

Recommendation 26 — Extra-territorial reach of the law

Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.

The in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law.

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

For further detail on extra-territorial reach of the law, see [Section 23.2](#).

3.5 CARTELS

Cartel conduct between competitors is anti-competitive in most circumstances and should be prohibited per se. The Panel supports the intent of the cartel conduct prohibitions, including the combined criminal and civil sanctions.

However, the Panel sees significant deficiencies in the current framework of the cartel prohibitions, particularly having regard to its criminal sanctions. Specifically, the Panel considers that:

- The provisions are excessively complex, which undermines compliance and enforcement.
- The cartel provisions, consistent with Australia’s competition laws generally, should be confined to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on a business within Australia.
- Given the potential for criminal sanctions, the provisions ought to be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility.
- Joint ventures and similar forms of business collaboration should not be subject to cartel prohibitions and should only be unlawful if they substantially lessen competition.
- Similarly, trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing) should not be subject to cartel prohibitions, and should only be unlawful if they substantially lessen competition.

Recommendation 27 — Cartel conduct prohibition

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

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

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

The Panel also considers that the per se prohibition of exclusionary provisions, as defined in section 4D, is no longer necessary since, in practice, such conduct is materially the same as cartel conduct in the form of market sharing.

Accordingly, the Panel believes that the prohibition against exclusionary provisions should be removed from the CCA.

Recommendation 28 — Exclusionary provisions

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

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

For further detail on cartel conduct, see [Section 20.1](#).

3.6 ANTI-COMPETITIVE DISCLOSURE OF INFORMATION

The Panel considers that, in their current form, the prohibitions against 'price signalling' in the CCA do not strike the right balance in distinguishing between anti-competitive and pro-competitive conduct. Being confined in their operation to a single industry (banking), the current provisions are also inconsistent with the principle that the CCA should apply to all businesses generally.

The Panel considers that public price disclosure can help consumers make informed choices and is unlikely to raise significant competition concerns. Accordingly, the Panel believes there is no sound basis for prohibiting public price disclosure, either in the banking industry or more generally.²²

Private price disclosure to a competitor will generally have more potential to harm competition, as it may be used to facilitate collusion among competitors. However, private disclosure may be necessary under some business circumstances or in the ordinary course of business, particularly in connection with joint ventures or similar types of business collaboration. For that reason, a per se prohibition has the potential to overreach.

The Panel considers that anti-competitive price signalling does not need its own separate Division in the CCA; rather, price signalling can be addressed by extending section 45 to cover concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

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

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

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

Recommendation 29 — Price signalling

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

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

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

For further detail on anti-competitive disclosure of information, see [Section 20.2](#).

3.7 MISUSE OF MARKET POWER

An effective provision to deal with unilateral anti-competitive conduct is a necessary part of the competition law. This is particularly the case in Australia, where the small size of the Australian

22 The Panel notes that the prohibition on certain public disclosures also applies to disclosures of a corporation’s capacity or commercial strategy. The Report does not deal with these matters separately, since the Panel considers that the same issues arise as in the case of public price disclosure.

economy frequently leads to concentrated markets. The Panel considers that section 46 can be re-framed in a manner that will improve its effectiveness in targeting anti-competitive unilateral conduct and focus it more clearly on the long-term interests of consumers.

The Panel regards the threshold test of ‘substantial degree of power in a market’ as appropriate and well understood. In contrast, the ‘take advantage’ limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. This test has given rise to substantial difficulties of interpretation, which have been revealed in the decided cases, undermining confidence in the effectiveness of the law.

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

Further, the focus of the prohibition on showing the purpose of damaging a competitor is inconsistent with the overriding policy objective of the CCA to protect competition, and not individual competitors. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

The Panel also considers that the supplementary prohibitions, which attempt to address concerns about predatory pricing,²³ do not advance the policy intent of section 46.

Accordingly, the Panel proposes that the primary prohibition in section 46 be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in that or any other market. The proposed test of ‘substantial lessening of competition’ is the same test as is found in section 45 (anti-competitive agreements), section 47 (exclusive dealing) and section 50 (mergers) of the CCA, and the test is well accepted within those sections.

Conduct undertaken by a firm with substantial market power can have pro-competitive and anti-competitive features. The issue for courts, and for firms assessing their own conduct, is to weigh the pro-competitive and anti-competitive impacts of the conduct to decide if there has been a substantial lessening of competition. To clarify the law and mitigate concerns about over-capture, the Panel proposes that section 46 include legislative guidance with respect to the intended operation of the section. Specifically, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition in a market, to have regard to the extent to which the conduct:

- increases competition in a market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- lessens competition in a market, including by preventing, restricting or deterring the potential for competitive conduct in a market or new entry into a market.

The proposed reform to section 46 is intended to improve its clarity, force and effectiveness so that it can be used to prevent unilateral conduct that substantially harms competition and that has no economic justification.

²³ *Competition and Consumer Act 2010* subsections 46(1AAA) and (1AA).

Recommendation 30 — Misuse of market power

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

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

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

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

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

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

For further detail on misuse of market power, see [Section 19.1](#).

3.8 UNCONSCIONABLE CONDUCT

Both the business and the wider community expect business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards of fair dealing within the law.

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

Enforcing business-to-business unconscionable conduct provisions is an important function of the Australian Competition and Consumer Commission (ACCC). The Panel notes the recent Federal Court declarations in two proceedings instituted by the ACCC that Coles engaged in unconscionable conduct in 2011 in its dealings with certain suppliers. These cases indicate that the current unconscionable conduct provisions are working as intended to meet their policy goals.

