not only departs from the ordinary meaning of the word "likely", but also misconstrues the Full Court approach in *Tillman's* by failing to take into account that Deane J's remarks on "likely" were spoken in the context of the purpose of the conduct. The draftsman chose the weakest definition referred to by Bowen CJ without considering that his Honour was in fact addressing the purpose element. Properly construed, the decision does not support the view that "likely" includes a possibility that is not remote. In any event, section 44ZZRB is contrary to the ordinary meaning of the term and the weight of judicial authority on it.

Further, it is unclear whether the definition of "likely" in section 44ZZRB applies to the competition condition in section 44ZZRD(4). Gordon J applied the definition this way in *Norcast Sàrl v Bradken Ltd (No 2)*<sup>88</sup>, but the definition does not clearly apply to the competition condition, although the supply, acquisition of goods or services, and the production of goods and the capacity to supply services, are inevitably involved when two parties are in competition with each other. It is bad drafting when it is unclear whether a definition of an expression does or does not apply to an instance of that expression in the same Division.

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<sup>87</sup> (1979) 42 FLR331 at 339 and 346.

<sup>88</sup> [2013] FCA 235.

## 8.2 Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors

The Committee submits that Division 1A should be repealed.<sup>89</sup> Division 1A imposes prohibitions on unilateral conduct, defined in terms of disclosure of information. However, as a matter of both established economic principle and international practice, information disclosure should attract liability only insofar as it evidences collusion or facilitates co-ordination of conduct between competitors in a market, thereby removing the need for competitors to collude explicitly. Information disclosure or exchanges between competitors are addressed overseas in the context of collusion. The laws in other countries, such as the United States, Europe and Canada are very different to Division 1A.

In May 2011 the Committee raised concerns over the Bill which introduced Division 1A and submitted that, if there is to be a prohibition on price signalling:

- it should apply universally and not just to selected business sectors;
- it should only apply in respect of future prices, not current or historical prices;
- it should be narrowly drafted, as notifications to the ACCC and ACCC guidelines (whilst helpful) are not practical or sufficient to overcome overreach.

The Committee's submission<sup>90</sup> drew a number of comparisons between the proposed Division 1A and the European law of information exchange, which applies a competition assessment to this conduct. The law in the United Kingdom is similar<sup>91</sup>.

The European Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (**EC Guidelines**) relevantly recognise that: "*information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient.*"

In contrast, Division 1A prohibitions impose an extensive regulatory burden. Further, they are over-reaching, and capture conduct that may be benign, pro-competitive or welfare-enhancing in some other way. This is particularly so in the case of section 44ZZW which imposes *per se* liability for private disclosure of pricing information to a competitor.

The over-reach of section 44ZZW is not addressed satisfactorily by the qualification that the prohibition does not apply to disclosures in the ordinary course of business. That qualification is misconceived and it also introduces unnecessary uncertainty into the law.

The requirement in section 44ZZX that the disclosure have the purpose of substantially lessening competition does not address the fact that the prohibition is misconceived (for the reason stated above). Further, the purpose element will be difficult to establish in practice.<sup>92</sup> Division 1A only applies selectively, by regulation, to prescribed classes of goods or services. This is manifestly inappropriate. There is no principled justification for selective application of these prohibitions.<sup>93</sup> Regulations are not subject to the same Parliamentary scrutiny to which

<sup>89</sup> Further detail regarding these reasons is available in the Committee Competition and Consumer Committee's submissions on the Exposure Draft of the Competition and Consumer Amendment Bill (No. 1) 2011 (Cth) dated 20 January 2011 and 25 May 2011.

<sup>90</sup> see <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2500-2599/2515%20-%20Inquiry%20into%20the%20Government%27s%20Price%20Signalling%20Bill.pdf>>.

<sup>91</sup> s 2(1) Competition Act 1998 (UK).

<sup>92</sup> The over-reach of the Division 1A prohibitions is not addressed by the exceptions in ss 44ZZY and 44ZZZ. Moreover, it is unsatisfactory to attempt to cure unnecessarily far-reaching prohibitions by creating a necessarily long list of exceptions. Reliance on the authorisation or notification process to prevent the application of the prohibitions to legitimate information disclosure is also inappropriate. Authorisation is a useful mechanism in other contexts. However, it is difficult, costly, time consuming, public and hence impractical for all but the largest transactions. Notification is less cumbersome, but the factor of delay alone is likely to make it impractical in many situations.

<sup>93</sup> As a general policy, competition laws should apply across all sectors of the economy, and competition measures specifically directed to particular industries (whether by way of exemption or by way of additional regulation) should be avoided. That policy, as adopted and applied by the Swanson Committee and the Hilmer Committee, and strongly endorsed by the Dawson Committee, is

legislation is subject. The criteria for determining which sectors should be prescribed have not been properly articulated and are likely to be difficult to formulate in practice.

Key aspects of Division 1A (such as the meaning of "disclosure", for example) create significant uncertainty for business regarding their ability to engage in the many forms of legitimate and necessary conduct that are or would be prohibited by the prohibitions even though that conduct may be competitively benign or even pro-competitive.

Division 1A should be repealed. To the extent that the Review Panel considers that the Division should or might be replaced by other provisions addressing concerted practices which fall short of arrangements or understandings between market participants, the Committee's submission is that close attention should be given to the laws concerning concerted practices in other jurisdictions. In particular the Committee recommends an approach which adopts laws that focus on the purpose or likely effects of conduct on competition in Australian markets, rather than *per se* treatment.

The Committee opposes use of *per se* provisions, combined with numerous black letter exceptions that may not be adequate to cover all forms of conduct that is benign or procompetitive in this area.

### 8.3 **Do the joint venture exceptions of the CCA operate effectively, and do they work to further the objectives of the CCA?**

The existing joint venture provisions do not operate effectively. The Committee submits that the joint venture provisions in the CCA should be amended by repealing section 44ZZRO and section 44ZZRP and replacing these sections with a collaborative activity exemption based on that included in recently proposed amendments to the Commerce Act 1986 (NZ).<sup>94</sup>

The existing joint venture provisions do not operate effectively. They are seriously flawed in the following respects:

- The definition of a "*joint venture*" under section 4J is far from clear. Collaborations between competitors should qualify for exemption from *per se* liability if they are pro-competitive or efficient and whether or not they happen to be a "*joint venture*" as defined.
- The joint venture exceptions under sections 44ZZRO and 44ZZRP (and section 44ZZZ(3)) require the joint venture to be one "*for the production and/or supply of goods or services*". The exclusion of joint ventures for the *acquisition* of goods or services is arbitrary and economically irrational.
- The joint venture exceptions under sections 44ZZRO and 44ZZRP (and section 44ZZZ(3)) require that the joint venture be carried on jointly "*by the parties to the contract*" under consideration (sections 44ZZRO(1)(c) and 44ZZRP(1)(c)), that is the exact same parties as those said to be in a joint venture,. This requirement can preclude reliance on a joint venture exception in cases of legitimate joint venture activity and arrangements with a third party, where not all the parties to the contract carry on the joint venture activity jointly.
- The requirement for the joint venture exceptions under sections 44ZZRO and 44ZZRP that the cartel provision in issue be contained in a contract (or a proxy contract) is unduly onerous. Operational decisions or agreements by joint venturers may easily contain a cartel provision (as defined by section 44ZZRD) without being enshrined in a contract even though they are made for the purposes of a legitimate

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reflected in all of the existing prohibitions in Part IV of the CCA. The proposal that particular sectors, in effect, be made subject to the prohibitions by regulation is also highly problematic.

<sup>94</sup> Under the CCA, joint venture arrangements are exempted from the cartel provisions and the exclusionary provisions. Joint ventures are attractive to firms in highly dynamic industries, such as energy, health, information technology and financial services. Australian experience also points to a wide use of collaborative arrangements, such as tolling and co-production agreements in many traditional sectors such as in food processing, cement, quarrying and building materials.

joint venture. The joint venture defence under section 76C does not require that the exclusionary provision in issue be contained in a contract. Nor is there any such requirement under the United States, European Union and Canadian competition laws on collaborations between competitors.

- The wording "*for the purposes of a joint venture*" in sections 44ZZRO, 44ZZRP, and 76C (and section 44ZZZ(3)) is pivotal but highly uncertain. Does it mean: "*solely for the purposes of a joint venture*"; "*predominantly for the purposes of a joint venture*"; or "*substantially for the purposes of a joint venture*"? Are the relevant "purposes" determined objectively or do they depend on the subjective intention of all or some of the parties to the joint venture? Must the cartel provision (or other provision) be reasonably necessary to achieve the commercial objectives of the joint venture?
- The joint venture defence under section 76C is defined in terms of a competition test whereas the joint venture exceptions under sections 44ZZRO and 44ZZRP are not. This divergence in approach is arbitrary.

The joint venture exceptions under section 44ZZRO and 44ZZRP should be repealed and replaced with a collaborative activity exemption based on that under the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ) (as reported by the Commerce Committee in May 2013). The approach taken in that Bill is based on a considered attempt by the NZ Government to avoid the flaws of section 44ZZRO and 44ZZRP identified above and to reflect the way that competitor collaborations are treated under United States, European Union and Canadian competition laws.

The collaborative activity exemption proposed would apply not only to "joint ventures" but also to consortia, partnerships, strategic alliances, syndicated lending arrangements, lender work-out arrangements for insolvent borrowers, white labelled financial services, litigation settlement agreements, franchisors and franchisees under a franchise arrangement, and other kinds of collaborative activity between competitors.

A key requirement of the proposed NZ collaborative exemption is that the cartel provision be "reasonably necessary for the purpose of the collaborative activity" (or, in the context of a cartel offence, believed by the accused to be reasonably necessary for that purpose). This requirement is comparable to the rule of reason test that applies to collaborative ventures under section 1 of the Sherman Act (US) but the statutory test adopted seeks to avoid the complexity of the US case law. Helpful practical guidance on the intended operation of this requirement is set out in the NZ Commerce Commission's Draft Competitor Collaboration Guidelines (October 2013).

#### 8.4 **Other matters for consideration – Immunity policy, bar orders and extraterritoriality**

##### *Immunity Policy*

An immunity policy benefits consumers, businesses and the economy by facilitating the detection and punishment of those who engage in cartel activity, thereby deterring persons from engaging in cartel activity.<sup>95</sup>

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<sup>95</sup> The ACCC's Immunity Policy states the objective of the policy as follows: "A policy to provide greater certainty for immunity applicants so that the ACCC is better able to detect and break up hard-core cartels operating in Australia, so providing benefits for consumers, businesses and the economy."

The Committee does not support relieving an immunity applicant from all liability to pay compensation (such a proposal would be inconsistent with other comparable jurisdictions). Some jurisdictions partially exempt immunity applicants from damages.<sup>96</sup> In the Committee's submission, the law should provide greater incentives for immunity applications, by introducing bar orders along the lines of those in Canada and the United States.

### *Bar orders*

In Canada<sup>97</sup> parties to a class action may seek "bar orders" which block non-settling respondents from claiming contribution from a settling respondent, thus providing an incentive for a respondent to provide assistance to the private action, in exchange for a reduced damages liability.<sup>98</sup>

The Committee considers that the introduction of bar orders into the CCA would support the objective of deterrence, by encouraging disclosure of cartel conduct, and reduce the costs of administration of justice.

### *Extraterritorial Application of the CCA to Cartel Conduct*

Currently, considerable doubt exists as to whether a cartel arrangement made and implemented overseas by foreign corporations without a presence in this country, but relating to the supply or acquisition of goods or services by Australians, would be the subject of the CCA. It is vital that international cartels affecting Australian markets and their participants are properly regulated by the Act.

Regulation of overseas conduct involves two aspects: (1) *who* is regulated and; (2) *what conduct* is the subject of regulation.<sup>99</sup>

Section 5(1) of the CCA extends the operation of Part IV (and other provisions) to the engaging in conduct outside of Australia by bodies corporate either incorporated or carrying on business within Australia.<sup>100</sup>

The problems posed by section 5 where foreign corporations do not directly carry on local business but do so indirectly through a local subsidiary or agent were highlighted in *Bray v F*

<sup>96</sup> In the US, pursuant to the *Antitrust Criminal Penalty Enhancement and Reform Act 2004* immunity applicants can reduce their exposure to civil liability significantly if they provide "satisfactory cooperation" to civil plaintiffs, because only single as opposed to treble damages are allowed against the cooperating immunity applicant/defendant. Further, the Act limits the Federal and State liability of an immunity applicant to the damages attributable to the commerce of the applicant in the goods and services affected by the violation, and thus spares an immunity applicant from the doctrine of joint and several liability (under which each corporate cartel member is potentially liable for the full amount of a plaintiff's damages irrespective of the cartel member's share in the affected commerce). Similarly, in the EU, which has extensively examined ways to facilitate private claims for damages relating to anti-competitive conduct, the European Commission has proposed that the immunity recipient's liability, as well as its contribution owed to co-infringers under joint and several liability, should be limited to the harm it caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect suppliers: see European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (2013/0185 (COD)), Arts 11(2), 11(3), 11(4).

<sup>97</sup> In the leading Canadian case, *Ontario New Home Warranty Program v. Chevron Chern*, 46 OR (3d), the source of power was said to be sections 12 and 13 of the *Class Proceedings Act 1992*. Section 12 provides: "The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination, and, for the purpose, may impose such terms on the parties as it considers appropriate. Section 13 provides: The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate".

<sup>98</sup> Bar orders have been described as follows: "These orders typically bar claims by non-settling defendants for contribution or indemnity from settling defendants, and vice versa, and provide that class members must restrict claims against non-settling defendants to the damages that those defendants are responsible for. ... In effect, bar orders sever the joint liability of the defendants...Courts are aware that no defendant would agree to a settlement that did not include all defendants without a bar order": ABA section of antitrust law, indirect purchaser litigation handbook (2007), p 300, omitting references.

<sup>99</sup> This part of the Committee's submission looks at each of these in turn in the context of civil liability for cartel conduct under Division 1 of Part IV of the CCA. Further issues arise in the context of cartel offences given the application of Part 2.7 of the Criminal Code (Cth) to those offences (see s 6AA(1) of the CCA) and the differences between s 5 of the CCA on the one hand, and Part 2.7 of the Criminal Code, on the other.

<sup>100</sup> This express extension is required to overcome the principle of statutory construction that presumes that legislation does not apply extraterritorially unless the contrary intention is apparent: see, eg. *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10.

*Hoffman-La Roche Ltd.*<sup>101</sup> Merkel J declined to find that entry into the cartel arrangement was a contravention of Australian law, but avoided the need to rely on conduct occurring outside Australia by determining that the directions and communications to employees of the local subsidiary from those of the foreign parent implementing the cartel were conducted taking place in Australia for the purposes of section 5. He also considered that the conduct of the overseas parent company took place in Australia where it was engaged in by the subsidiary or by its officers on behalf of the parent.<sup>102</sup>

The Committee considers that more effective regulation of offshore cartels can be achieved by making application of the CCA dependent on the nature of the overseas conduct (rather than status of the entity). Reference to the positions in Europe and the United States is informative.

