

# Spier Consulting – Legal

## Responses to the recommendations in draft Panel Report

### Draft Recommendation 1 — Competition principles

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers. The following principles should guide Commonwealth, state and territory and local governments in implementing competition policy:

- legislative frameworks and government policies binding the public or private sectors should not restrict competition;
- governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;
- the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;
- governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities;
- government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;
- a right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest; and
- Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.

Applying these principles should be subject to a 'public interest' test, so that:

- the principle should apply unless the costs outweigh the benefits; and
- any legislation or government policy restricting competition must demonstrate that:
  - it is in the public interest; and

- the objectives of the legislation or government policy can only be achieved by restricting competition.

I agree with the general thrust of this recommendation.

However in “making markets work” suitable recognition should be given to fostering a climate that enables entry and exit in markets and fair trading in markets for all players in the market. That should not be seen as unacceptable intervention in markets.

### **Draft Recommendation 2 — Human services**

Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.

The guiding principles should include:

- user choice should be placed at the heart of service delivery;
- funding, regulation and service delivery should be separate;
- a diversity of providers should be encouraged, while not crowding out community and voluntary services; and
- innovation in service provision should be stimulated, while ensuring access to high-quality human services.

Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.

I support this recommendation but would suggest that in the Final report the Panel specify some of the restrictions to competition in human services, both legislative and cultural. Restrictions that have been outlined in submissions. So much can be achieved in this sector but that needs will and transparency.

### **Draft Recommendation 3 — Road transport**

Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, there should be a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.

I make no comment

### **Draft Recommendation 4 — Liner shipping**

The Australian Government should repeal Part X of the CCA.

A block exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features (see Draft Recommendation 35). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers and the liner shipping industry.

Other agreements should be subject to individual authorisation by the ACCC.

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

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

I agree with this recommendation. Part X is an anomaly, particularly as the Part does not require any analysis of the allegedly pro-competitive features of such agreements. In my view, there are few pro-competitive benefits from the day-to-day operation of Part X. The agreements are essentially anti-competitive.

There have been numerous reviews of PART X but no real action on the reviews.

#### **Draft Recommendation 5 — Coastal shipping**

Noting the current Australian Government Review of Coastal Trading, the Panel considers that cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved.

I agree with this recommendation. The cabotage restrictions are anti-competitive restrictions aimed to preserve employment opportunities for members of a particular union organisation.

#### **Draft Recommendation 6 — Taxis**

States and Territories should remove regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest.

If restrictions on numbers of taxi licences are to be retained, the number to be issued should be determined by independent regulators focused on the interests of consumers.

There have been recent regulatory changes in the taxi industry in many jurisdictions and it might be best to see how the changes pan out.

What appears to be urgent in the industry is accommodating the likes of “Uber”

#### **Draft Recommendation 7 — Intellectual property review**

The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission.

The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.

I agree with this recommendation. I believe that such a review is particularly timely given overseas developments in relation the use of intellectual property, primarily patents, to achieve anticompetitive outcomes in various industries, particularly in relation to pharmaceuticals.

The Ergas review of 2002 has been largely ignored and should be re considered.

Draft Recommendation Intellectual property exception.

The Panel recommends that subsection 51(3) of the CCA be repealed.

Agree with this recommendation.

### **Draft Recommendation 8 — Parallel imports**

Remaining restrictions on parallel imports should be removed unless it can be shown that:

- they are in the public interest; and
- the objectives of the restrictions can only be achieved by restricting competition.

A significant beneficiary of such restrictions are small businesses, for example independent book sellers and music stores. The Panel should note that one of the primary reasons why governments have preserved parallel import prohibitions is due to the concern that the removal of such laws may have a particularly devastating effect on various small business sectors.

Any lifting of the restrictions should make it clear what is the expected small business impact .Transparency in relation to the possible impact of removal of restrictions is important. This was overlooked in the past NCP processes.

### **Draft Recommendation 9 — Planning and zoning**

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

The principles should include:

- a focus on the long-term interests of consumers generally (beyond purely local concerns);
- ensuring arrangements do not explicitly or implicitly favour incumbent operators;
- internal review processes that can be triggered by new entrants to a local market; and

- reducing the cost, complexity and time taken to challenge existing regulations.

The main beneficiaries of such restrictions are small businesses, for example independent grocery and specialty food retailers and in many cases the survival of such businesses add to consumer choice.

The Panel should note that one of the primary reasons why governments have preserved restrictions on planning and zoning laws is because of the concern that the removal of such laws may have a particularly devastating effect on various small business sectors. Big players will simply expand as they will outbid others for sites. Less restrictive planning and zoning regimes are good for the likes of ALDI or COSTCO but it will be at the expense of smaller others.

### **Draft Recommendation 10 — Regulation review**

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- they are in the public interest; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

Agree in principle with this recommendation.