The European Commission exercises extraterritorial jurisdiction on the bases of two complementary doctrines: "attribution" which is generally equivalent to the approach adopted in *Bray*<sup>103</sup> and "implementation".<sup>104</sup> The implementation doctrine looks to whether the impugned agreement was implemented in the European Community to find jurisdiction. In such cases, an alleged cartel's recourse to subsidiaries, agents, sub-agents, or branches within the Community is immaterial.<sup>105</sup> While of broader application than the position under the CCA, the implementation doctrine still requires that effect be given to the unlawful agreement. This does not allow for measures to be taken to stop a cartel before its implementation causes damage to the economy.

The United States exercises extraterritorial antitrust jurisdiction on the basis of the "effects doctrine".<sup>106</sup> In broad terms, conduct that occurs outside the jurisdiction but infringes local antitrust laws can be considered to be within jurisdiction if it has an intended economic effect within the United States. Notably, the effects doctrine does not require the presence of related entities in the jurisdiction and avoids the need to determine what acts amount to implementation.<sup>107</sup> The doctrine has, however, been criticised as being contrary to principles of comity and international law<sup>108</sup> and some countries have introduced blocking statutes to prevent foreign States using their own antitrust laws to achieve trade policy.<sup>109</sup>

A third alternative for consideration is to expand the operation of section 5(1) to any foreign party for the purposes of Part IV, but introduce an express requirement that the cartel (or other anticompetitive) conduct be linked to Australia in a manner that does not intrude upon the sovereignty of other nations, so as not to attract the operation of blocking statutes or the refusal to enforce an Australian judgment in the jurisdiction of the party contravening Division 1 of the CCA.

The Committee does not at this early stage proffer a suggestion as to which of these alternatives should be adopted. It does, however, invite consideration of the issues by the Review Panel. The Committee acknowledges that greater international comity sensitivities may be raised if the CCA applies to extraterritorial conduct that has the purpose, but not the effect, of harming competition or consumer welfare in Australia. The issue may be addressed, however, by implementing a statutory provision that excludes from action in Australia anticompetitive conduct that causes only foreign injury. Such an approach is evident in the *Foreign Trade Antitrust Improvements Act 1982* of the United States.<sup>110</sup>

<sup>101</sup> (2002) 118 FCR 1.

<sup>102</sup> *Bray* at 18, 23, and 46.

<sup>103</sup> See *Imperial Chemical Industries Ltd v Commission of the European Communities* (C-48/69)[1972] ECR 619.

<sup>104</sup> *Re Wood Pulp Cartel; A Ahlstrom Oy v European Communities Commission* [1988] 4 CMLR 901; [1993] 4 CMLR 407.

<sup>105</sup> *Wood Pulp* at [17].

<sup>106</sup> *Hartford Fire Ins v California* 509 US 764 (1993); *US v Aluminium Company of America et al*, 148 F 2d 416 (2<sup>nd</sup> Cir, 1945) ('Alcoa'); *Timberlane Lumber Co. v Bank of America*, 549 F 2d 597 (9<sup>th</sup> Cir, 1976); see also *Foreign Trade Antitrust Improvements Act of 1982*; 15 U.S. Code § 6a.

<sup>107</sup> In *Bray* (2002) 118 FCR 1 at 15, Merkel J said that an effects doctrine is of particular utility in an era of e-commerce, electronic fund transfers, internet trading and information technology.

<sup>108</sup> See, for example, the discussion in Noonan C, *The Emerging Principles of International Competition Law* (Oxford University Press, 2008), Chs 8, 10 and 11; and Dabbah MM, *The Internationalisation of Antitrust Policy* (Cambridge University Press, United Kingdom, 2003), Ch 7.

<sup>109</sup> For example, *Protection of Trading Interests Act 1980* (UK) and *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth).

<sup>110</sup> For a further brief discussion, see *Extraterritorial application of Pt IV of the Competition and Consumer Act*, Ian B Stewart, (2014) 42 ABLR 90 at p 95.

Australian consumers and competitors should have a remedy under Division 1 where a cartel contract, arrangement or understanding entered into or arrived at outside Australia is given effect in Australia, but those who were parties to, or gave effect to it, are unlikely to satisfy the carrying on business in Australia requirement of section 5. An amendment to the CCA to facilitate its application in these instances would, in the Committee's view, overcome the potential for international cartelists to avoid liability by structuring their operations beyond the reach of the CCA - by design or good fortune - whilst limiting the potential for overreach.<sup>111</sup> Any amendment must, however, be cognizant of the reality that Australia is not the custodian of morality for the whole world, and that Australian law should only apply where a sufficient jurisdictional connection with Australia exists.

The Committee recommends that section 5 of the CCA be amended to broaden the CCA's extraterritorial operation. While consideration of the United States style "effects doctrine" is warranted, the Committee considers that such effects should be constrained to those imposed on Australian consumers or commercial activity. This would permit Australian Courts to exercise jurisdiction in respect of conduct outside Australia which (purposefully or otherwise) causes harm to Australian markets and their consumers. It might also avoid the protracted technical arguments that currently attend section 5.<sup>112</sup>

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<sup>111</sup> The Committee notes, in this regard, that the framers of the cartel conduct provisions deliberately omitted reference to "market" in an apparent effort to avoid the "highly technical exercise" of market definition (Explanatory Memorandum to Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2009 at [1.38]).

<sup>112</sup> See *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at 23; *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166 at p 180–1.

9. **COMPETITION LAWS (CHAPTER 5): ARRANGEMENTS BETWEEN SUPPLIERS AND CUSTOMERS AND SECONDARY BOYCOTTS**

**Key points in this section:**

- (a) **Third line forcing:** The *per se* prohibition for third line forcing should be removed, and the prohibition made subject to a competition test, as previously recommended by the Committee and the Dawson Committee. The related bodies corporate exemption should be retained as it is consistent with underlying economic principle (which should be focused on conduct by a single economic entity).
- (b) **Resale price maintenance:** Despite relaxation in other jurisdictions, resale price maintenance in Australia is subject to the same test for illegality as cartel conduct. The Committee believes this is incongruous. There is a strong case for relaxing the *per se* prohibition on resale price maintenance and prohibiting this conduct, like other forms of vertical restraint, only where it has the purpose, or is likely to have the effect, of substantially lessening competition. At the very least, there is a case for permitting resale price maintenance to be capable of a simple notification procedure under section 93 of the Act, to give the ACCC the ability to assess the effect of such conduct on a case by case basis. The ACCC should publish guidelines on when notifications (ie. exemptions) may be set aside or allowed to stand.

9.1 **Do the provisions of the CCA on third line forcing operate effectively, and do they work to further the objectives of the CCA?**

The current *per se* prohibition for third line forcing should be removed. There should be no change to the protection of conduct involving related bodies corporate.

Third line forcing is a form of exclusive dealing that is prohibited outright (or *per se*) by section 47 of the CCA and is not subject to a substantial lessening of competition test. The Committee has previously advocated, and continues to advocate, the removal of the *per se* prohibition against third line forcing so that it is subject to the same competition test as applies to other exclusive dealing conduct in section 47.

While vertical restraints may, in some cases, enable a corporation to extend its market power from one market to another, third line forcing can be pro-competitive and there is an ongoing risk that the *per se* prohibition will stifle the delivery of substantial consumer benefits. For example, customer loyalty schemes and discounts or where selling two or more products in combination results in production or distribution efficiencies which are then passed on to consumers. A competition test would address any competition concerns while not impeding the many instances where third line forcing may benefit consumers.

The current approach to third line forcing requires a corporation to either:

- restructure supply arrangements in order to avoid third line forcing (such as re-casting arrangements in an agency or "resupply" structure); or
- notifying the ACCC through the "notification and disallowance" mechanism in section 93 of the CCA.

Both of these "solutions" impose costs and impediments on business conduct which are not justified by the nature of the conduct, most of which is pro-competitive. The Committee therefore submits that the Panel endorse previous recommendations, including of the Dawson Committee, that the third line forcing prohibition be made subject to a competition test.

Support for the removal of the *per se* prohibition has been advocated for some time.

The provision was made *per se* in 1976 following concerns about lending institutions insisting that borrowers use a nominated insurer which tended to charge higher premiums. However,

following increased competition in financial markets, the Hilmer Committee in 1993 recommended that third line forcing be subject to a competition test “to bring it into line with the Act’s treatment of other forms of exclusive dealing”.<sup>113</sup> This position was reiterated by the Dawson Committee in 2003<sup>114</sup> and the *per se* prohibition was not supported in any of the submissions to that Review.<sup>115</sup>

The Committee also notes that paragraph 3.3.5 of the Terms of Reference referred to the exemption for conditional offers by or between related bodies corporate as an example of existing exemptions from competition law. Notably, the only change made to the third line forcing provisions following the Dawson Review was to extend this exemption to third line forcing conduct.

Although not specifically mentioned in the Issues Paper, the Committee wishes to strongly reiterate the importance of this exemption. The exemption treats third line forcing involving related companies in the same manner as third line forcing by a single corporate entity, which is entirely appropriate. To do otherwise, would require corporate groups to either inefficiently restructure their offers so that they are made by the same corporate entity, or otherwise notify the ACCC of, straightforward bundled offers.

Recognising related entities is also consistent with the Committee’s broader submission that a principled approach needs to be taken to any amendment to the CCA. The object and economic underpinnings of the CCA are not directed at preventing or restricting competitive conduct by a single economic enterprise (which from an economic perspective must extend to corporate groups), unless the conduct is shown to involve the anti-competitive use of substantial market power within the meaning of section 46.

## 9.2 **Do the provisions of the CCA on resale price maintenance operate effectively, and do they work to further the objectives of the CCA?**

The Committee believes the principal question is whether the *per se* prohibition on resale price maintenance (**RPM**) should be relaxed.

In the 1993 Hilmer Report, that Committee stated:

*“Economic theory indicates that there are circumstances in which RPM could enhance economic efficiency. For example, it may be that consumers will buy more of a certain good if there are associated pre-sales services, such as explanation of certain technical matters. Retailers who do not offer those services may operate at lower cost, and thus offer lower prices. Customers may be able to obtain the services from the high cost retailer and buy the goods from the low price retailer. In such situations competition among retailers could result in less than optimal provision of pre-sales services, and thus less than optimal total sales of the manufacturer’s product. To increase sales, the manufacturer may wish to encourage all retailers to provide increased services. This might be achieved by RPM because if retailers are unable to compete on price they will be forced to compete in other ways, such as the level of services provided.”<sup>116</sup>*

However, not being satisfied that efficiency enhancing RPM occurs with sufficient frequency, the panel concluded that the *per se* prohibition on RPM should remain in place, instead recommending that authorisation should be available for such conduct.<sup>117</sup>

<sup>113</sup> Independent Committee of Inquiry, National Competition Policy (AGPS, Canberra, 1993), p xxiii <<http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20Report.%20The%20Hilmer%20Report.%20August%201993.pdf>>.

<sup>114</sup> Trade Practices Act Review Committee, Review of the Competition Provisions of the Trade Practices Act (January 2003), p 125 <<http://tpareview.treasury.gov.au/content/report.asp>>.

<sup>115</sup> Trade Practices Act Review Committee, Review of the Competition Provisions of the Trade Practices Act (January 2003), p 17 <<http://tpareview.treasury.gov.au/content/report.asp>>.

<sup>116</sup> Hilmer Report, p 57.

<sup>117</sup> Hilmer Report, p 59.

A significant international development occurred in 2007, with the decision of the United States Supreme Court in *Leegin Creative Leather Products Inc v PSKS Inc*<sup>118</sup>, in which the Court held that the practice of RPM should no longer be subject to a *per se* prohibition under US Federal antitrust law, and would instead be tested under a rule of reason analysis. In its opinion, the majority stated:

*“Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance. See, e.g., Brief for Economists as Amici Curiae 16 (‘In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects’); Brief for United States as Amicus Curiae 9 (‘[T]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote interbrand competition and consumer welfare in a variety of ways’); ABA Section of Antitrust Law, *Antitrust Law and Economics of Product Distribution* 76 (2006) (‘[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes’) ... Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, e.g., Brief for William S. Comanor et al. as Amici Curiae 3 (‘[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a rule of reason rather than a *per se* approach is warranted’); F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990) (hereinafter Scherer & Ross) (‘The overall balance between benefits and costs [of resale price maintenance] is probably close.’”*

The Court concluded (in a 5-4 decision) that the *per se* prohibition under Federal anti-trust law should be relaxed, although some US states have retained a *per se* prohibition on RPM in their antitrust legislation. Canada relaxed its strict prohibition in 2009,<sup>119</sup> while the European Commission continues to treat RPM as a hardcore restriction, but notes that there are circumstances where an efficiency defence could be made out.<sup>120</sup>

While there is a dearth of empirical analysis on the extent to which RPM is used to enhance efficiency in Australia, the Committee believes the principles articulated by the Supreme Court in *Leegin* are sound. When RPM is viewed from the perspective of *harm*, the Committee believes there is real doubt as to whether this should continue to be a *per se* prohibition.

The Dawson Review, in assessing the *per se* prohibitions contained in Part IV, stated:

*“The rationale behind a *per se* prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.”*<sup>121</sup>

Assessed against this benchmark, it is plainly arguable that RPM conduct is not so detrimental to welfare, and not so unlikely to be beneficial, that it continues to merit a strict prohibition.

The prohibition on RPM is not aimed at attempts to restrict inter-brand competition. Such behaviour is rightly the subject of laws relating to cartel conduct. While RPM may limit the extent to which retail outlets can discount certain product lines, it is impossible to accurately assess whether this will harm competition and consumer welfare without considering the conditions in the markets into which the relevant products are supplied.

In a market where there is inter-brand competition, a manufacturer engaging in RPM risks losing market share as a consequence of the constraints imposed by rival brands. In these conditions, it is difficult to characterise the conduct as being so detrimental to consumers that a

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<sup>118</sup> 551 U.S. 877 (2007)

<sup>119</sup> *Competition Act 1985* (Canada), section 76.

<sup>120</sup> European Commission *Guidelines on Vertical Restraints* (2010), paragraphs [223]-[225].

<sup>121</sup> *Review of the Competition Provisions of the Trade Practices Act* (2003), page 123.

*per se* prohibition is justified. Such conduct, engaged in by an innovative new entrant, may in fact promote competition and enhance efficiency. There may of course be circumstances where RPM could damage competition, for example, in situations where there is limited inter-brand competition. However, such conduct could still be tested under a substantial lessening of competition test, or under section 46 of the CCA.

Currently, the CCA applies the same test for illegality to RPM that it applies to cartel conduct. On its face, this seems incongruous. Given the uncertainty as to the harm resulting from RPM, and the potential for efficiency enhancing RPM, it must follow that the *per se* prohibition is, to some extent at least, prohibiting conduct that should normally be permitted, if not encouraged. Only if it can be shown to impact adversely on competition would we expect such conduct to be prohibited.

It is helpful to view resale price maintenance for what it is - a form of vertical restraint, more analogous to exclusive dealing than cartel conduct. Consider the following example:

- (a) if a wholesaler supplies on the condition that a retailer not re-supply the product below a specified price, the condition will be strictly prohibited by virtue of section 96(3)(c);
- (b) if a wholesaler supplies on the condition that a retailer not re-supply the product *at all*, the condition will be prohibited by virtue of section 47(2)(f), but only if it has the purpose, or is likely to have the effect, of substantially lessening competition.

It is not clear why the first of these conditions should be subject to a more stringent prohibition than the second. The Committee submits there is a strong case for aligning the prohibition on RPM with other vertical restraints, and prohibiting such conduct only where it has the purpose, or would be likely to have the effect, of substantially lessening competition.

Even if the *per se* prohibition on RPM is not relaxed, at the very least there is a case for permitting RPM, like other forms of vertical restraint prohibited under section 47, to be notified to the ACCC under section 93, if only to facilitate RPM in circumstances where it can enhance efficiency.

The availability of authorisation has done little, if anything, to facilitate efficiency enhancing RPM. While it has been possible to seek authorisation for RPM under Part VII since 1995, the use of this option by business is almost unheard of. This is unsurprising. There are few circumstances where a manufacturer that wished, for example, to specify minimum retail prices in launching a new product, would be prepared to place its product launch on hold while the ACCC conducted a public inquiry into whether it would enhance economic efficiency. If notification was available, the ACCC would have the option of publishing guidelines on circumstances where it may view RPM as lessening competition or enhancing efficiency.

### 9.3 **Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?**

The secondary boycott provisions are targeted at two distinct areas of activity:

- certain actions undertaken in an industrial relations context; and
- certain forms of anti-competitive conduct.

At this time the Committee makes no comment, in the context of this submission, on the legislation to the extent that it relates to industrial action.

Subject to the comments below, the Committee believes that section 45DA, in so far as the provisions relate to anti-competitive conduct, should be retained. While this is a provision of the CCA that is not often used, it is targeted at conduct that should, on its face, be prohibited. If two or more persons act in concert to prevent a third person dealing with a fourth, in circumstances where the conduct has the purpose, or would be likely to have the effect, of substantially lessening competition in a market where the fourth person operates, the Committee sees no reason why such conduct should not be prohibited. The rationale for such a prohibition is little different to the rationale underpinning section 45 of the Act. All that is required is consistency in the test to be applied.

The Committee believes there are issues of consistency that should be addressed as part of a wider simplification program. Specifically:

- the requirement in section 45DA that conduct be undertaken for the purpose, *and* be likely to have the effect, of substantially lessening competition; and
- the contrast between section 45DA(2) (which provides that a person engages in conduct for a purpose if they engage in conduct for purposes that include that purpose) and section 4F, which requires that a purpose be a "substantial" purpose.

## 10. COMPETITION LAWS (CHAPTER 5): MERGER PROVISIONS AND THEIR APPLICATION

### Key points in this section:

- (a) Whilst mergers and acquisitions may potentially lessen competition in Australian markets, they also are a means by which competition can be increased and stimulated, and consumer welfare enhanced. The mechanisms used in Australia to draw the line between competitive mergers (or mergers with neutral or insignificant competitive impact) and mergers that are anti-competitive are, by and large, appropriate and effective.
- (b) There are some changes which the Committee believes will lead to an even more effective and efficient system for all concerned, as described below.

### Areas requiring no change:

- (c) No amendments are required to the current substantive competition test for mergers set out in section 50 of the Act. The current test contained is effective and in line with international best practice.
- (d) The existing informal merger clearance process adopted by the ACCC is effective for non-complex mergers, and should be retained.
- (e) The existing merger authorisation process should remain in place.
- (f) No amendments are required to the CCA to deal with creeping acquisitions as the ACCC has adequate powers to address such matters.

### Areas where improvements can be made:

- (g) The existing informal merger clearance process adopted by the ACCC is not as effective as it could and should be for complex or controversial mergers.
- (h) For complex merger matters, changes could be made to the merger review process to increase transparency and timeliness throughout the process, and to introduce a requirement for the ACCC to publish its reasons for decision. There are a number of ways in which this could be effected, as set out in this section, including by introducing via legislation a new formal "second phase" review process. However, the Committee does not support abolition of the informal merger system, or its wholesale replacement with a formal process.
- (i) The existing formal merger review process contained in the CCA requires overhauling and should be repealed or amended.
- (h) It has been suggested by some Committee members that the ACCC should publish safe harbour thresholds for mergers and acquisitions as part of its Merger Guidelines. This is because the Merger Guidelines do not clearly articulate (eg., by reference to market share and/or HHI tests) that acquisitions which fall below those thresholds will not be examined by the ACCC, or do not need to be notified to the ACCC.

### 10.1 The current substantive test is effective and in line with best practice

The Australian merger prohibition is contained in section 50 of the Act, and prohibits direct and indirect acquisitions of shares or assets that would be likely to have the effect of substantially lessening competition in a market in Australia, or a State, Territory or region of Australia.

This provision has proved effective in the 22 years since it was re-introduced into section 50 in 1992. The test provides an appropriate and internationally recognised standard by which the ACCC and the Courts can delineate between transactions which should not be subject to

regulatory intervention and those that should be prohibited due to their potential adverse impact on competition in Australian markets.

The test is in line with international best practice. It is the test used in many OECD countries including the United States, Canada, New Zealand, the United Kingdom, and also, despite a difference in statutory nomenclature, in the European Union.<sup>122</sup>

The current test was considered by the Dawson Committee in its 2003 report, which recommended that it be retained and that a return to the dominance test was not appropriate.<sup>123</sup> The Committee sees no basis for a change in that recommendation.

At a time of increasing convergence of international competition laws and practices, the Committee believes that it would be inappropriate for Australia to move away from the substantial lessening of competition test as it currently stands. There are significant benefits for businesses if merger regimes across major global economies are made more consistent, as well as for regulators in the cross jurisdictional enforcement of the law.

## 10.2 Brief overview of the Australian merger review process

Australia's merger control merger regime is not subject to turnover thresholds, and there is no mandatory notification procedure. Further, historically and comparatively, Australia's merger review process is unusual in that it developed informally outside any statutory procedure. The earliest incarnation of the CCA did not contain a statutory procedure for the consideration of mergers, only provisions for when mergers would be determined to be anti-competitive, and provisions for the ex post enforcement of such a determination. Merging parties not wishing to risk an adverse determination post-merger could seek the approval of the ACCC informally in advance. While a statutory procedure was eventually enacted in 2007, it has not yet been used.<sup>124</sup>

Today, if parties proceed with an acquisition without first having obtained clearance from the ACCC, they bear the risk that the ACCC will investigate the acquisition<sup>125</sup> and, if it forms the view that the acquisition is likely to substantially lessen competition, it may elect to seek an injunction, or orders for divestiture or to void the acquisition, and/or seek civil pecuniary penalties of up to \$10 million in the case of corporation and up to \$500,000 for individuals involved in the breach, orders disqualifying individuals from holding management positions, and orders for legal costs.

For parties that are seeking a greater degree of comfort regarding the approach of the ACCC to the competitive impact of their transaction, three options are available:

- an informal merger review; or
- a formal (statutory) clearance decision; or
- a merger authorisation from the Australian Competition Tribunal (**Tribunal**), based on public benefits.

By far the most common method for merger parties to seek the ACCC's views is through the first option, being the informal merger review process, which is an administrative, non-statutory and non-binding process operated by the ACCC.

Broadly, the informal procedure involves an applicant voluntarily applying to the ACCC, and providing to the ACCC whatever information and data it requests to aid it in making its merger

<sup>122</sup> See Clayton Act (US), section 7; Competition Act, section 96; Commerce Act (NZ), section 47; Enterprise Act (UK), section 22 and Article 2(2) EU Merger Regulation 139/2004.

<sup>123</sup> Review of the Competition Provisions of the Trade Practices Act, January 2003, pages 55-58.

<sup>124</sup> See sections 95AA – 95AS of the Act.

<sup>125</sup> The ACCC's policy is to further investigate proposed acquisitions where the proposed acquisition would be likely to result in the acquirer having a market share of 20% or more, and the products of the merger parties are either economic substitutes or complements.

decision. The ACCC will also consult interested third parties and make other market inquiries, none of which it is obliged to make public, or even make known to the applicant. There can also be a considerable amount of information provided by, and correspondence from the ACCC to, the merger parties as part of the early stages of the ACCC's assessment. After a period of time, the ACCC will either "clear" the merger (by issuing a non-binding letter to the parties indicating that it does not intend to take any further steps with respect to the acquisition), or else issue to the applicant at its discretion a "Statement of Issues" (**SOI**), outlining in summary form its view of the competition issues surrounding the merger and the likely direction of its final decision. A SOI is generally made public, though that is also at the ACCC's discretion. After further submissions by the applicant and any interested parties, the ACCC makes a final decision, the reasons for which it may eventually publish, entirely at its discretion, in summary form by way of a Public Competition Assessment (**PCA**).<sup>126</sup>

### 10.3 **The informal process is effective for non-complex mergers**

The benefits of the informal procedure are timeliness, speed, informality and cost. For the overwhelming majority of mergers, the Committee submits that these benefits of the informal procedure outweigh any potential downside of the procedure. Generally speaking, these are mergers which are relatively less complex. In 2012/13 the ACCC considered 289 matters under section 50, and determined that 64 of these should progress to a public review (rather than being cleared without the ACCC undertaking market inquiries). Of the mergers that proceeded to a public review, a SOI was released in ten mergers (ie. approximately 15% of public reviews proceeded to the SOI phase). Of those, six were opposed and two proceeded after the provision of undertakings.<sup>127</sup>

The Committee considers that, for the majority of mergers, the current informal process enables the ACCC to review mergers as promptly as possible, and acknowledges that the ACCC aims to complete the majority of reviews within an eight week period, while recognising that this will not be possible in complex or contentious matters.

### 10.4 **The informal process is inadequate for complex or contentious mergers**

For the relatively small proportion of mergers that are complex and require detailed application of sophisticated market and competition analysis, the Committee submits that the benefits of the informal procedure do not outweigh its downside – and for these mergers, the downside of the informal procedure for complex mergers is more pronounced.

That downside includes:

- lack of transparency as between the ACCC and the merger parties, as well as between the ACCC and third parties;
- lack of timelines and timeliness of decision making, particularly for those mergers that proceed to a post SOI phase; and
- lack of reasons for decision following merger reviews that proceed to a post SOI phase.

**Lack of transparency.** Anonymity of third party consultation is maintained by the ACCC during the informal merger procedure. There is an asymmetry of information between the applicants and the ACCC, third parties and the ACCC, and the applicant and third parties. Information gathered by the ACCC remains unknown by other parties, depriving parties of the chance to test and respond to allegations and submitted data, and depriving the ACCC of the benefit of such testing and response.

<sup>126</sup> The procedure is described diagrammatically at p 4 of the ACCC's Informal Merger Review Process Guidelines, September 2013, available on the ACCC website.

<sup>127</sup> ACCC and AER Annual Report 2012-13, page 41

A concern often cited by the ACCC in relation to calls for greater transparency is that it needs to protect the confidentiality of market participants who provide information to the ACCC as part of its considerations. The concern is that market participants may elect not to provide such information to the ACCC if their identity or the substance of their views are made known to the merger parties, for fear of reprisals (particularly where they are a customer of, or supplier to, a merger party). However, the Committee submits that it is possible for these concerns to be appropriately balanced against the objective of transparency, with the implementation of confidentiality protocols and procedures, as is the case in the UK and Europe. Further, the New Zealand Commerce Commission (**NZCC**) places the applications for merger clearances and copies of its clearance decisions on its website, and redacts confidential information from these materials.<sup>128</sup> By way of general comment, the Committee considers that these materials contain more information as to the reasons for the NZCC's decisions and the evidence upon which their decisions are based than the ACCC's typically provides (even where a PCA is published).

The Committee also notes that the process for merger authorisations administered by the Tribunal provides access to merger submissions and evidence (both of the application and interested third parties)<sup>129</sup>, subject to confidentiality rulings, as does the process for non-merger authorisations.<sup>130</sup>

**Lack of timeliness:** As an informal procedure, there are no statutory mileposts for the making of merger decisions. For less complex mergers, this lack of procedural deadlines aids in the expeditious processing of mergers. For more complex mergers, however, it can have the opposite effect – the lack of formal compulsion of timeliness on the ACCC to make its decision can lead to dilatoriness and even, in theory (and occasionally in practice), to no decision being made at all.

**Lack of detailed reasons:** There is no statutory requirement on the ACCC to publish reasons for its merger decisions. Historically, no reasons for decisions were provided to affected parties under the informal merger procedure. In 2003, the ACCC volunteered to make PCAs available in respect of its merger decisions. These PCAs lack comprehensiveness, often failing to detail the evidence upon which the decisions were based. For any particular merger their publication is at the discretion of the regulator. For example, in 2012/13, despite identifying competition concerns sufficient to release ten Statements of Issues, the ACCC subsequently only released five PCAs.<sup>131</sup> Given that in some cases the ACCC approved a transaction that it had raised concerns about, and in others blocked a transaction that it had not raised particularly significant issues about, the lack of public information about the ACCC's reasons impedes a proper understanding of the basis for the decision. This has implications for natural justice, and for the consistency with which lawyers can advise clients, and therefore for business certainty.

For complex mergers, the Committee submits that any merger review procedure should involve greater transparency, the compulsion of detailed reasons for decision, including the evidence upon which the decision is based, and a requirement to make a final decision with clearly-determined mileposts met along the way. Such changes would be of mutual benefit to all parties and to the competition regulator.

Various options for improving the procedure in the case of complex mergers are available both in the literature and from overseas example, and these are considered further below.

<sup>128</sup> Unlike the Australian regime, although there is no formal requirement to seek clearance from the NZCC for a merger, section 66(1) of the Commerce Act 1986 provides that a party may seek clearance for the merger, and that the NZCC must clear a merger if it is satisfied that the merger would not be likely to substantially lessen competition in any market. Amongst other things, the NZCC requires parties to provide both public and confidential versions of their merger applications and takes a cautious approach in accepting assertions of confidentiality. A summary of the NZCC's approach to merger review and confidentiality can be found on page 57 of its Merger and Acquisitions Guidelines July 2013, available on the NZCC website.

<sup>129</sup> See sections 95AZ and 95AZA of the Act.

<sup>130</sup> See section 89 of the Act.

<sup>131</sup> ACCC and AER Annual Report 2012-13, pages 42 and 44.

## 10.5 Recommendations for improving the informal process for complex mergers

### *Improving transparency: adopt a form of the UK and European procedures*

To assist the Review Panel, an overview of the UK and European procedures is set out in Annexure A.<sup>132</sup>

Of these procedures, the Committee submits that the key principles and procedures that should apply to merger reviews once they proceed to the ACCC issuing a SOI (**SOI phase**) are that:

- the ACCC's objective is to be **open and transparent** in its decision making;
- the ACCC should **disclose the key arguments** of the main parties and **those of third parties** (noting that it would not be necessarily required to disclose all submissions where they make the same key arguments);
- any **economic evidence or other expert material** that has been prepared by the ACCC (or that it has commissioned) and upon which it is relying in its analysis **should be disclosed** to the merger parties, and in appropriate cases to third parties;
- the merger parties are to be provided with the opportunity of reviewing and commenting on key documents obtained by the ACCC and that are intended to be relied upon by the ACCC in its merger considerations (including substantiated submissions of third parties running counter to the notifying parties' own contentions);
- generally speaking, **third party submissions** should be disclosed to the merger parties (and vice versa) subject to considerations of confidentiality;
- there are express **confidentiality guidelines** as to what information will be considered to be confidential and **procedures** to resolve disputes over confidentiality (including that third parties are required to provide both confidential and non-confidential versions of submissions);
- merger parties are able to request **access the ACCC's file** after it has issued a SOI; and
- the ACCC can only base its decision on **objections** on which the parties have been able to **submit their observations**.