However, any such regulation review should also consider, as part of its consideration of the public benefit, the impact that any changes are likely to have on small businesses. There is a likelihood that many of these regulations are driven by the policy objective of providing support and opportunities for local small and medium sized businesses.

### Draft Recommendation 11 — Standards review

Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, the Australian Government's Memorandum of Understanding with Standards Australia should require that non-government mandated standards be reviewed according to the same process specified in Draft Recommendation 11.

Agree.

### Draft Recommendation 12 — Competitive neutrality policy

All Australian governments should review their competitive neutrality policies. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).

**Strongly** agree with this recommendation.

### Draft Recommendation 13 — Competitive neutrality complaints

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum:

- assigning responsibility for investigation of complaints to a body independent of government;
- a requirement for the government to respond publicly to the findings of complaint investigations; and
- annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Draft Recommendation 39) on the number of complaints received and investigations undertaken.

Agree **strongly** with this recommendation. A number of my clients have been involved in the competitive neutrality complaints processes in the past and got nowhere.

I agree that the government bodies responsible for investigating these complaints have generally not investigated such matters in a rigorous and transparent matter. A more transparent process is important to remove any suspicion that the government agency investigating the competitive neutrality complaint may have a conflict of interest.

A further concern is that the government agencies charged with investigating such competitive neutrality complaints often do not have appropriately trained investigatory staff. It is important therefore for the proposed Australian

Council for Competition Policy to be appropriately staffed with trained investigators.

#### **Draft Recommendation 14 — Competitive neutrality reporting**

To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.

Agree with this recommendation. Greater transparency in competitive neutrality reporting is essential given past failures in this area.

#### **Draft Recommendation 15 — Electricity, gas and water**

State and territory governments should finalise the energy reform agenda, including through:

- application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;
- deregulation of both electricity and gas retail prices; and
- the transfer of responsibility for reliability standards to a national framework.

The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration.

All governments should re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:

- economic regulation of the sector; and
- harmonisation of state and territory regulations where appropriate.

Where water regulation is made national, the body responsible for its implementation should be the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).

No comments

#### **Draft Recommendation 16 — Competition law concepts**

The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.

I support this recommendation, it reiterates concerns about the apparent confusion about the actual objects of the CCA. The objects of the CCA are not the promotion of competition to the exclusion of all else. See later comments in relation to section 46.

### **Draft Recommendation 17 — Competition law simplification**

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions.

The Panel recommends that there be public consultation on achieving simplification.

Some of the provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977;
- sections 45B and 45C concerning covenants; and
- sections 46A and 46B concerning misuse of market power in a trans-Tasman market.

This task should be undertaken in conjunction with implementation of the other recommendations of this Review.

Agree, the NZ Commerce Act is a good starting example but much more should be done, Much of the complex and confused drafting is due to historical baggage and constitutional limitations which may no longer be relevant.

Any simplification must go further than the provisions listed above,

### **Draft Recommendation 18 — Application of the law to government activities**

The CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

**Strongly** agree and should be a priority matter that all Governments can agree upon as a matter of urgency. In fact the Commonwealth Government can lead on this issue. Further this recommendation should not be confined to the competition law provisions but all of the CCA/ACL.

### **Draft Recommendation 19 — Definition of market**

The current definition of 'market' in the CCA should be retained but the current definition of 'competition' should be re-worded to ensure that competition in Australian markets includes competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied by persons located outside of Australia to persons located within Australia.

Agree with this recommendation. The recommendation would be a formalisation of the current ACCC practices when defining the relevant market for the purposes of the CCA.

### Draft Recommendation 20 — Extra-territorial reach of the law

Section 5 of the CCA should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions.

The in-principle view of the Panel is that the removal of the foregoing requirements should also be removed in respect of actions under the Australian Consumer Law.

I do not agree with the first part of this recommendation. I am not satisfied that a compelling case has been made for taking steps to restrict the current jurisdictional reach of the CCA or the ACL. The recent Full Federal Court decision of **ACCC v Air NZ and Ors** needs to be considered.

Agree that the requirement for a private party to seek ministerial consent before relying on the extra-territorial provisions should be removed. That is an anomaly.

### Draft Recommendation 21 — Cartel conduct prohibition

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

- the provisions should apply to cartel conduct affecting goods or services supplied or acquired in Australian markets;
- the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility;
- a broad exemption should be included for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services), recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition;
- an exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing), recognising that such conduct will be prohibited by section 47 of the CCA (revised in accordance with Draft Recommendation 28) if it has the purpose, or has or is likely to have the effect or likely effect of substantially lessening competition.

Agree with this recommendation.