### *Requirement for set timelines:*

For mergers proceeding to a SOI phase, the Committee considers it appropriate that the ACCC be required to set and meet a formal timeline for each subsequent step in its review process, with the result that, other than in exceptional cases, the ACCC must inform the merger parties of its decision within 12 weeks of a SOI being published. This is consistent with the current three month timeframe required for a decision of the Tribunal in a merger authorisation application<sup>133</sup>.

This timeline should be capable of being extended by the ACCC upon request by the parties, or through the ACCC pausing the timeline to allow for the parties to provide additional information or develop potential remedies (as is currently the case with the informal timeframes). However, if extended, there should be a requirement that it be extended for no

<sup>132</sup> The Committee notes that the US merger regime is quite different and considers that it does not offer an appropriate precedent with respect to information disclosure and transparency.

<sup>133</sup> Section 95AZI of the Act.

longer than a further 12 weeks (again, consistent with the current merger authorisation process<sup>134</sup>).

**Requirement for detailed reasons:**

Similarly, for mergers proceeding to a SOI phase, the Committee considers it appropriate for the ACCC to be required to issue detailed reasons for its decisions, preferably in all such merger matters, but at least in respect of mergers that it has opposed, or that it has cleared subject to undertakings or where requested to do so by the merger parties.

The Committee believes that a requirement to issue detailed PCAs within a relatively short timeframe in complex merger matters would play an important role in terms of procedural fairness, transparency and accountability. In making these observations, the Committee expressly acknowledges the ACCC's continuing efforts to improve transparency in the informal clearance process and ensure that parties are not caught by surprise on key issues impacting on the ACCC analysis. However, the Committee's views are expressed in the context of the concerns expressed leading up to and during the deliberations of the Dawson Committee in 2003 and the recommendations in the Dawson Committee's final report.

Against this background, detailed PCAs would serve to (as was originally intended):

- improve the ACCC's process by greater transparency and reduce the potential for regulatory error;
- afford a measure of procedural fairness for the merger parties;
- enhance understanding of the ACCC's decision and reduce uncertainty about the way the process operates; and
- establish, over time, a body of detailed reasons for ACCC decisions, thus providing improved understanding of the ACCC's approach to clearance applications and competition issues.

The Committee also considers that it would be appropriate for the ACCC to be required to issue a PCA within a set period, say 28 days. This would serve both as a discipline on the ACCC and to send an appropriate message to those involved or interested in the ACCC's processes.

**10.6 Options for giving effect to these recommendations**

The changes in section 10.5 above could be effected in a number of ways:

- (a) Through amendments to the ACCC's existing Informal Merger Review Process Guidelines (last updated by the ACCC in 2013). This would require commitment from the ACCC to make the recommended changes to its Guidelines and processes, but would not involve any legislative changes to the Act.

*The benefits of this approach is that no further amendment is required to the Act. The downsides of this approach is that it does not bind the ACCC or the merger parties to any of the requirements and any amendments to the Guidelines would continue to have no statutory effect.*

- (b) Through retaining the current informal merger process and associated Guidelines but introducing a "fork in the road" step that provides a merger applicant with an option if it wishes, to move the clearance application from the current informal process to a new formal (meaning legislative) process upon a trigger event, and which reflects the recommendations in section 10.5 above. For example, this could involve the introduction of a new formal "stage 2" type process for those mergers

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<sup>134</sup> Section 95AZI(2) of the Act.

where the ACCC issues an SOI. This would require amendments to the CCA to introduce a new formal process that would take effect upon a trigger event. The Committee notes that, in its view, the current formal merger review process contained in the CCA is unworkable for the reasons set out in section 10.7 below, and the intention would be for that process to be abolished and replaced with a new process as described in this paragraph (b).

*The benefits of this approach is that it preserves the flexibility of the current informal process for non-complex mergers, but introduces formal requirements for more complex mergers that would bind the ACCC and the merger parties and create certainty of application. The downside of this approach is the potential for too rigid or proscriptive a process to be adopted in the legislation and the potential difficulty in defining a "trigger" event that itself would occur pursuant to a non-legislative process (being the initial informal and non-statutory merger review).*

- (c) By abolishing the current informal process and replacing it with a new formal (legislative) process that retains the flexibility of the current process, but deals with the issues identified in section 10.5 above. Again, this would require amendments to the CCA to introduce a new formal process.<sup>135</sup>

*The benefits of this approach are that it introduces formal requirements and would create certainty of application.*

*However, the Committee does **not** support this option as the (very significant) downside of this approach is that the current efficiency, flexibility and timeliness of the existing informal merger process would be lost, particularly for non-complex mergers. As noted above, the Committee considers that the existing informal process should be retained given that it works very well for the majority of mergers, and accordingly believes that the issues identified should be addressed through one of options (a) or (b).*

The Committee would be pleased to develop these or other options for the Review Panel's consideration, should the Review Panel consider there to be merit in the Committee's identified concerns and suggestions for improvement.

## 10.7 **The current formal merger process needs to be overhauled**

When the Dawson Committee recommended in 2003 that Australia should introduce a parallel formal merger clearance process to the existing informal system, it did so in the expectation that this would "offer the best of both worlds."<sup>136</sup> The current system would be preserved, but a new optional process would be available which would offer merging parties "a greater understanding of the reasons for the [ACCC] decision and be given the opportunity to have the Tribunal review an unfavourable decision."<sup>137</sup>

It has been over seven years since the new formal merger process came into operation, and there has not been a single application to the ACCC (or at least none that have progressed to the point of the ACCC accepting a filing under section 95AC). Clearly, something has gone wrong. The Committee submits that the shortcomings of the formal system that have led to its rejection by both Australian and international businesses as a vehicle for merger clearance can be summarised as follows:

- The ACCC initially adopted a very conservative position on the interpretation of the requirements for a valid application, which led businesses to have concerns about a substantial increase in the time and cost of filing a formal application (in addition to the \$25,000 filing fee).

<sup>136</sup> Review of the Competition Provisions of the Trade Practices Act, January 2003, page 62.

<sup>137</sup> Ibid, page 62.

- This approach is evidenced in the language of the ACCC's 2008 Formal Merger Review Process Guidelines<sup>138</sup> which suggests a highly technical approach to applications ("*the ACCC will strictly enforce the legislated validity requirements*"<sup>139</sup>; "*applications will be scrutinised thoroughly ... for compliance with the information requirements*".<sup>140</sup>) There is a significant difference between the language of this document and the guideline issued by the New Zealand Commerce Commission in relation to its formal clearance process.<sup>141</sup>
- The information requirements set out in the Directions to Form O list a substantial amount of information that it is mandatory to provide, regardless of its potential relevance to a transaction. For example, market shares on the basis of sales, revenue and productive capacity must be produced for 5 years.<sup>142</sup> Again, by contrast the New Zealand Commerce Commission Guidelines are more flexible, and for example only require market share on volumes and productive capacity to be provided if relevant to the transaction.<sup>143</sup>
- It was not clear from the materials issued by the ACCC in relation to the way in which it would consider claims for confidentiality in the formal process that there would necessarily be a significantly greater degree of transparency to the merging parties than the informal process.<sup>144</sup>

Sufficient time has elapsed that it is safe to conclude that the above issues represent a significant barrier to the adoption of the formal process by business. It is not appropriate for Australia to have in place a statutory merger clearance regime that is ignored by the business community. Accordingly, the Committee recommends that the current formal merger process be overhauled, and that the concerns that led to its creation be dealt with in accordance with the suggestions in this submission.

## 10.8 The existing merger authorisation process should be retained

Historically, applications for authorisation of a merger have been rare. Following the recommendations of the Dawson Committee in 2003, the Act was amended in 2006 to allow for merger authorisation applications to be made directly to the Tribunal (rather than to the ACCC). To date, there have only been two occasions in which this process has been utilised (both occurring in the last 6 months). This recent activity suggests that the authorisation process is a viable option where the acquirer believes that the acquisition will result in such a benefit to the public that it should be allowed to occur (even if it may substantially lessen competition).

The first application was by Murray Goulbourn Group to acquire Warrnambool Cheese & Butter. The Tribunal conducted some hearings and a considerable amount of information was provided to the Tribunal in relation to the matter prior to the application being withdrawn when Warrnambool Cheese & Butter Organisation was bought by Saputo.

The second application was the recent authorisation granted to AGL to acquire the assets of Macquarie Generation (25 June 2014).

<sup>138</sup> Formal Merger Review Process Guidelines, June 2008.

<sup>139</sup> Ibid, paragraph 3.14.

<sup>140</sup> Ibid, paragraph 3.29.

<sup>141</sup> Mergers and Acquisitions Guidelines, July 2013.

<sup>142</sup> Form O, page 13 – 14.

<sup>143</sup> Business Acquisition Clearance Form for Notice Under Section 66, page 5:10.

<sup>144</sup> Formal Merger Review Process Guidelines, June 2008, paragraph 3.61 and Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes.

The Committee has mixed views as to the efficacy of the current authorisation process contained within the Act<sup>145</sup>, and the extent to which improvements could or should be made. Some initial observations as to the role of the ACCC in assisting the Tribunal are set out below. However, the Committee considers that it is appropriate to defer a more comprehensive review of these processes until such time as there have been sufficient merger authorisation applications against which to test the effectiveness of those processes, and the extent to which they can be improved.

Examples of areas worthy of consideration include the timeframes for the process, the role of the ACCC in assisting the Tribunal and the interaction between them (as briefly discussed below), the information gathering powers provided to both the Tribunal and the ACCC, the mandatory requirements of the authorisation application form (Form S) and subsequent reliance (or lack thereof) on Form S information.

One practical suggestion that could be implemented now is to recommend that the Tribunal be encouraged to appoint Counsel Assisting (as is common in Commissions of Inquiry) to assist the Tribunal in any independent forensic activity it is appropriate to undertake, assess confidentiality claims and implement and manage procedural and case management matters.

#### *Interaction between the ACCC and the Tribunal*

Notwithstanding that the ACCC no longer acts as decision maker in the merger authorisation process, it continues to play a significant role in that process (and the process set out in the CCA envisages that it does so).<sup>146</sup>

In order to assist the Tribunal, it will be necessary for the ACCC to obtain information from the parties and from interested third parties. The ACCC should be able to test, and tease out, arguments and issues raised by the applicants and others as part of the authorisation process. Nevertheless, it has been suggested by some involved in recent authorisation processes and others observing these processes, that the ACCC has tended to adopt a more adversarial role (that is, opposing the application), rather than a contradictor role, in the process of assisting the Tribunal.

The Committee considers it vital that the Tribunal retains the role of ultimate decision maker, and makes the observation that the ACCC's role should be focussed upon assisting the Tribunal with respect to assessing the competitive effects of the proposed acquisition, rather than acting as an advocate with respect to the outcome of the application of the authorisation test itself (being whether, in all circumstances, the acquisition would be likely to result in such a benefit to the public that it should be allowed to occur).<sup>147</sup>

Members of the Committee involved in recent merger authorisations are happy to provide additional comments directly to the Review Panel on practical and other issues arising from the operation of the authorisation process should this be of assistance.

### 10.9 **No amendments are required to the CCA with respect to "creeping acquisitions"**

There have been a number of previous proposals and draft Bills to amend section 50 of the CCA to "deal with" creeping acquisitions<sup>148</sup>. In essence, the concern giving rise to these proposals is that the current test in section 50 does not prevent a company from undertaking a series of smaller acquisitions where each acquisition does not substantially lessen competition in and of itself, but the cumulative effect of all acquisitions may be to substantially lessen competition over time.

<sup>145</sup> Subdivision C of Division 3 of Part VII of the Act.

<sup>146</sup> See sections 95ZEA, 95AZF and 95AZFA of the Act.

<sup>147</sup> Section 95AZH of the Act.

<sup>148</sup> See for example the Discussion Paper on creeping acquisitions released by the Treasury of the Commonwealth of Australia in 1 September 2008 which considered an 'aggregation' or 'substantial market power' model and the second Creeping Acquisitions Discussion Paper published on 6 May 2009 which considered a new 'substantial market power' model or alternatively providing the Minister with a unilateral power to declare corporations or sectors that would be subject to a creeping acquisitions test.

The Committee does not believe this concern to be justified, or that the CCA requires amendment to address any such concern. The Committee considers that the current test is a highly flexible one that already enables the Commission and the Courts to take into account a very wide range of factors that are relevant to the likely effect of a particular transaction on competition (including previous acquisitions in the relevant markets).

Aside from the various mandatory factors identified in section 50(3) of the Act, the “substantial lessening of competition” test already allows thorough attention to be given to the dynamics of the relevant market in a manner which focuses on the underlying structure of that market (rather than merely on the market shares of the existing participants in that market).

It also allows for the degree of substantiality that needs to be shown to be determined by those characteristics, rather than by a “one size fits all” approach. In particular, “substantial” does not simply refer to the size of the relevant market in terms of the number of customers, or total sales volume, or total geographic reach, that the merged firm will have post acquisition. Rather it focuses the relevant inquiry on whether the merged firm will enjoy greater freedom in its price and non-price conduct than was previously the case.

The argument most commonly made for reform assumes that the ACCC is not currently able to examine small-scale acquisitions, or acquisitions in local markets (for example, supermarket and childcare). This position is unfounded. The ACCC is not only able to review small acquisitions but is prepared to object to them if necessary. Examples of objection and review include:

- the ACCC’s decision in June 2008 to block the proposed acquisition by Woolworths of a small independent supermarket in Karabar, NSW. The ACCC considered that the proposal was likely to substantially lessen competition in the market, comprising local supermarkets within a 3-5km radius of the target;
- the ACCC decision in October 2013 to object to the acquisition of a vacant development site by Woolworths in Glenmore Ridge, Western Sydney;
- the ACCC’s consideration of Woolworth’s acquisition of Lindisfarne Cellars in Tasmania in February 2014, in which the ACCC assessed the impacts of the acquisition on the “local market” being a market encompassing 3-5 kilometres of Lindisfarne Cellars on the eastern side of the river, but not including bottle shops within 3-5 kilometres of Lindisfarne that were on the western side of the river; and
- the ACCC’S consideration of various ABC Learning Centres by Goodstart Childcare Limited in March 2010 in which the ACCC assessed the proposed acquisition in the context of markets including a market for the supply of long day childcare services within an approximate 10 kilometre radius surrounding Goodstart’s existing centres located in Eumemmerring and Doveton in the south east of Melbourne.

The ability of the ACCC to narrowly define markets and assess competition in them gives it the means by which to consider and block very small acquisitions.

Previous discussions papers with respect to “creeping acquisition” amendments, and submissions in response to those issues papers, appear to imply that there is something intrinsically wrong with corporation seeking to enhance their competitive position through acquisitions<sup>149</sup>. In practice, corporations will often see acquisitions as a means of enhancing their market position through inorganic growth. The nature of competition as “*deliberate and ruthless*” has been recognised by the Courts.<sup>150</sup> A well-functioning competitive market will necessarily result in certain competitors winning market share at the expense of others. The essential role of merger control is to assess whether sufficient competitive constraints will remain post-merger. If sufficient competitive constraints will remain, then the acquisition will, by definition, not be likely to result, in a substantial lessening of competition.

<sup>149</sup> See for example paragraph 11 of the ACCC’s submission to the second Creeping Acquisitions Discussion Paper published on 6 May 2009 .