It is also suggested that serious consideration be given to the fact that in many cases suppliers and resellers are in competition with each other. It needs to be made clear that the law catches this structure and that that structure not be exempt from the law. The ACCC has in some case advised my clients that agents are not in competition with principals.

This issue is on appeal by the ACCC, decision reserved. Depending on the outcome of that appeal there should be consideration of a specific provision

that agents and principals are in competition with each other unless the facts are otherwise.

#### **Draft Recommendation 22 — Exclusionary provisions**

The CCA should be amended to remove the prohibition of exclusionary provisions in subparagraphs 45(2) (a) (i) and 45(2) (b) (i).

I do not agree with this recommendation. A case has not been made for the repeal of these provisions. I am not convinced that primary boycotts will be appropriately dealt with.

#### **Draft Recommendation 23 — Price signalling**

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

Section 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.

Agree that the 'price signalling' provisions of Division 1A of the CCA are inappropriate to the extent that they only apply to the banking sector but do not agree with the proposal to exclude public price signalling from the reach of the CCA. Recent examples in the airline and insurance industry demonstrate the appropriateness.

A preferred approach in relation to price signalling is to introduce a general prohibition on price signalling, which is in line with laws in both the US and the EU.

However the information sharing provisions of the CCA should be repealed.

#### **Draft Recommendation 24 — Misuse of market power**

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

However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.

To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and

- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

**The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.**

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

I am somewhat surprised that the Harper Review in its Draft Report has recommended making such significant changes to section 46 without first investigating whether the section is currently operating effectively.

The Panel makes a recommendation that will not improve the law, in fact, makes it harder to enforce, will take out the existing language about competitors and repeal the predatory pricing (Birdsville) provision.

When introducing the current law into the Senate in 1973 the late Lionel Murphy stated,

*"Monopolisation is denned in clause 46, which is now in the form of the amendments that I circulated before the double dissolution of Parliament. The clause covers various forms of conduct by a monopolist against his competitors or would-be competitors. A monopolist for this purpose is a person who substantially controls a market. The application of this provision will be a matter for the Court. An arithmetical test such as one third of the market- as in the existing legislation- is unsatisfactory. The certainty which it appears to give is illusory.*

*Clause 46 as now drafted makes it clear that it does not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.*

*The provision will not apply merely because a person who is in a position to control a market engages in conduct within one of the classes set out in the clause. It will be necessary for the application of the clause that, in engaging in such conduct, the person concerned is taking advantage of the power that he has by virtue of being in a position to control the market. For example, a person in a position to control a market might use his power as a dominant purchaser of goods to cause a supplier of those goods to refuse to supply*

*them to a competitor of the first mentioned person- thereby excluding him from competing effectively. In such circumstances the dominant person has improperly taken advantage of his power”.*

The clear intention at the time was to impact on competitors and on competition. I am not aware of the Parliament changing that intention.

Over the years the ACCC and the Courts had interpreted the section to impact on competition only and not competitors. Although it will often be hard to distinguish between the two.

It is fine for the ACCC in choosing its priorities to limit its role to matters that impact upon competition broadly but not for the Courts.

Politically the section has always been promised to assist small business and that was compounded when the price discrimination provisions were repealed in 1995 it was said at the time that section 46 would do a better job of combatting such conduct to the benefit of small business.

In my submission we need both regimes, one that focuses on competition and one that covers competitors. - they will often intersect. **Appendix A** sets out some conduct of real concern to small business and how the law or proposed law would deal with the conduct.

I see a value in the Panels suggested provision but to be used primarily by the ACCC to attack major and broad anti-competitive conduct and to include substantial remedies including divestiture.

However In relation to the Committee proposal I would not have the suggested defence. If there is to be a defence it should be ‘legitimate business conduct’, although that is very uncertain and may need some fleshing out.

By itself the suggested provision will make misuse of market power more difficult to prove. Substantial lessening of competition is a hard concept. Deleting the word substantial might be considered but that may have negative spin offs,

I would then suggest the following collateral provision that relates to competitors, namely,

The provision

*(1) A corporation that has a substantial degree of power in a market shall not engage in conduct, in that or any other market, for the purpose or effect or likely effect of:*

*(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*

*(b) preventing the entry of a person into that or any other market; or*

*(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*

*(1A) For the purposes of subsections (1):*

*(a) the reference in paragraphs (1) (a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors or to a particular competitor,*

*(b) the reference in paragraphs (1) (b) and (c) to a person includes a reference to persons generally, or to a particular class or to a particular competitor.*

*In the Second Reading Speech and in the Explanatory Memorandum there should be a clear statement that the law is assist competitors as well as competition generally. Further I suggest there be a non-exclusive list of conduct that may damage competitors namely.*

Add a list (non-exclusive) of conduct to be deemed to be likely to amount to a breach along the lines of the Canadian law, namely the following,