<sup>150</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177

It should not be the role of effective merger control to seek to introduce a presumption that mergers involving large corporations are inherently anti-competitive, or to impose *de facto* market share caps, as past creeping acquisition reform proposals have appeared intended to do.<sup>151</sup>

The available evidence suggests that concerns about creeping acquisitions have been raised in relation to only a few sectors of the economy. Even in those sectors, the degree of risk raised by creeping acquisition to small business and consumers is uncertain and appears to be based more on potential concerns rather than on any adverse effects identified to date. By way of example, although the supermarket industry is commonly held up as an example of the problems caused by "creeping acquisitions", after an extensive review of the grocery industry in 2008, the ACCC concluded creeping acquisitions "*are not currently an issue in the grocery industry*"<sup>152</sup> and that a cumulative assessment of recent acquisitions within the grocery sector "*has not been a significant contributor to any competition problems in the supermarket sector in recent years*".<sup>153</sup>

One such negative implication would be the impact such amendments might have on the value of small businesses. While a creeping acquisition principle might be considered to be a protection for small business, it must also be borne in mind that many small business owners work very hard to build attractive and viable businesses as an investment in their own futures, not simply as a source of income. A creeping acquisition principle would inherently make it harder for a small business to be sold to a larger buyer, artificially dampening demand for the business and reducing its capital value. Government should not intervene in a way that reduces competitive tension in the acquisition of small businesses and leaves their owners with fewer potential buyers and a lower sale price, without sound economic theory that to do so avoids an even greater competitive harm. It is submitted that there is currently no such economic support for a creeping acquisition amendment.

Further, the harm to competition that is said to arise from creeping acquisitions has not been clearly articulated. Unless there is a clear articulation of the competition harm proposed amendments are intended to address, there is a significant risk that the amendments will not address that harm and could have negative implications for legitimate acquisitions that improve the efficiency of the Australian economy.

In this context, it is notable that:

- the competition laws in the United States and of the European Union do not recognise the creeping acquisition theory. Previous proposed reforms would have put Australian law at odds with those of most other modern economies that have a competition law; and
- the need for creeping acquisition reform was rejected by the Dawson Committee in 2003.

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<sup>151</sup> See for example the "aggregation model" proposed in the Discussion Paper on creeping acquisitions released by the Treasury of the Commonwealth of Australia in 1 September 2008, amendments proposed by then Senator Fielding, and subsequent amendments proposed by former Senator Andrew Murray in 2007.

<sup>152</sup> *Grocery Report*, supra, at 421.

<sup>153</sup> *Grocery Report*, supra, at 427.

## 11. COMPETITION LAWS (CHAPTER 5): EXEMPTIONS AND INDUSTRY SPECIFIC ARRANGEMENTS

### Key points in this section:

- (a) The operation of the CCA would benefit from a holistic review of current exemptions and exceptions, aimed at achieving a more principled (and less complex) drafting approach, including the introduction of a new efficiency defence for collaborative arrangements.
- (b) There should be a simplified and principled review of the prohibitions, defences and exemptions to ensure that they are more clearly articulated, less complex and better reflect underlying economic principles. This would improve and simplify the operation of the law.
- (c) The Committee recommends that any such review should involve:
  - removing inconsistent or narrow exceptions in favour of broader more principled exceptions;
  - ensuring that any Commonwealth or State legislation or regulation that authorises conduct under section 51(1) is aligned with the Competition Principles Agreement (and if relevant, the National Reform Agenda);
  - a new general “efficiency-based” defence akin to the United States rule of reason doctrine, the direct applicability of Article 101(3) in the EU, and the recent collaborative ventures defence in New Zealand;
  - repealing Part X of the CCA (Liner Shipping), which is no longer necessary or aligned with international practice; and
  - consideration to amendments to Part XIB of the CCA to simplify the competition notice provisions and/or the repeal of some unused provisions. There should continue to be periodic reviews of Part XIC (such as that presently being undertaken by the Vertigan Review) to ensure that it operates in a manner that achieves the objects of the CCA.
- (d) While the authorisation and notification arrangements are generally operating well, the Council recognises that the authorisation notification processes impose costs, delay and complexity on business and are a “second best” outcome compared with providing well designed and principled exemptions and defences which permit efficient or pro-competitive conduct without the need for administrative approval.
- (e) A more principled approach to defining the primary prohibitions, defences and exemptions including the addition of an “efficiency defence” as noted above would reduce the current over-reliance on authorisation, which is out of step with international practice.

### 11.1 Statutory exemptions, exceptions and defences

The Committee recommends a simplified and more principled approach to prohibitions, defences and exemptions that reflect accepted economic principles and a more effective operation of the CCA.

The exceptions, exemptions and defences (referred to collectively as “**exceptions**” in this submission) in the CCA are important to the effective pursuit of its objectives.

Well-designed exceptions limit overreach where prohibitions are otherwise defined broadly and improve certainty around the scope and application of the law. In some instances (most notably authorisation and notification) they also allow efficiencies and other public benefits to be taken into account when assessing whether or not a restraint on competition is justified.

Exceptions under the CCA currently exist in a number of forms, namely:

- exceptions defined within primary conduct provisions (for example, joint venture or related bodies corporate exceptions from cartel conduct);
- specific exceptions in section 51 of the CCA;
- exceptions dealing with specific sectors (eg. the Liner Shipping provisions in Part X);
- conduct authorised through Commonwealth, State or Territory acts or regulations made under section 51(1); and
- conduct otherwise permitted by the ACCC, through the authorisation and notification processes provided for under the CCA, predominantly in Part VII.

Overall, the Committee is concerned that, like much of the CCA, exceptions have evolved or been added to the ACCC in an incremental and ad hoc way over time. This has contributed to:

- a high degree of complexity and inconsistency in the way in which exceptions are drafted and dealt with in the CCA; and
- current exceptions do not always have a clear and principled economic foundation, and as such often are not defined and/or do not operate as effectively as they should do.

The CCA would benefit from a comprehensive review of the design and operation of exceptions, including to ensure that they reflect accepted economic principles. Taking these steps would result in a more cohesive relationship between the prohibitions, exemptions and defences. This, in turn, would improve and simplify the operation of the law and provide more certainty for business, including by reducing the current over-reliance under the CCA on costly and time-consuming authorisation and notification processes. It would also avoid the need for firms to adopt collaborative or other structures which are potentially less efficient or pro-competitive, in order to come within the scope of unduly narrow CCA defences or exceptions.

The Committee further submits that consideration should be given to introducing a general defence based on the United States rule of reason doctrine in order to reduce the need for the parties to efficiency-enhancing commercial agreements to rely on the cumbersome process of authorisation or notification.

This approach proposed is also comparable to:

- the exemption to cartel conduct for certain efficiency-enhancing collaborative activities recently introduced in New Zealand in the Commerce (Cartels and Other Matters) Amendment Bill (discussed in more detail in section 8 above);
- the direct applicability of Article 101(3) in the EU, which since the modernisation of EU competition law in 2004, no longer requires a decision of the regulator to determine whether agreements benefit from the relevant exemptions (ie. agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned)<sup>154</sup>; and

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<sup>154</sup> See EC Commission Guidelines on the application of Article 101(3) of the Treaty [OJ C101 of 27.4.2004]. This modernised approach has been followed in several EU Member States, including the UK.

- s 4(1) of the *Competition Act 2009* (South Africa) which provides a defence if a party to a horizontal agreement can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs the substantial lessening of competition effect alleged.

## 11.2 Examples of exceptions embedded as part of conduct provisions

The Committee points to the following examples of specific CCA exceptions that operate inconsistently or narrowly, and which call for review:

- The related corporation exceptions under sections 44ZZRN and 45(8), which do not apply unless **all** parties to the contract, arrangement or understanding (**CAU**) are related corporations. There is no economic justification for excluding from the scope of these exceptions cases where a guarantor or other third party is a party to the CAU and the reason for including the guarantor or other third party is not to avoid the application of a *per se* cartel prohibition. In order to function as an economic enterprise, corporate groups (and their related arrangements) often need to involve third party banks and advisers.
- On one interpretation, the partnership exemption under section 51(2)(d) does not extend to provisions entered into for the purpose of establishing a partnership *before the commencement of the partnership*.
- The joint venture exceptions under sections 44ZZRO and 44ZZRP are subject to significant limitations that lack economic justification and are unique to Australia. These limitations are discussed in section 8 of this submission.
- The section 44ZZRV exception for collective acquisitions and joint advertising applies only to price fixing but not to other types of cartel conduct prescribed by section 44ZZRD(3) (e.g. restriction of supply) or to exclusionary provisions as defined by section 4D. This prevents the exception from operating in a coherent and economically consistent manner.
- The exception under section 52(2)(e) relating to protection of the goodwill of a business before completion of sale is subject to an unjustifiably narrow sole purpose test.
- Withdrawal is a defence to aiding, abetting, counselling or procuring under sections 76 or 79 but not in relation to liability for being "knowingly concerned". There is no justification for treating those that are "knowingly concerned" in conduct differently to others for the purpose of this defence.

In other cases, a broader or more principled approach should be adopted to exceptions or the Panel may consider supporting the introduction of new exceptions.

A good example of this is the "anti-overlap" exceptions in sections 44ZZRS and 45(6) and the definition of a competition condition under section 44ZZRD(4). These sections do not exclude liability in cases where one competitor enters into a supply agreement with another which is pro-competitive or efficiency-enhancing.<sup>155</sup> Supply agreements between competitors are often efficiency-enhancing or competitively neutral and hence do not justify *per se* liability and should not require the cost, publicity and delay associated with authorisation.

The Committee submits that a wider and more principled exception from cartel conduct (or exclusionary provisions) should be introduced for supply agreements that are efficiency enhancing, similar to that recently proposed in New Zealand.<sup>156</sup>

<sup>155</sup> See the examples discussed in C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) section 8.6.

<sup>156</sup> Proposed new s 32 of the Commerce Act 1986 (NZ); see at:

[http://www.legislation.govt.nz/bill/government/2011/0341/latest/DLM4090009.html?search=ts\\_act%40bill%40regulation%40deemedreg\\_Commerce+\(Cartels+and+Other+Matters\)+Amendment+Bill+resel+25+a&p=1](http://www.legislation.govt.nz/bill/government/2011/0341/latest/DLM4090009.html?search=ts_act%40bill%40regulation%40deemedreg_Commerce+(Cartels+and+Other+Matters)+Amendment+Bill+resel+25+a&p=1)

### 11.3 The operation of section 51

The Committee recommends that the scope of section 51(1) of the CCA be limited to legislation only, and not also regulations or ordinances. Acts (or regulations) which authorise conduct as contemplated by section 51(1) should be required as part the RIS process to specify how the exemption aligns with the Competition Principles Agreement and, if relevant, the National Reform Agenda.

#### *Section 51(1) – Exemptions provided by Commonwealth, State or Territory Acts or regulations*

Section 51(1) provides a mechanism to enable conduct to be authorised through an Act or Ordinance of the Commonwealth or States/Territories, or subordinate regulations.

Section 51(1) has been used on a limited number of occasions, including:

- to establish "single desk" marketing schemes, most of which have subsequently been dismantled;<sup>157</sup>
- to protect a number of other primary product industries, although these have also been subsequently removed;<sup>158</sup> and
- to facilitate particular industry structural reforms, including gas<sup>159</sup> and telecommunications<sup>160</sup>.

The Committee makes the following observations and recommendations in relation to the current structure and operation of section 51(1):

- It is not clear why Commonwealth delegated legislation can authorise potential infringements of Part IV of the CCA but not section 50 or 50A. There appears to be no sound policy reason for requiring more direct Parliamentary scrutiny of merger infringements than is the case for other Part IV breaches.
- There seem to be good grounds for limiting the scope of section 51(1) of the CCA to Acts (or enactments) and not to regulations or subordinate legislation. This would ensure that any conduct that is exempted under section 51(1) has received appropriate Parliamentary consideration and oversight, reflecting the significance of authorising conduct in this way.
- Section 51(1) contains no meaningful guidance about the principles that ought to be considered or applied when authorising conduct (no doubt reflecting the broad range of public interest considerations that may be relevant). The Committee submits that one means for improving the principled development of exceptions under section 51(1) may be to require any State or Commonwealth law (including subordinate legislation) that authorises conduct to include a statement as part of the RIS process explaining how such authorisation is consistent with the COAG Competition Principles Agreement and, if relevant, the National Reform Agenda.

<sup>157</sup> Examples include the Australian Dairy Corporation (Cth), Australian Wheat Board (Cth), NSW Grains Board (Cth), Rice Marketing Board (NSW), Australian Barley Board (Vic & SA), Grainco (Qld), Queensland Sugar Corporation (Qld), Grain Pool of WA (WA) and WA Meat Marketing Corp (WA). Source: Productivity Commission, *Single-Desk Marketing: Assessing the Economic Arguments* (Productivity Commission Staff Research Paper, July 2000), pg10.

<sup>158</sup> For example under the Trade Practices (Primary Products Exemptions) Regulations 1974 (Cth), certain associations in relation to mushrooms, oysters, citrus fruit, dried fruits, bananas, apples and pears, cherries, raw cotton, vegetable products and macadamia products were exempted from s 45 CCA.

<sup>159</sup> Previously under s 62PA(2) Gas Industry Act 1994 (Vic) (section now repealed) certain conduct with respect to the Market and System Operation Rules (MSO Rules) were exempted from Part IV CCA. This exemption operated until 1 January 2003.

<sup>160</sup> See s 577BA Telecommunications Act 1997 (Cth).

### *Section 51(2)*

Section 51(2) of the CCA excludes certain conduct from the operation of Part IV of the CCA.

Excluded conduct includes certain labour market arrangements; restrictions in the sale of partnerships, employee and business agreements (in the case of business contracts, these exclusions only apply to any provision of a contract that is solely for the protection of the purchaser with respect to the goodwill of the business); standards; and export arrangements.

The Committee believes that, at the least, these provisions would benefit from being simplified in order to reduce the existing drafting complexity.

More substantively, the section 51(2) exclusions should be re-visited as part of the holistic review of exclusions from the CCA recommended by the Committee above. It may be that more principled drafting of the primary provisions or the inclusion of additional and wider defences could obviate or at least reduce the need for such highly detailed and narrow statutory exceptions.

### *Section 51(3) – Licensing or assignment of intellectual property rights (IPR)*

Section 51(3), as drafted, seeks to maintain a balance between encouraging and rewarding innovative, creative endeavour (by exempting prescribed uses of intellectual property rights from the operation of Part IV of the CCA) – and by excluding section 46/46A and section 48 from the scope of the exemptions in section 51(3).

The Law Council proposes to lodge a supplementary submission addressing the operation of section 51(3) and the recommendations of the Ergas Committee on that provision.

## 11.4 **Sector specific exemptions**

The Committee is of the view that, unless there are demonstrable reasons for sector specific laws, competition law and the CCA in particular should not single out any particular industry.

The CCA includes some significant departures from these principles.

### (a) **Part X (Liner Shipping)**

The Committee recommends the repeal of Part X.

The International Liner Cargo Shipping regime in Part X of the CCA describes the conditions under which international liner operators can form conferences to provide joint cargo services for Australian exporters and importers.

Part X has been considered twice by the Productivity Commission. In 1999, the Productivity Commission found that, on balance, the regime still at that time served Australia's national interest.<sup>161</sup> The Commission believed that Part X allowed the efficiencies of conference arrangements while letting competition from non-conference lines and the countervailing power of Australian exporters constrain their potential market power.<sup>162</sup>

In 2005, however, the Productivity Commission concluded that a more effective way to introduce selective approval of carrier agreements would be to repeal Part X and rely on authorisation under Part VII.<sup>163</sup> The Commission noted in its latter inquiry – critically – that relaxing special competition rules in industries with similar conditions in other jurisdictions had not created any evidence of market instability.

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<sup>161</sup> Productivity Commission (1999), Report No 9, International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974.

<sup>162</sup> *Ibid*, xviii.

<sup>163</sup> Productivity Commission (2005), Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, xxvi.

The Commission also observed that deregulation in those sectors had led to improved service provision and lower prices.<sup>164</sup>

The Committee believes that the Commission's 2005 recommendations and findings remain relevant today. Part X is at odds with the principle that industry sectors should not be singled out for special treatment and the Committee recommends Part X's repeal.

(b) **Part XIB and XIC (Telecommunications)**

The Committee recommends that consideration be given to amendments to Part XIB of the CCA to simplify the competition notice provisions and/or the repeal of some unused provisions. There should continue to be periodic reviews of Part XIC (such as that presently being undertaken by the Vertigan Review) to ensure that it operates in a manner that achieves the objects of the CCA.

Part XIB regulates market conduct by telecommunications carriers and carriage service providers. It establishes a modified set of anti-competitive conduct prohibitions and enforcement powers for telecommunications and content markets.

The modified competition enforcement regime under Part XIB includes the following:

- a "competition rule" which applies an effects test (and which operates in telecommunications markets in addition to the purpose test under section 46); and
- where the ACCC has reason to believe that a carrier or carriage service provider has contravened or is contravening the competition rule, it may issue a Part A or Part B competition notice which can, in some cases, have the effect of reversing the onus of proof.

Pecuniary penalties under Part XIB are substantial. For a contravention that continues for more than 21 days, the maximum penalty is \$31 million plus \$3 million for each day in excess of 21 days. In all other cases, the maximum penalty is \$10 million plus \$1 million for each day the contravention continues.

Part XIB was introduced into the CCA because of concerns that total reliance on Pt IV of the CCA to constrain anti-competitive conduct might in some cases be ineffective because of the state of competition and the fast pace of change in the telecommunications industry. In particular, there was concern that competitive harm may arise relatively quickly as a result of anti-competitive conduct in this sector. At the time that it was introduced, Part XIB was intended by the Government to be transitional in nature, with a view to general competition law ultimately governing the sector.

There are differences of view within the Committee as to the effectiveness of Part XIB.

While Part XIB has been in place for nearly 17 years, the conduct-related provisions of Part XIB have rarely been used,<sup>165</sup> and never in a way that has resulted in a successful prosecution. However, this may, at least in part, be a result of the complexity of the provisions dealing with Part A and Part B competition notices (the validity of certain competition notices has been successfully challenged), but it is arguably also because the substantial penalties that can flow from the issue of a Part A competition notice provide an effective deterrent. The deterrent value of Part XIB (over and above existing Part IV provisions) is unclear and subject to debate – and whether telecommunications and media sectors, in the modern economy, warrant such a targeted approach to legislative deterrence is also subject to debate.

The last competition notice issued by the ACCC was issued in 2006 and while some retail tariff filing by Telstra has been required, the general tariff filing provisions and a range of exemption powers have never been used. The ACCC has made more use of certain procedural powers

<sup>164</sup> Ibid, xxxiii.

<sup>165</sup> Only 5 notices have been issued over the period from 1998 to 2006.

that enable it to require mandatory reporting by Telstra and, at times, other carriers (in the form of "record keeping rules" and "disclosure directions").

The Committee considers that, at the least, repealing unused parts of the Part could yield benefits and a more holistic review of Part XIB's continued role may be warranted.

Finally, the Committee notes the industry-specific telecommunications access arrangements in Part XIC of the CCA, which operate within a complex legislative framework governing telecommunications and the National Broadband Network policy. These are currently under review by a panel of experts headed by Dr Michael Vertigan AC. The review is required to be undertaken under section 152EOA.

The Committee does not consider that it is appropriate to seek to pre-empt the outcome of the Vertigan Review. It notes only that periodic reviews of this kind are valuable and should be an enduring feature of the regime – and any other sector specific arrangements – to ensure that regulatory arrangements are properly targeted and subject to regular independent review. Wherever possible, processes of this kind should be used to remove unnecessary or disproportionate regulatory burdens, particularly where this is impeding efficient investment.

## 11.5 Authorisation and notification provisions

The Committee submits that while the authorisation and notification arrangements are operating well, it should be recognised that these are a "second best" outcome and that the CCA is over-reliant on these administrative arrangements to facilitate pro-competitive and efficient collaborative conduct. This could be addressed, in the first instance, by taking a more principled approach to framing the primary provisions (and defences) as well as the introduction of an "efficiency defence" similar in substance to the rule of reason defence in the United States, the modernised EU law and the NZ collaborative ventures defence.

There are a number of authorisation and notification or disallowance processes established under the CCA for different types of conduct, including:

- authorisation of conduct by the ACCC (or the Tribunal);
- collective bargaining notifications by small business groups to the ACCC;
- a notification and disallowance regime for exclusive dealing, including third line forcing conduct;
- authorisation of mergers or acquisitions by the Tribunal (discussed in section 10 above); and
- a notification and disallowance scheme for private disclosure of price information under the price-signalling provisions.

These are in addition to the informal and formal merger clearance processes undertaken by the ACCC (and addressed separately in this response).

The Committee acknowledges that the current authorisation process plays a valuable role within the operation of the CCA. It is also recognised that the ACCC has generally administered the authorisation process well, and in a manner that recognises the efficiencies and other benefits that often arise from collaborative arrangements. The Committee's comments with respect to the authorisation process as it applies to mergers are set out in section 10 and are not repeated here.

Consistent with the Committee's view that a more principles-based approach could be adopted to the operation of the CCA, the Committee notes that reliance upon an administrative process, such as authorisation or notification/disallowance for collaborative conduct (as opposed to for merger matters) is a "second best" mechanism for dealing with conduct that is efficient and, in some case, pro-competitive.

Relying upon these processes imposes a number of inefficient costs on business, including:

- the cost and delay associated with making applications and engaging with the ACCC. While the Committee acknowledges the value of the interim authorisation process (generally available within 30 days), this is only generally applied in clear cut cases, and where the arrangement is capable of being unwound if final authorisation is not granted;
- the authorisation processes exposes collaborative commercial arrangements to public scrutiny, including engagement by the ACCC with competitors, suppliers and/or customers; and
- the ACCC is required to expend considerable resources dealing with these applications, even in cases where the benefits are clear cut.

Currently, authorisation process is only available to provide comfort to parties in cases where collaborative arrangements give rise to a public benefit, which typically must extend beyond efficiencies accruing only to the parties themselves.

The Committee submits that consideration should therefore be given to reducing the need to rely on the processes of authorisation and notification by introducing a defence based on the United States rule of reason doctrine, or the EU modernisation principles. A "rule of reason" defence would apply to the prohibitions relating to cartel provisions and exclusionary provisions, covering restrictions on competition that are reasonably necessary to achieve efficiency, and placing a persuasive as well as evidentiary burden of proof on the defendant.

As discussed in section 8 above, in the context of cartel provisions, such an approach has been adopted in the proposed NZ collaborative activity exemption – a cartel provision is exempted from liability if it is "reasonably necessary for the purpose of the collaborative activity" (or, in the context of a cartel offence, believed by the accused to be reasonably necessary for that purpose).<sup>166</sup> That requirement is comparable to the rule of reason test that applies to collaborative ventures under section 1 of the Sherman Act (United States) but the statutory test adopted seeks to avoid some of the complexity of the United States case law on the rule of reason.

A similar approach has existed in the EU since 2004, when the modernisation of EU competition law moved away from notifications to the Commission, and allowed parties (and the Courts) to directly apply the defence in Article 101(3) to their arrangements. That is, in the EU, where agreements contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, they will not be prohibited.

A general rule of reason or efficiencies defence, or at least a collaborative activity exception, would improve the operation of the CCA, improve certainty for business and reduce the current reliance on authorisation and notification processes for efficiency-enhancing conduct. This approach would align the CCA more closely with international practice and reduce the administrative burden and costs associated with current over-reliance on authorisations and notifications.

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<sup>166</sup> Helpful practical guidance on the intended operation of this requirement is set out in the NZ Commerce Commission's Draft Competitor Collaboration Guidelines (October 2013) ch 5; see at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/>

## 11.6 Collective bargaining

### *Overview of process*

Collective bargaining is an arrangement where two or more competitors or potential competitors seek to collectively negotiate terms and conditions with a supplier or customer; this can include negotiations involving price. A group of businesses may appoint a representative to act on its behalf in the negotiations, for instance a trade association. Collective boycott occurs when a group of competitors or potential competitors agree not to acquire goods or services from, or supply goods and services to, a business with whom the group is negotiating.

Due to the *per se* nature of the cartel conduct and exclusionary provisions prohibitions of the CCA, collective bargaining or boycott conduct will normally constitute an illegal cartel or exclusionary provision unless exempted by processes such as authorisation or notification.

Collective bargaining has been a part of the competition law regime in Australia since 1974. It particularly developed in the 1980's with authorisations applications relating to small business collective bargaining being in the TPC or ACCC and the Australian Competition Tribunal. In some cases such collective bargaining authorisations arose out of high profile quasi industrial disputes.

However, while most collective bargaining authorisation applications are granted by the ACCC, the authorisation process was seen as cumbersome, slow and expensive and exposed applicants to possible appeal to the Australian Competition Tribunal. The ACCC has in recent times developed a quicker and less formal authorisation process for collective bargaining applications for authorisation but it still has many of the hallmarks of the statutory authorisation process.

In response to concerns raised by small business, the Dawson Committee recommended a fast track notification process for small business collective bargaining. That Committee strongly supported some form of statutory exemption for small business collective bargaining and boycott within the CCA.

Consequently, as from 1 January 2007 the CCA was amended to introduce a fast track collective bargaining notification regime for collective bargaining and in some cases collective boycott. This regime is in addition to the existing authorisation process but is quicker, target specific, lower cost, and the onus is on the ACCC to say that any notification is against the public interest as opposed to the authorisation process where the applicant has to prove public benefit. If the ACCC does not oppose the notification the decision cannot be appealed.

Despite high expectation in the small business community there have been less than 10 notifications in relation to the new regime. On one view, the problem lies with some of the detail, especially the requirements in the corresponding regulations and forms. An alternative view is that the nature of the conduct involved often does not, on its face, trigger genuine competition law concerns. Businesses may well be engaging in similar conduct without knowledge of the risk of breach. In terms of the detail of the regime the following issues arise:

- the notification can only involve one target;
- The collective bargaining group cannot change and if it does the protection would not extend to new members and a new notification would have to be lodged;
- the lodgement fees cannot be waived;
- the threshold of \$3 million is too low for some sectors;
- the written consent of each party to the collective bargaining group has to be obtained and lodged with the ACCC; and

- a new notification cannot be lodged within 12 months of the former.

*How could the current notification system be improved?*

If the current notification system is to be retained, the Committee believes that a number of changes are necessary in order to make the system more workable and accessible to small and medium business.

For instance, the following changes might be considered:

- no monetary threshold, but exclusion of public companies;
- notification can cover more than a single target;
- no need for individual consent to be obtained from each member, but the applicant to keep a register of members;
- no time limit on the frequency of new applications;
- the collective bargaining group can change without losing the protection;
- public benefit is to be deemed unless the ACCC raises issues within 14 days of application being lodged and then time is stayed. This was proposed in a 1979 Report to the Government in relation to primary producer collective arrangements; and
- discretion to waive lodgement fees.

*Is there a better alternative?*

As part of simplification of the CCA, the Committee supports a rethinking of the approach to notifications and authorisations. In particular, consideration should be given to the removal of the *per se* illegality threshold for proscribed conduct (as has been done in many overseas jurisdictions).

It is likely that in many cases the collective arrangements which would benefit from the collective bargaining regime are unlikely to have a substantial impact on competition in the respective markets in any event. The requirement for such arrangements to be notified or authorised is thus an inefficient regulatory burden, which may be preventing collective bargaining arrangements being formed to the detriment of small and medium business (and, ultimately, consumers).

Australia is somewhat behind the times (when compared with overseas jurisdictions like the US, UK and EU) in having notification and authorisation processes like collective bargaining and authorisation, rather than having a law which only targets conduct which substantially lessens competition, or adopting a rule of reason approach and allowing businesses to self-assess. This has been in place in the USA for many years or decades, while the EU "modernised" its approach in 2004. The current review affords an opportunity for Australia to consider doing the same, to reduce the red tape associated with notification and authorisation processes and move more towards an effects based, rather than form or process based, approach to competition enforcement.

Should the *per se* nature of the CCA be preserved, some lesser changes to the CCA or Commission processes should be considered to enhance timeliness and cost.

The changes could include:

- collective bargaining by small business be assumed to be a public benefit unless the Commission considers otherwise;

- interim authorisation to collective bargaining applications should be automatic within 14 days (in line with current third line forcing exclusive dealing notifications) unless ACCC decides otherwise;
- collective bargaining applications be deemed authorised or exempted within 28 days unless ACCC decides the application is against the public interest; and
- the ACCC should initially grant immunity for 5 years and any subsequent re authorisation to be for 10 years, unless in the view of the ACCC there are special reasons not to do so.

12. **COMPETITION LAWS (CHAPTER 5): REMEDIES, POWERS AND PECUNIARY PENALTIES**

**Key points in this section:**

- (a) The role of the Courts as the principal decision-maker with regard to the imposition of remedies should be retained and that role should not be derogated to administrative processes. In the opinion of the Committee, retention of the Courts as the principal arbiter in competition law enforcement is critical to ongoing relevance, efficacy and fairness in the administration of competition law.
- (b) The current penalty regime is considered by the Committee to be adequate in achieving its objectives and the Committee believes there is no basis for extending or enhancing the portfolio of remedies available to the ACCC. The relatively small number of domestic cartel matters in recent times does not support a conclusion that the deterrent value of penalties awarded by the Courts has been insufficient.
- (c) Consideration should be given to promoting private enforcement, but at the same time not interfering in the ability of the ACCC to enforce the Act. Further consideration should be given to how to best promote both objectives although there may need to be a trade-off where the two objectives are in conflict - as for example, with suggestions allowing private litigants to access parts of the Commission's investigative file in appropriate circumstances, or by requiring immunity and leniency applicants to provide information and compensation to private litigants, or facilitating the use in private litigation of admissions made in regulatory actions.
- (d) There is no evidence apparent to the Committee suggesting that the remedies and powers of the ACCC need to be significantly enhanced or extended, including to provide for divestiture powers or cease and desist powers.
- (e) Further consideration may however be given to whether the ACCC should be granted more specific authority to undertake market studies. In the Committee's view, there is an open argument in favour of such market investigations, in the context of Australia's many concentrated industries. Carefully conducted inquiries may equally serve in "myth busting" where those industries are already competitive. However they come at a very significant cost to the companies concerned and the remedies and outcomes of such reviews need to be further evaluated before advocating change in this area.