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose or effect of impeding or preventing the customer's entry into, or expansion in, a market;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose or effect of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (c) freight equalization on the plant of a competitor for the purpose or effect of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the purpose or effect of preventing a competitor's entry into, or expansion in, a market; and
- (i) selling articles at a price lower than the acquisition cost for the purpose or effect of disciplining or eliminating a competitor.
- (j) introducing additional capacity into a market that has no economic rationale with the purpose or effect to eliminate or prevent competition.
- (k) *discriminate between customers which has no economic rationale*
- (l) *using buying power to induce discrimination and knowingly threaten the viability of the supplier unless it can be shown that the viability is threatened for other reasons.*

It could be a defence to the above prohibition if the corporation can show that the conduct is pro-competitive or amounts to legitimate business conduct.

In relation to sanctions there would not be penalties or divestiture but injunctions and damages.

Authorisation is to be available for both provisions where conduct in breach can be exempted if there is countervailing public benefit.

Consideration should be given to changing the name of the provision to **monopolisation** once taking advantage is taken out as suggested by the Panel.

### **Divestiture**

I am concerned at the Panels cursory treatment of the question of whether a divestiture should be introduced for proven breaches of section 46.

First, there is no discussion in the Draft Report of the various situations where the remedy has been used in the US and whether the remedy was used successfully in these cases to achieve positive competitive outcomes.

Second, it appears that the Panel blithely assumed that the use of a divestiture remedy "is likely to have broader impacts on the efficiency of the firm." There is simply no basis for stating that a divestiture remedy is "likely" to have this effect.

The fact is that divestiture will seldom be utilised but in my view should be in the suite of remedies.

### **ACCC compliance powers**

Whilst not covered by the draft Report consideration should be given to giving the ACCC the power to issue “compliance orders”. Along the lines of the ‘cease and desist’ powers of the NZ Commerce Commission. Strong safeguards need to be built in but such power will enable the ACCC to move against unlawful conduct quickly and get a fast marketplace result. Such power to relate to all provisions of the CCA/ACL.

#### **Draft Recommendation 25 — Price discrimination**

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the recommended revisions to section 46, see Draft Recommendation 25).

Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include the removal of restrictions on parallel imports (see Draft Recommendation 9) and ensuring that consumers are able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.

Whilst I do not support the reintroduction of a specific price discrimination provision, I am disappointed at the lack of rigour shown by the Harper Review in discussing this important issue.

A major problem which many small businesses face is that they are unable to buy products from their suppliers at a wholesale price which is lower than the retail prices being offered for the same products by their major retail competitors. It is important for the Harper Review to fully investigate and gain an understanding of this problem before dismissing any potential solutions.

Serious consideration should be given to section 46 and concerns about discrimination as was promised when section 49 was repealed in 1995 when in the Second Reading Speech it was said,

“The prohibition against price discrimination is to be repealed as the provision is largely redundant, and the conduct it is designed to address is adequately covered by other provisions of the Act.”

This has not been the experience since then.

#### **Draft Recommendation 26 — Third-line forcing test**

The provisions on ‘third-line forcing’ (subsections 47(6) and (7)) should be brought into line with the rest of section 47. Third-line forcing should only be

prohibited where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

I **totally** disagree with this recommendation. The Panel has evaluated third line forcing through the lens of competition law. However there is an equally valid way of considering the prohibition on third line forcing – namely that it promotes freedom of contract.

The prohibition in subsections 47(6) and (7) are aimed at preventing interference with freedom of contract. In other words, these provisions preserve the freedom of a party not to have to agree to purchase goods or services which they do not want or need from a party whom they do not want to contract with. The prohibition also frees up business dealings.

The Panel has not considered the likely effect that this recommendation will have in the marketplace. I believe that if this recommendation is implemented there will be a dramatic upsurge of tied sales in a wide range of industries. Furthermore, it is likely that the main group which will end up being subject to such tied arrangements will be small businesses. Big business can resist such “forcing”

An argument in favour of the Panel’s recommendation is that most third line forcing notifications to the ACCC are let stand. Off course that is to be expected, one would not notify if the conduct is objectionable.

### **Draft Recommendation 27 — Exclusive dealing coverage**

Section 47 should apply to all forms of vertical conduct rather than specified types of vertical conduct.

The provision should be re-drafted so it prohibits the following categories of vertical conduct concerning the supply of goods and services:

- supplying goods or services to a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and
- refusing to supply goods or services to a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

The provision should also prohibit the following two reciprocal categories of vertical conduct concerning the acquisition of goods and services:

- acquiring goods or services from a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and

- refusing to acquire goods or services from a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

I agree with this recommendation. The existing provisions of section 47 are unnecessarily complex.

#### **Draft Recommendation 28 — Resale price maintenance**

The prohibition on resale price maintenance (RPM) should be retained in its current form as a per se prohibition, but the notification process should be extended to include resale price maintenance

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

I do not agree with this recommendation for the same reasons as I do not agree with the recommendation concerning third line forcing. Again the Panel has evaluated resale price maintenance (RPM) through the lens of competition law. . However there is an equally valid way of considering the prohibition on RPM – namely that it promotes freedom of contract.

The prohibition on RPM is aimed at preventing interference with freedom of contract. In other words, these provisions preserve the freedom of a party to sell a product, which they have purchased and title in, at any price they wish, rather than being forced to sell the product at a price determine by another party.

The Panel has not considered the likely effect of this in the marketplace. I believe that if this recommendation is implemented there will be a dramatic upsurge of the incidence of RPM. Again, it is likely that the main group which will end up being subject to RPM will be small businesses and consumers as RPM will always set higher prices than a free market.

In my view the law should stand as is. The ACCC has just issued its first draf determination proposing to authorise rpm conduct,

Furthermore if suppliers want to control the pricing of a product, supply on consignment.

Having said the above the section 48/96 provisions need simplification.

#### **Draft Recommendation 29 — Mergers**

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

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

- the ACCC should be the decision-maker at first instance;
- the ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or it is satisfied that the merger results in public benefits that outweigh the anti-competitive detriments;
- the formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information;
- the formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties; and
- decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.

I agree with the recommendations.

However I do suggest that the ACCC be empowered to levy fees on its informal merger regime.

#### **Draft Recommendation 30 — Secondary boycotts enforcement**

The ACCC should include in its annual report the number of complaints made to it in respect of secondary boycott conduct and the number of such matters investigated and resolved each year.

Agree

#### **Draft Recommendation 31 — Secondary boycotts proceedings**

Jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA should be extended to the state and territory Supreme Courts

I thought they had such jurisdiction.

#### **Draft Recommendation 32 — Restricting supply or acquisition**

The present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation' to deal with, should be removed.

**The Panel invites further submissions on possible solutions to the apparent conflict between the CCA and the Fair Work Act including:**

- a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements which contain potential restrictions of the kind referred to in sections 45E and 45EA, and to intervene and make submissions;
- amending sections 45E and 45EA so that they expressly include awards and enterprise agreements; and
- amending sections 45E, 45EA and possibly paragraph 51(2) (a) to exempt workplace agreements approved under the Fair Work Act.

I agree with this recommendation but do not see that there is a significant problem in relation to the perceived overlap between the CCA and the FWA.

### **Draft Recommendation 33 — Authorisation and notification**

The authorisation and notification provisions in the CCA should be simplified:

- to ensure that only a single authorisation application is required for a single business transaction or arrangement; and
- to empower the ACCC to grant an exemption (including for per se prohibitions) if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or that the proposed conduct is likely to result in a net public benefit.

This does change the authorisation test and it is not clear how that will operate. More consideration should be given to the consequences. This is in line with NZ.

### **Draft Recommendation 34 — Block exemption power**

Exemption powers based on the block exemption framework in the UK and EU should be introduced to supplement the authorisation and notification frameworks.

I am generally supportive of this recommendation but would wish to see further details of how this particular recommendation would operate in practice. In particular will there be time limits and can the block exemption be challenged.

### **Draft Recommendation 35 — Section 155 notices**

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age.

Either by law or guideline, the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

I agree that the ACCC should update its guidelines in relation to section 155. The ACCC is already in the process of undertaking such an update.

I do not agree with the proposal to qualify the obligations required under section 155 to require the recipient to undertake a “reasonable search”. The section 155 power should not be “watered down” by allowing recipients to define what constitutes a reasonable search but rather should continue to require that recipients undertake a thorough search.

### **Draft Recommendation 36 — Facilitating private actions**

Section 83 should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the court.

I **strongly** agree with this recommendation. The Act from the start had a strong self-enforcing goal but that turned out to be illusory.

Much more has to be done to facilitate private actions. In this regard, I am disappointed that the Panel did not consider other more meaningful ways of seeking to facilitate private actions, such as allowing treble damages awards and making changes to the usual costs rules.

The issue of compensation to victims of breaches of the TPA is a major one and has not really been addressed by anyone in the past.

It was always the policy of the TPA (section 83) that where the ACCC or any litigant was successful in proving a breach of the TPA others can use that action to base damages action upon. This policy has never materialised in practice.

The suggestions seek to overcome practical problems that have arisen when victims of anti-competitive conduct have tried to get compensation following successful ACCC cases. This is not where the ACCC seeks compensation for victims (representative actions) but where victims seek to take their own action.

I might also that that consideration should be given to a provision that damages can include punitive damages, such as treble damages if the Court deemed that appropriate.