12.1 **Are the enforcement powers, penalties and remedies, including for private enforcement, effective in furthering the objectives of the CCA?**

(a) **Administrative Remedies**

The role of the Courts as the principal decision-maker with regard to the imposition of remedies should be retained and that role should not be derogated to administrative processes. In the opinion of the Committee, retention of the Courts as the principal arbiter in competition law enforcement is critical to ongoing relevance, efficacy and fairness in the administration of competition law.

The Committee has concerns about the increasing use of administrative powers, such as infringement notices, in place of judicial process. In particular, there are concerns about the lack of rigour and accountability that is associated with the use of deeming provisions and administrative remedies.

The Committee believes that over-reliance on such devices risks impeding the dynamic development of competition law and may result in a disconnection between current commercial practices and the administration of competition law. The proliferation of

administrative remedies is not only likely to lessen transparency in decision-making but also risks reduced consistency between enforcement decisions.

(b) **Penalty Regime**

The current penalty regime is considered by the Committee to be adequate in achieving its objectives and the Committee believes there is no basis for extending or enhancing the portfolio of remedies available to the ACCC. The relatively small number of domestic cartel matters in recent times does not support a conclusion that the deterrent value of penalties awarded by the Courts has been insufficient.

Furthermore, the absence of any prosecutions under the criminal liability provisions which took effect in 2009 does not suggest that increases in the level or nature of penalties that can be awarded under the CCA are warranted. The Committee submits that a successful criminal prosecution is likely to have a greater impact on the level of deterrence than any increase in the level of penalties.

The Committee also notes that the level of penalties awarded for contraventions of the competition law provisions may in part be an artefact of the apparent propensity of the ACCC to reach consent agreements in relation to the level of penalties and the diminishing role of the Courts in actively determining the level of penalties that are imposed.

Lastly, more time should be given to allow for the effect of the increase in the maximum pecuniary penalties that can be awarded (to 10% of annual group turnover of the contravening company) that were introduced in 2009 to be gauged.

(c) **Private enforcement actions**

It is clear from the private action reforms which are being introduced into the European Union in relation to competition law matters that private actions are increasingly being viewed as an essential aspect of competition law enforcement. However, as has been central in the debate surrounding the European reforms, an important balance needs to be struck between the public and private enforcement regimes and the administrative costs associated with increases in the volume of litigation.

The Committee raises the issue of whether section 83 of the CCA should be amended to clarify its scope and specifically whether it applies to admissions made and agreed facts in proceedings in which liability is not in issue.

Private actions, usually representative proceedings, provide the only real means for consumers and small businesses affected by cartel conduct to obtain compensation. While the Commission plays a vital role in regulating anti-competitive conduct, and prosecutions by the Commission can lead to imposition of penalties against the wrongdoer company,<sup>167</sup> they rarely compensate those who suffer a loss as a result of the contravening conduct.

Aside from the largest businesses, representative proceedings are likely to be the only real means of obtaining redress. The expense and potentially adverse cost orders should an action be unsuccessful will deter most private litigants from taking individual action (in this context the *Cadbury Schweppes v Amcor* litigation is the exception which proves the rule). The reality at present is that these actions are rare (there have only been five) and small businesses affected by cartel conduct in Australia rarely recover their losses.

<sup>167</sup> Under subsection 87(1B) of the CCA, the Commission has power to bring actions for damages on behalf of cartel victims who suffer loss caused by contraventions of the Act, but must obtain their consent in writing before bringing such an application. This prevents the Commission from bringing actions on behalf of a class which includes members who are not identified when the application is issued, which is typically the case in a class action. In practice, the Commission rarely seeks damages on behalf of persons who have suffered loss caused by contraventions of the CCA. As far as we are aware, the largest number of persons on behalf of whom the Commission has applied for damages is a group of 26, in *ACCC v Chats House Investments* (1996) 71 FCR 250.

Private litigation and in particular representative proceedings for breaches of the cartel provisions are complex, difficult, expensive to conduct, and difficult to resolve. Cartels are conducted in secret and are difficult to prove. Current or former employees of alleged cartelists are often subject to strict obligations of confidence, which significantly restrict the ability of the lawyer for the victims in taking a witness statement in the proceeding, and also may limit the usefulness of any evidence the witness can provide.<sup>168</sup> In the absence of evidence from participants or other witnesses, proof of the existence and operation of a cartel will likely rely on circumstantial evidence, such as "communication evidence" (for example records of telephone conversations between competitors, or of meetings), and/or economic evidence, such as evidence of parallel pricing. This evidence can be difficult to obtain. Private litigants lack the investigative powers of the Commission under section 155 of the CCA; the Commission is reluctant to provide information to private litigants;<sup>169</sup> private litigants cannot provide an immunity or leniency policy to encourage cooperation by respondents; and they may derive limited assistance from section 83.

Consequently, private litigants rely significantly on discovery, which can be expensive and heavily contested in cartel conduct cases. The problems are magnified in the case of cartels because they are often global in scope, such that issues of sovereignty and jurisdiction complicate and potentially limit the scope for private action.

A representative proceeding commenced pursuant to Part IVA of the Federal Court Act attracts the ordinary rules of pleading, and a defective pleading is liable to be struck out. Respondents to representative proceedings often apply to partially or wholly remove the pleading, alleging for example that the group member definition lacks certainty and is embarrassing, that the claims of group members lack the requisite commonality, or that the representative party has failed to plead material facts sufficient to give rise to a cause of action.<sup>170</sup> The proliferation of interlocutory challenges (and appeals) to class action pleadings has been criticised by the Courts as "litigation by attrition"<sup>171</sup> and a "disturbing trend that is ... best brought to an end."<sup>172</sup>

Private enforcement could be promoted by permitting private litigants to access some of the Commission's investigation file or a restricted subset of that file; by requiring leniency applicants to provide information and/or compensation to private litigants; and ensuring that findings from regulatory action are more broadly available to establish liability in private actions. However the Committee recognises that each of these steps may have an effect of deterring immunity applications being made or deterring settlements. The ACCC has an interest in settling its investigation in a timely way. Ultimately, further analysis and a balancing of competing interests is required to resolve these issues.

Provided the Commission can carry out its role, the Commission and the legislature should welcome private enforcement, as it can operate effectively following a Commission prosecution; can provide compensation to the victims of cartel conduct, often small businesses; does not require use of taxpayers funds; and it lets the Commission focus on its key enforcement role, rather than trying to manage claimants, assess and distribute their loss and administer settlements.

Some members of the Committee consider that section 83 of the CCA requires amendment, on the basis that the legislature appears to have intended that follow-on private actions for damages be facilitated by public enforcement action. That intention is conveyed in section 83

<sup>168</sup> See *AG Australia Holdings v Burton & Anor* (2002) 58 NSWLR 464.

<sup>169</sup> See PCI provisions of the CCA and *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137; *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2008] FCA 554, at [37] - [38]; *ACCC v Visy Industry Holdings Pty Ltd (No 2)* [2007] FCA 444 at [103] - [108]; and *Visy Industries Holdings Pty Ltd v ACCC* [2007] FCAFC 147 at [94] - [113].

<sup>170</sup> The entitlement of the respondent(s) to be appraised from the outset of the case to be met (*Cameron v Qantas Airways Ltd* (1993) ATPR ¶41-251, 41,370) presents unique challenges for the representative party and group members in cartel matters, given that cartels usually involve concealed conduct, and private litigants lack recourse to investigative powers and immunity incentives employed by competition regulators. For discussion of relevant principles, see *Queensland v Pioneer Concrete (QLD) Pty Ltd* [1999] ATPR ¶42-691, 42,831 (Drummond J) citing with approval *Adsteam Building Industries v Queensland Cement and Lime Company Limited (No 4)* (1984) 1 Qd R 127, 133 (McPherson J).

<sup>171</sup> *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR ¶42-691, [22] (Drummond J).

<sup>172</sup> *Bright v Femcare Ltd* (2002) 195 ALR 574, 607 (Finkelstein J).

of the CCA which provides that findings of fact made against a respondent in earlier proceedings are prima facie evidence of those facts in later proceedings for damages or compensation orders. However, there have been few cases in which section 83 has operated in the manner evidently intended by the legislature. This is due in large part to the process under the ACCC *Cooperation Policy for Enforcement Matters* 2002 whereby the ACCC and respondent "settle" proceedings by way of an agreed statement of facts and proposed orders that are presented to the court for its consideration and approval. It is common practice for an agreed statement of facts to expressly qualify the admissions made by the respondent as being for the purpose of those particular proceedings only.

While there have been a few instances in which orders have been made that findings of fact in prior proceedings are findings for the purposes of section 83, uncertainty has emerged as to whether this course is open in settled proceedings given the possible interpretation of "findings of fact" in section 83 as requiring findings based on evidence, as distinct from findings based on admissions. Conceivably as a result of this uncertainty (albeit possibly also for other reasons), the ACCC has refrained from seeking section 83 findings in competition cases in recent years. Nor has it sought to have the uncertainty resolved through appeal in those cases in which its application for section 83 orders has been denied.

As a result, parties that have settled with the ACCC and paid significant penalties are in a position to deny both liability as well as allegations of loss and damage, unhampered by admissions made in ACCC proceedings, and requiring claimants to prove both of these elements of their cause of action at significant risk and expense. This position is both inefficient for the administration of justice and, arguably, unfair from the perspective of private litigants.

By contrast in Europe, pursuant to Article 16(1) of Regulation No 1/2003, a decision of the European Commission relating to proceedings under Article 101 or 102 of the Treaty has a probative effect in subsequent actions for damages, and a national court cannot take a decision running counter to such Commission decisions. In the US final decrees in public enforcement proceedings are prima facie evidence in follow on claims under section 5 of the *Clayton Act* 15 U.S.C. (2006). However, it appears from its terms that section 5 will not apply in situations where there is the equivalent of an agreed statement of facts and not a contested hearing on the evidence. That said, the section also refers to the doctrine of collateral estoppel and commentators claim that defendants can be estopped from denying facts found either at a trial or admitted in a plea agreement or settlement with the trial court retaining discretion.

There are differing views within the Committee about what reforms are appropriate, if any. Nevertheless, some members of the Committee believe that consideration should be given to amendments to section 83 of the CCA in order to facilitate private enforcement of the CCA. There is also a general view that the requirement for ministerial consent in section 5 of the CCA should be removed.

Section 5(3) of the CCA provides that in the case of private damages claims under section 82, the consent of the Minister is required before conduct occurring outside Australia can be relied on at a hearing. This provision is widely taken to mean that proceedings may be instituted before obtaining the consent of the Minister, but that consent must be obtained before an applicant may rely on extraterritorial conduct at a hearing in the proceeding. Section 5(4) requires that in the case of an application for other remedial orders under section 87, consent of the Minister is required before a person can make such an application, that is, before instituting proceedings. Under section 5(5), the Minister is obliged to give consent unless, in the Minister's opinion, the conduct in question was required or specifically authorised by the law of the country in which it was engaged in, and in the Minister's opinion, the giving of consent is not in the national interest.

Members of the Committee consider that these provisions are problematic in a number of respects. In their view, a decision which is critical to the interests of the parties, on complex questions of fact and foreign law, ought not to be required before proceedings are instituted and before all the facts, circumstances, allegations and defences are known. The Courts may

be better placed than the Minister to consider complex questions of fact and foreign law in relation to where the conduct occurred and whether it was authorised.

Even where there is no indication that the foreign conduct was required or specifically authorised, ministerial consent must still be obtained, resulting in substantial expense and delay. Considerations of international comity no longer warrant the approach in section 5 for global cartels. If anything, the original "comity" rationale for the ministerial consent provisions should now be seen as anachronistic in the context of global commerce and markets. The Committee is not aware of any counterpart to these provisions in the corresponding laws of the US, EU, Canada, the UK or New Zealand. Moreover, so far as the Committee is aware no other cause of action under Australian general law (eg. negligence or breach of contract) requires ministerial consent to rely on conduct occurring outside of the country's geographical borders.

In these circumstances, the Committee considers that, in proceedings which relate to cartel conduct at least, the requirement for ministerial consent under sections 5(3) to 5(5) should be abolished.

12.2 **Are there any other remedies or powers (for example, in overseas jurisdictions) that should be considered in the Australian context?**

*Divestiture/Cease and Desist Powers*

The view of the Committee is that there is no need for a divestiture remedy beyond the current powers applying to mergers and acquisitions in connection with section 50 of the CCA.

As explained in section 5 of this submission, the proposition that market share and market power are necessarily harmful and require intervention does not have any sound basis in economics or good commercial practice. To confer a power on the ACCC, or another body, to require the divestiture of assets would permit, in the Committee's opinion, an unwarranted interference with the operation of the relevant markets.

Apart from the potential harmful effects of requiring a reduction in market share, there would be considerable legal and practical difficulties in the administration of a divestiture power. It would not simply be a question of directing a reduction in market share. The relevant order would need to be quite specific in requiring the divestiture of particular assets. However, such a process is likely to be very arbitrary in its selection of assets, and very uncertain as to its actual effects on market share, let alone market power.

For the reasons given in section 13 in relation to the role of the Courts, the Committee also believes that it is unnecessary and would be inappropriate to introduce cease and desist powers or to expand the administrative remedies available to the ACCC.

With respect to the question of cease and desist powers, the Committee submits that there is no evidence that the enforcement of the CCA has been hampered by the absence of such powers. There is also the countervailing consideration that, while on many occasions the ACCC has been successful in quickly obtaining injunctions, there have been a number of occasions where the Federal Court has been unwilling to grant injunctions in response to applications by the ACCC. In the Committee's view, this suggests that the checks and balances provided by the Federal Court in circumstances of that nature should not be surrendered.

*Market studies*

The Issues Paper at Box 5 notes that, in the UK, competition authorities may investigate where particular features of a market give rise to anti-competitive effects which might not be captured by other competition law rules (in particular, the prohibition-based rules on anti-competitive agreements and abuse of dominance).

The UK Competition Commission (now part of the UK Competition and Markets Authority) has recently conducted "market investigations" into the supply of aggregates, cement and ready mix concrete, private health insurance and statutory audit services. In each case, the Competition Commission has been required to consider and decide (within 2 years), "*whether any feature, or combination of features, of each relevant market, prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom*". In the case of aggregates or cement or concrete, and in relation to a previous market investigation of airport services, the Competition Commission made findings of "*adverse effects on competition*", and proposed orders for divestiture of business assets and other sanctions, in each case.

In the Committee's view, there is an open argument in favour of such market investigations, in the context of Australia's many concentrated industries. Carefully conducted inquiries may equally serve in "myth busting" where those industries are already competitive.

However, several points should be borne particularly in mind:

- There are already in place quite extensive powers for the ACCC to conduct industry price inquiries, publish price notifications and conduct price monitoring, under Part VIIA of the CCA. Further, the ACCC must comply with Ministerial direction under section 29. These powers may suffice for the ACCC to explore (or to be required to explore) issues of concern in the functioning of particular Australian markets.
- A key question is "what is to be done?", upon a market investigation being conducted. In the UK, a "market investigation" process may result in sanctions being imposed upon those investigated, such as prohibiting particular conduct, regulating prices, requiring the supply of products, or even divestiture of businesses or assets. Any similar Australian process would need to approach the issue of such "remedies" cautiously. There are potential constitutional issues for the Federal Parliament in imposing such sanctions, in the absence of a finding of illegal conduct.