### **Section 83- coats tails actions**

- (1) In a proceeding against a person under section 82 or in an application under sub section 87 (1 A) for an order against a person a finding by a court made in any proceedings under this Act, in which a person has been found to have contravened, or to have been involved in a contravention of, a provision of this Act is prima facie evidence of the fact that a contravention has occurred.
- (2) For the purposes of subsection (1), a finding of contravention may:

- (a) be proved by production of a document under the seal of the court from which the finding appears; and
- (b) also be proved by the evidence contained in documents available at the hearing of the proceeding for the contravention or offence, including:
- (i) written statements or admissions admissible as evidence on the hearing of the application;
  - (ii) depositions taken at the application proceeding; or
  - (iii) any written statements or admissions used as evidence in the proceeding.
- ( 3 ) In any proceeding under section 82 or an application under section 87 (1A), a court will accept any of matters listed in sub paragraph ( 2 ) above as conclusive of a finding of contravention, unless there is evidence to the contrary.
- (4) In considering the issue of damages the Court may impose any damages that the Court considers appropriate, including punitive damages.

### **Consent injunctions.**

#### **Section 80 (1A)-**

- ( i ) In a consent application under sub paragraph ( 1AA) the Court shall take reasonable steps to determine whether such an order , without the Court being satisfied that a person has engaged , or is proposing to engage, in conduct in contravention of the Act , will detrimentally affect any other persons.
- ( ii) If the Court is of the view that any other persons will be detrimentally affected the Court shall not make a consent order, without being satisfied that a person has engaged, or is proposing to engage, in conduct in contravention of the Act.

### **Draft Recommendation 37 — National Access Regime**

The declaration criteria in Part IIIA should be targeted to ensure that third-party access only be mandated where it is in the public interest. To that end:

- criterion (a) should require that access on reasonable terms and conditions through declaration promote a material increase in competition in a dependent market;
- criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.

The Competition Principles Agreement should be updated to reflect the revised declaration criteria.

The Australian Competition Tribunal should be empowered to undertake merits review of access decisions while maintaining suitable statutory time limits for the review process.

#### **The Panel invites further comment on:**

- **the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; and**

- **whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.**

Am generally supportive of this recommendation.

### **Draft Recommendation 38 — Establishment of the Australian Council for Competition Policy**

The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy.

The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.

Agree. An organization such as the ACCP is required as an advocate for competition policy. It is not appropriate for a law enforcement agency such as the ACCC to be called on, or expected, to provide policy advice to government.

### **Draft Recommendation 39 — Role of the Australian Council for Competition Policy**

The Australian Council for Competition Policy should have a broad role encompassing:

- advocate and educator in competition policy;
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design and regulatory issues, including proposed privatisations; and
- undertaking research into competition policy developments in Australia and overseas.

Agree. The proposed role of the ACCP is appropriate.

#### **Draft Recommendation 40 — Market studies power**

The proposed Australian Council for Competition Policy should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation or to the ACCC for investigation of potential breaches of the CCA.

**The Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the PC model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.**

Agree I do not support the ACCC doing such studies. There are potential issues of conflict of roles of the ACCC and diverts the ACCC from its core roles.

#### **Draft Recommendation 41 — Market studies requests**

All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy to undertake a competition study of a particular market or competition issue.

All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy.

The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.

Agree

#### **Draft Recommendation 42 — Annual competition analysis**

The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.

Agree, subject to the ACCP being required to seek input from the ACCC about areas which it considers to be of particular importance.

#### **Draft Recommendation 43 — Competition payments**

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, the Panel favours competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort would be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

Agree with this recommendation.

#### **Draft Recommendation 44 — ACCC functions**

Competition and consumer functions should be retained within the single agency of the ACCC.

**Strongly** agree with this recommendation.

No case has been made for separating the ACCC's competition and consumer functions into two separate agencies. Indeed, over recent years there has been a great deal of evidence of the synergies which exist between the competition law and consumer law functions.

Past attempts to split some of these roles have failed and powers taken off the ACCC have been returned and at times enhanced, for instance product safety.

#### **Draft Recommendation 45 — Access and pricing regulator functions**

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national access and pricing regulator:

- the powers given to the NCC and the ACCC under the National Access Regime;
- the powers given to the NCC under the National Gas Law;
- the functions undertaken by the Australian Energy Regulator under the National Electricity Law and the National Gas Law;
- the telecommunications access and pricing functions of the ACCC;
- price regulation and related advisory roles under the *Water Act 2007* (Cth).

Consumer protection and competition functions should remain with the ACCC.

The access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.

I can see the possible benefits of this particular recommendation, but believe that a great deal more consultation needs to be undertaken before committing to such a move.

I also see a great challenge in achieving a single access regulator encompassing the State and Territory regulators.

I would stay with the status quo.