Further, if a full "market investigation" (as per the UK model) is to be undertaken, who is to undertake the investigation? While the ACCC has conducted various extensive industry inquiries in the past<sup>173</sup> under the powers referred to above, the UK model involves very considerable resources, information gathering and analysis. In the Committee's view, such investigations would be better carried out by the Productivity Commission, for the following reasons:

- One of the Productivity Commission's main current functions is to inquire into the economic structure and performance of Australian industries. While it does not normally venture into possible anti-competitive conduct in markets, it may be a straightforward extension to do so, with the addition of a specialist commissioner in competition economics, if necessary.
- As a matter of process, it may be preferable for such inquiries to be conducted by an organisation with a research role. While information gained from such an investigation may, in turn, inform the ACCC (especially in its enforcement function), comprehensive market investigations may be better conducted away from the immediate threat of sanction.

More broadly, the Review Panel should be cautious about further regulation of Australian industry, in the absence of current and clear anti-competitive conduct. Even to conduct market research, let alone to threaten sanction following a "market investigation", may dull a fundamental competitive impetus in the Australian economy. As Learned Hand J in *Alcoa* stated:<sup>174</sup>

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<sup>173</sup> For example, ACCC Unleaded petrol price inquiry 2007, and ACCC Inquiry into the competitiveness of retail prices for standard groceries, 2008. See ACCC website.

<sup>174</sup> *U.S. v Alcoa* 148 F.2d 416 (2d Cir. 1945)

*"A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases, a strong argument can be made that, although the result may expose the public to the evils of monopoly, the (competition law) does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."*

In any event, it is submitted that ACCC should be limited to making recommendations only, as is the currently the case under its price inquiry powers.

### 13. ADMINISTRATION OF COMPETITION POLICY (CHAPTER 6)

#### Key points in this section:

The Committee considers that:

- (a) the ACCC has overall been an effective agency and should be retained as the principal national agency responsible for both competition and consumer law enforcement;
- (b) the effectiveness of the ACCC is likely to be significantly enhanced if it engaged in systematic and thorough retrospective review of its processes and decisions. Such a practice would bring it into line with equivalent overseas agencies;
- (c) on balance, there are more advantages than detriments from the ACCC retaining its role in both consumer and competition law matters;
- (d) there would be substantial benefits from introduction of an advisory body or ombudsman to provide guidance on, or deal with, complaints about the ACCC's decisions and actions;
- (e) there would be benefits from introducing a specialist division for the hearing of competition and consumer law matters within the Federal Court, or that the role of the Australian Competition Tribunal as a body for the review of decisions of the ACCC should be expanded, subject to the relevant limitations under the Constitution;
- (f) there is a clear need for an independent institution with responsibility for the ongoing development and reform of that law and policy; and
- (g) the COAG competition agenda, as reflected in the Competition Principles Agreement and other agreements and initiatives, was effective in progressing achievement of competition policy objectives, at both the Federal and State levels. The Committee believes that there is an ongoing need for a scheme such as the competition reform payments, and has difficulty envisaging an alternate scheme that would be as effective.

#### 13.1 **Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?**

In the Committee's experience, the quality of processes and decision-making associated with the enforcement of the CCA are at least as important as the substantive content of the legislation.

Further, the quality and vibrancy of policy development in the competition law area is critical to the maintenance and evolution of law and administration which is effective and efficient in the achievement of the economic goals of the legislation, as outlined earlier in this submission.

##### (a) **ACCC as principal national agency**

On the whole, taking into account the recent enforcement action of the ACCC on competition law matters, the ACCC has been an effective agency and should be retained as the principal national agency responsible for competition law enforcement.

The Committee submits that responsibility for competition law matters should not be delegated to State agencies as this risks a fragmented approach to the content and administration of competition law between different States. Such fragmentation runs contrary to the express objective of efficiencies and reduced costs through uniform national laws, such as the ACL. In particular, the Committee has concerns about the increasing introduction of State based small business legislation with powers and roles which overlap those of the ACCC.

(b) **Retrospective review of processes and decisions**

However, the Committee does consider that the effectiveness of the ACCC is likely to be significantly enhanced if it engaged in systematic and thorough retrospective review of its processes and decisions. Such a practice would bring it into line with equivalent overseas agencies.

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. Consistent with such calls, a growing number of competition agencies are engaging in ex post review and evaluation. The United States' Federal Trade Commission and Department of Justice have a long history of such activity. More recently, agencies such as the European Commission, the Canadian Competition Bureau, and the (former) United Kingdom Office of Fair Trading have also initiated and conducted or sponsored others to conduct retrospective assessments of the impact and effectiveness of their enforcement programs.

A program of regular rigorous ex post analysis and assessment should encompass review of both ACCC interventions (for example, cases in which enforcement action is taken by way of legal proceedings) and non-interventions (for example, informal merger clearances). In reviewing this activity the focus of the evaluation should be on the effects or results of the intervention or non-intervention in terms of the functioning of the markets concerned. Ex post review should also be undertaken more regularly and systematically of the ACCC's enforcement processes. The focus of such review should be on how the ACCC makes and implements enforcement-related decisions, having regard to criteria such as the inputs to decision-making (what information was it based on, who was involved in the decision-making process); decision-making efficiency (how long did it take, could and should the process be simplified); and conformity of decisions with agency values (was it transparent, was it consistent).

Ex post review and assessment of enforcement activity 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 from government, advocating for law reform where necessary, influencing competition-related government policies and over the long term, effecting attitudinal and behavioural change within the business community in favour of voluntary compliance. More generally, 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.

(c) **Retention of both competition and consumer roles**

There are differing views within the Committee as to whether the ACCC should retain responsibility for the enforcement of both consumer and competition law. Concern has been expressed that having responsibility for both areas risks diverting the attention and resources of the ACCC to consumer law because it is easier to enforce and has more direct public appeal.

On balance, however, the Committee considers that there are more advantages than detriments from the ACCC retaining its role in both consumer and competition law matters.

Apart from the scale and expertise efficiencies that are associated with the combination of both roles in one agency, there is an observable convergence in competition and consumer law represented by the application of unconscionable conduct and unfair contract terms provisions

in both areas and the role that the conduct of consumers plays in behavioural economics. These factors are reflected in the decision of the UK Government to vest responsibility for both areas in the new Competition and Markets Authority.

(d) **Advisory body or ombudsman?**

Concern has expressed in several venues about the need for increased transparency and accountability in relation to decisions and actions of the ACCC. It is a trite observation that sound administrative process requires an appropriate mechanism for the review of decisions and possible improvements in that regard are canvassed in several other parts of this submission. However, there are time and expense limits on such reviews and they are further restricted by the focus on the proper outcome of the particular controversy that is the subject of the review.

Accordingly, the Committee also believes that there would be substantial benefits from introduction of an advisory body or ombudsman to provide guidance on, or deal with, complaints about the ACCC's decisions and actions.

An organisation or office of this nature could, in the Committee's view, enable a timely and less expensive avenue for review of the ACCC's decisions, and one which focusses not on the merits of the particular decision, but rather the appropriateness of the policies and processes adopted by the ACCC, either in general or in relation to a particular matter.

(e) **Specialist Court or review body?**

The Committee submits that there would be benefits from introducing a specialist division for the hearing of competition and consumer law matters within the Federal Court, or that the role of the Australian Competition Tribunal as a body for the review of decisions of the ACCC should be expanded, subject to the relevant limitations under the Constitution.

The complexity of the competition law provisions of the CCA is now such that it is important for consistency in judicial decision-making, and for greater predictability of outcomes, that an experienced approach is brought to bear in proceedings. A specialist division of the Court, or a greater role for a specialist tribunal, is also consistent with the principles-based approach to the content and administration of competition law that is advocated in other parts of this submission.

13.2 **What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?**

While the Law Council of Australia and other organisations do assist in the development and reform of competition law and policy, the Committee considers that there is a clear need for an independent institution with responsibility for the ongoing development and reform of that law and policy.

The view of the Committee is that the Productivity Commission is not an appropriate body to perform that role, as it has a different purpose and focus and is limited to specific reviews commissioned by the Government.

While this policy and reform role could theoretically be performed within Treasury, it is not considered that Treasury has sufficient resources or independence to give justice to those responsibilities.

The Committee submits that a body modelled on the Administrative Review Council or the Law Reform Commission is one option that should be considered. It is further thought that this organisation should have an ongoing and self-sustaining charter, with the authority to initiate reviews and consultations on its own motion.

13.3

**Was the Council of Australian Governments competition agenda, with reform payments overseen by the National Competition Council, effective?**

The Committee regards the COAG competition agenda, as reflected in the Competition Principles Agreement and other agreements and initiatives, as having been effective in progressing achievement of competition policy objectives, at both the Federal and State levels.

The Committee believes that there is an ongoing need for a scheme such as the competition reform payments, and has difficulty envisaging an alternate scheme that would be as effective.

## Annexure A : Overview of UK, European and US Merger Procedures

### 1. UK procedures:

The procedures of the UK Competition Commission (which have been adopted by the UK Competition and Markets Authority) were designed to implement the various obligations of the Commission under the Enterprise Act 2002. These obligations included:

- (a) so far as practicable, consult the person about what is proposed before making the decision;
- (b) in consulting the person concerned, so far as practicable, give the Commission's reasons for the proposed decision;
- (c) have regard to restrictions imposed by any timetable when considering what is practicable; and
- (d) have regard to issues of confidentiality when considering what is practicable.<sup>175</sup>

A concern often cited by the ACCC in relation to calls for greater transparency and disclosure of concerns relating to particular mergers is that it needs to protect the confidentiality of market participants who provide information to the ACCC as part of its considerations. The concern is that market participants may elect not to provide such information to the ACCC if their identity or the substance of their views are made known to the merger parties, for fear of reprisals (particularly where they are a customer of, or supplier to, a merger party).

The way the Competition Commission has attempted to deal with this obligation is to issue Chairman's Guidance<sup>176</sup> to the groups of the Competition Commission appointed to undertake merger inquiries.<sup>177</sup> This Guidance:

- reflects the aim of the Competition Commission to be open and transparent while, as appropriate, maintaining the confidentiality of information that it obtains during its inquiries.<sup>178</sup>
- states that, in general, Groups should aim to disclose the key arguments of the main parties and those of third parties (noting that, as would be the case in Australia, "*it is unlikely to be necessary or practical for all such submissions to be disclosed. For example, the Competition Commission often receives the same key arguments repeatedly.*"<sup>179</sup>
- provides that, generally internal working papers should be disclosed: "*In merger inquiries it is generally more appropriate to disclose working papers (or extracts) to main parties (and occasionally interested third parties) by supplying the party concerned with the document.*"<sup>180</sup>. Paragraph 9.14 provides a number of possible ways in which information may be disclosed without breaching confidentiality. These are:
  - (i) provision of ranges as an alternative to providing exact figures (for example, when indicating market shares;
  - (ii) provision of aggregated data as an alternative to individual responses or data (for example, by aggregating sales or purchase figures or by providing a summary of responses from customers);

<sup>175</sup> Competition Appeal Tribunal in Case Number 1218/6/8/13 *MBI Healthcare Limited et al and Competition Commission* decision dated 2 October 2013, paras 9 and 10.

<sup>176</sup> *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (Revised April 2013).*

<sup>177</sup> *Chairman's Guidance*, para 1.1.

<sup>178</sup> *Chairman's Guidance*, para 2.1.

<sup>179</sup> *Chairman's Guidance*, para 6.5

<sup>180</sup> *Chairman's Guidance*, para 7.4.

- (iii) provision of aggregated summaries of submissions and responses to questionnaires;
- (iv) excision of the confidential information from documents (for example, of names, locations and data) when the information excised is not material to the CC's inquiries or its decision or where the excision does not affect the comprehension of the document of the reader concerned;
- (v) anonymizing the information;
- (vi) disclosure to one or more parties but without publication;
- (vii) disclosure subject to restrictions (for example, disclosure to parties' professional advisers subject to the receipt of undertakings); and
- (viii) use of a data room.<sup>181</sup>

## 2. European procedures:

As with the UK procedures, the procedures in Europe attempt to balance transparency of decision-making with genuine issues of confidentiality. For example:

- the Commission's Note on Access to the File gives guidance on what information is considered to be confidential;
- there are procedures to resolve disputes over confidentiality<sup>182</sup>;
- third parties must provide both confidential and non-confidential versions of submissions<sup>183</sup> and notifying parties are given access to third-party submissions; and
- notifying parties are generally provided with the opportunity of reviewing and commenting on "key documents" obtained by the Commission (including substantiated submissions of third parties running counter to the notifying parties' own contentions)<sup>184</sup>.

Further, notifying parties have upon request a right to access the Commission's file after the Commission has issued a Statement of Objections<sup>185</sup> (**SO**). In contrast to the Statements of Issues released by the ACCC, an SO in Europe is a very detailed piece of economic research and may be of 200 pages<sup>186</sup>. It addresses all points against the parties which the Commission intends to include in its final decision. This is because Article 18(3) states that the Commission can base its decision only on objections on which the parties have been able to submit their observations.<sup>187</sup> Normally, the SO will also be sent to third parties that have a sufficient interest and which have applied in writing to be heard.<sup>188</sup> Indeed, these third parties have a right to receive a copy of the SO.<sup>189</sup>

After release of the SO, notifying parties and other involved parties have a right to access the Commission's file subject to confidentiality restrictions (this not true of third parties).<sup>190</sup>

<sup>181</sup> *Chairman's Guidance*, para 9.14. The use of data rooms was subject to an appeal in *MBI Healthcare Limited et al and Competition Commission*.

<sup>182</sup> Jonathan Faul and Ali Nikpay, *The EC Law of Competition*, 2<sup>nd</sup> ed, Oxford (2007) 5.420.

<sup>183</sup> Article 17(2) of the Implementing Regulation, third parties should always provide the DG Competition with a non-confidential version of their submissions at the time of filing or shortly thereafter to facilitate access to the file and other measures intended to ensure transparency for the benefit of the decision making process. DG Competition Best Practices on the Conduct of Merger Proceedings, published at <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>, para 37.

<sup>184</sup> Best Practices, para 45.

<sup>185</sup> See Article 18(3) of the Merger Regulation and Article 13(3) of the Implementing Regulation.

<sup>186</sup> Universal EMI SO.

<sup>187</sup> Faul and Nikpay para 5.551.

<sup>188</sup> Faul and Nikpay, para 5.555.

<sup>189</sup> Faul and Nikpay, para 5.558.

<sup>190</sup> Faul and Nikpay, para 5.561.

Following receipt of the SO, notifying parties have the right to provide their comments to the Commission in writing. Two weeks after the SO, there will be an oral hearing at which the notifying parties can exercise a right of reply to the SO. This will be attended by recipients of the SO.

The Commission makes a decision only after these procedures have been followed and, if appropriate, a discussion of possible remedies.

3. **United States procedures:**

The Committee has not provided an overview of the relevant United States procedures on the basis that it is quite different to the other regimes, and accordingly offers less by way of precedent on the issues raised by the Committee. The Committee further considers the UK and EU procedures to be the more appropriate model to follow in Australia with respect to transparency and disclosure. The Committee would nevertheless be happy to provide an overview of the United States regime and procedures to the Review Panel if it would be of assistance.