#### **Draft Recommendation 46 — ACCC governance**

The Panel believes that incorporating a wider range of business, consumer and academic viewpoints would improve the governance of the ACCC.

**The Panel seeks views on the best means of achieving this outcome, including but not limited to, the following options:**

- **replacing the current Commission with a Board comprising executive members, and non-executive members with business, consumer and academic expertise (with either an executive or non-executive Chair of the Board); or**
- **adding an Advisory Board, chaired by the Chair of the Commission, which would provide advice, including on matters of strategy, to the ACCC but would have no decision-making powers.**

The credibility of the ACCC could also be strengthened with additional accountability to the Parliament through regular appearance before a broadly-based Parliamentary Committee.

I **strongly** oppose the proposal to replace the current ACCC Commission with a Board comprising executive members. No case has been made for such a change. Indeed, in my view, such a change would seriously weaken the effectiveness and independence of the ACCC. I am also concerned that Board appointments would become politicised, which would in turn undermine the independence of the ACCC.

I also have great concerns about an Advisory Committee, it will impact on the independence of the ACCC. The ACCC will always be looking over its shoulder.

The status quo should be maintained.

What I do support is a Standing Joint House Parliamentary Committee that reviews the ACCC twice yearly.

#### **Draft Recommendation 47 — Media Code of Conduct**

The ACCC should also develop a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law.

I am not sure about this recommendation.

It is important for the ACCC to develop a protocol in relation to its media interactions and have it as part of its Charter but a Code might go too far. This was recommended by the Dawson Committee but never implemented. .

#### **Draft Recommendation 48 — Small business access to remedies**

The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

**The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.**

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

I am very disappointed that the Panel has not been able to put forward more substantive recommendations in relation to this issue. It has thrown the issue back to the submitters. No doubt in the initial submissions suggestions were forthcoming and they could have been assessed,

It is a pity that the focus of the discussion on how to provide small businesses with better access to justice always focuses on informal mechanism of justice, such as ADR. Small business are as willing as larger businesses in pursuing their legal rights through courts and tribunals. Unfortunately, the costs of pursuing those rights are often cost prohibitive.

A first step is to try to identify ways in which small businesses can assert their legal rights in courts and tribunals in the most cost effective ways.

One novel solution may be to explore the possibility of state and territory Tribunals being given jurisdiction to adjudicate in relation to simple competition law matters. Currently, many small businesses pursue ACL issues, including unconscionable conduct allegations, through state tribunals such as the NCAT, QCAT and VCAT, with some measure of success.

There is no reason in principle why a small business would not be able to pursue a complaint involving less complex competition law issues through a state tribunal. For example, it seems that a small business which was the subject of third line forcing arrangement or a resale price maintenance arrangement should be able to pursue that issue through a tribunal by seeking an order that the relevant agreement was void and unenforceable. Small businesses could also have the right to seek compensation from the Tribunal in relation such conduct.

I also believe that it would be feasible for tribunals to be called upon to adjudicate on small business complaints involving other types of exclusive dealing arrangements. In these matters, the small business would be required to demonstrate on the balance of probabilities that the particular conduct was likely to substantially lessen competition. The main concern is that most tribunals may not have sufficient expertise with CCA provisions or concepts. However, these issues could be overcome by providing additional training.

Other options for improving small business access to justice would include encouraging the ACCC to pursue both pecuniary penalties and compensation as part of its CCA cases. Section 79B would then come into play with the Court being required to give preference to compensation for victims of the anticompetitive conduct.

Other options which could be explored include the introduction of US-style incentives for private actions, such as a right to treble damages awards and

changes to the usual cost orders in competition law private actions – ie costs to be born by each party rather than costs following the event.

Another initiative which could be explored is the creation of a pro-bono law firm panel for the provision of competition and consumer law advice to small businesses. The idea would be for particular firms with expertise in competition and consumer law matters to be appointed to a pro-bono panel for the purpose of providing small businesses with initial free advice in relation to competition and consumer law issues. Through this process, many small businesses would be able to understand the reasons why their particular complaint may not raise an actionable breach of competition or consumer laws.

In relation to access to justice through mediation the various Small Business Commissioners have been providing a valuable mediation function to many small businesses. The Committee believes that these initiatives should be supported and if possible extended.

I certainly do not support the ACCC having a mediation role in small business disputes. Such a role would invariably create conflicts of interests which would blur the ACCC's role as an enforcement agency.

Some other options that might be considered are.

### **Disputes between businesses that are not suitable for litigation.**

**Trade associations** to filter complaints and to seek to resolve matters. (some funding to be allocated to "approved" trade associations). If that fails to resolve the dispute then next step is to refer to----

**Small business Commissioner-** seeks to mediate /arbitrate dispute.

**ACCC/ASIC-** referrals from trade association / small business commissioner where enforcement action might be warranted. Neither ACCC nor ASIC currently seek to resolve complaints as such and probably should not unless there is a major rejigging of their role.

**Private litigation/ADR-** always available to business. Trade associations should be given standing in relevant Courts and Tribunals to represent business plaintiffs.

### **Disputes that warrant private litigation**

The major impediment to such action is costs orders. It is suggested that consideration to prevent such orders in CCA actions unless they are vexatious. There are precedents for such a regime.

At the start of the TPA its self-enforcing nature was seen as a major innovation but that did not eventuate in the competition provisions.

### **Coat tails action to ACCC actions**

I have covered this issue earlier in this submission.

#### **Draft Recommendation 49 — Collective bargaining**

The CCA should be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed (although there ought to be a process by which the businesses covered by the notification from time to time are recorded on the ACCC's notification register).

The ACCC should take actions to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses.

I **strongly** agree with this recommendation but am disappointed that the Panel did not suggest more by way of improvements. That being the case I have suggested the following to overcome practical difficulties.

Serious consideration should also be given to protecting members of a collective boycott group approved by the ACCC from breach of contract action. There is precedent for this in the IR sphere

### **Changes to the collective bargaining provisions.**

#### **Notice to Commission**

Take away the contract language in the current law and use the language of agreement, understanding and arrangements. This avoids some of the inflexibilities in relation to changing the composition of groups.

#### **Threshold.**

In addition to the prescribed monetary thresholds any person who is covered by the mandatory Franchising Code can be a member of a collective bargaining group with no reference to any monetary threshold.

#### **Consent, to being part of a collective bargaining group.**

In any Notice lodged with the ACCC it will be assumed, unless the contrary can be shown, that the listed parties have consented to the Notice,

#### **Public benefit**

It should be stated in the Act that collective bargaining is, unless the contrary can be shown, a public benefit.

Variations to a group.

A notice may be varied at any time by the applicant and the ACCC has 14 days to object.

A notice of variation shall not be a new Notice and will be assessed by the Commission as a variation only.

Time for new application.

An applicant may not lodge a same or similar notice within a period of 12 months of a Notice being rejected by the Commission or the Tribunal.

Collective boycotts.

Where a collective boycott has been exempted under these provisions the target of such a boycott will seek leave of the Court where it wishes to take legal action for breach of contract flowing from implementing the boycott.

The Court will assess whether in all the circumstances it is appropriate that a breach of contract action is in the public interest. In doing so the Court must have regard to the ACCC decision.

**Draft Recommendation 50 — Retail trading hours**

The Panel notes the generally beneficial effect for consumers of deregulation of retail trading hours to date and the growth of online competition in some retail markets. The Panel recommends that remaining restrictions on retail trading hours be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day.

I can understand the perceived economic benefits associated with the deregulation of the retail trading hours.

However, such changes are likely to have a particularly negative effect on the existing retailers, the vast majority of which are likely to be small and medium sized businesses. Therefore, we think that it is important for the Panel to consider the impact of this proposed change on both consumers and small businesses.

**Draft Recommendation 51 — Pharmacy**

The Panel does not consider that current restrictions on ownership and location of pharmacies are necessary to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy products and services, and the ability of providers to meet consumers' preferences.

The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access and quality of advice on pharmaceuticals that do not unduly restrict competition.

Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.

Again I understand the perceived economic benefits associated with the deregulation of the pharmacy sector.

However, such changes are likely to have a particularly negative effect on the existing pharmacies, the vast majority of which are small businesses.

Therefore, it is important for the Panel to consider the impact of this proposed change on both consumers and the relevant small businesses.

#### . Appendix A-

#### The Conduct

- **Introducing additional capacity into a market that has no economic rationale with the purpose or effect to eliminate or prevent competition or competitors.**

Current law- maybe caught if “taking advantage” and “purpose” can be shown and also wide impact on competition added by ACCC and Courts. This was one of the issues in BORAL.

Panel proposal- only caught if an SLC can be proven. Target or targets would have to be significant players in the relevant market or markets.

- **Conduct aimed at preventing the entry of a new player in the market.**

Current law- again need to show “taking advantage” and “purpose” and slc test added by ACCC and Courts. Actual words of section 46 in relation “damage to competitors” etc would seem to catch such conduct but not the way Courts and ACCC has written those words out of the Act.

Panel proposal- only caught if slc can be shown. Entrants come and go and it would need to be shown that a particular new entrant would have such an impact on the market that its loss amounted to an slc.

- **Selling below cost for a sustained period.**

Current law- maybe be caught by “Birdsville” provision.

Panel proposal- only if slc. Much selling below cost might be pro competition.

- **Discrimination between customers of like status with no economic rationale for the differences.**

Current law- same comments as above

Panel proposal – same comments as above.