Active and ongoing review of these provisions should occur as other matters arise. If deficiencies in the operation of the provisions become evident, they should be remedied promptly.

For further detail on unconscionable conduct, see [Section 19.4](#).

3.9 PRICE DISCRIMINATION

The Panel recognises that some small businesses and consumers have concerns about the impacts of price discrimination. However, the former prohibition on price discrimination (contained in the former section 49 of the CCA) was found likely to result in price inflexibility, which would undermine consumer welfare.

In relation to international price discrimination, the Panel considers that any attempt to prohibit this would face significant implementation difficulties. A prohibition on international price discrimination could also have significant negative consequences, ultimately limiting consumer choice. Instead, the Panel favours encouraging the development and use of lawful market-based mechanisms to put downward pressure on prices.

Recommendation 31 — Price discrimination

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

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

For further detail on price discrimination, see [Section 19.3](#).

3.10 VERTICAL RESTRICTIONS (OTHER THAN RESALE PRICE MAINTENANCE)

As a general principle, the Panel believes that the CCA should not interfere with trading conditions agreed between buyers and sellers in connection with acquiring and supplying goods and services, unless those conditions have the purpose, effect or likely effect of substantially lessening competition.

Section 47 prohibits most vertical restrictions only if they have the purpose, effect or likely effect of substantially lessening competition. The one exception is third-line forcing. Under the CCA, third-line forcing is prohibited per se — that is, regardless of the purpose or effect of the conduct.

The Panel sees no need for third-line forcing to be singled out from other forms of vertical trading conditions and be prohibited per se. As notifications to the ACCC demonstrate, third-line forcing is a common business practice and rarely has anti-competitive effects.

Recommendation 32— Third-line forcing test

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

The Panel agrees with the view expressed in many submissions that section 47 is unnecessarily complex and therefore difficult for business to understand and apply. The section focuses attention

on particular forms of vertical restraints and directs attention away from the central issue — whether the restriction is anti-competitive.

The amendments to section 46 recommended in this Report (see Recommendation 30) will render section 47 redundant. Section 45 will apply to all vertical restraints (including third-line forcing) included in a contract, arrangement or understanding; section 46 will apply if a corporation refuses to supply goods or services because the acquirer will not agree to accept a vertical restraint (including third-line forcing). As amended, section 45 and section 46 would apply the same competition test as in section 47.

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

The Panel therefore recommends that section 47 be repealed, simplifying the competition law.

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

Recommendation 33 — Exclusive dealing coverage

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

For further detail on vertical restrictions (other than resale price maintenance), see [Section 20.3](#).

3.11 RESALE PRICE MAINTENANCE

The appropriateness of a per se prohibition on resale price maintenance (RPM) has been debated for many years, both in Australia and overseas. When the per se prohibition was enacted in Australia in the mid-1970s, it reflected the law in many comparable jurisdictions. However, over the last 20 years some countries — particularly the US and Canada — have moved away from the per se prohibition of RPM. Other jurisdictions, including Europe and New Zealand, have retained the per se prohibition.

At this time, the Panel sees no sufficient case for changing the prohibition of RPM from a per se prohibition to a competition-based test. However, it would be appropriate to allow business to seek exemption from the prohibition more easily. This could be achieved through allowing RPM to be assessed through the notification process, which is quicker and less expensive for businesses than authorisation. This change would also have the advantage of allowing the ACCC to assess RPM trading strategies more frequently, and thereby provide better evidence as to the competitive effects of RPM in Australia.

A general tenet of the competition law is that companies within a corporate group are treated as a single economic entity and are not considered to be competitors. For that reason, the prohibitions in

sections 45 and 47 do not apply to trading arrangements entered into between related companies.²⁴ A similar principle ought to apply to RPM. Currently, there is no exemption for RPM between a manufacturer and a retailer that is a subsidiary of the manufacturer.

Recommendation 34 — Resale price maintenance

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

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

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

For further detail on resale price maintenance, see [Section 20.4](#).

3.12 MERGERS

The Panel considers that the current prohibition of mergers that are likely to substantially lessen competition in Australian markets is appropriate.

Concerns have been raised that Australia's merger law does not give proper consideration to global markets within which many businesses compete. Some submissions argue that the term 'market' in the CCA is defined as a market 'in Australia' and that causes the competition analysis to be narrowly focused. As noted above (see [Section 3.3](#)), although the Panel considers that the CCA correctly focuses upon conduct that damages competition in markets in Australia (to protect Australian consumers), the CCA has been framed to take account of all sources of competition that affect Australian markets. Recommendation 25 is intended to strengthen that principle.

Although some submissions raise concerns that the ACCC opposes too few mergers, others question whether the ACCC's application of the CCA is constraining Australian businesses from achieving efficient scale through mergers to become globally competitive. To compete effectively, businesses must continuously pursue economic efficiency. In many industries, efficiency requires scale. Businesses may pursue mergers to achieve efficient scale to compete more effectively in global markets.

In many markets in Australia, achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA. However, in some markets, the opposite will be the case: the influence of imports may be weak and unable to constrain the resulting market power of the merged businesses. When that occurs, conflicting interests emerge: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers arising from reduced competition.

The Panel considers that the CCA has sufficient flexibility to allow such issues to be adjudicated and determined by the ACCC or the Australian Competition Tribunal (the Tribunal). The merger authorisation process applies a public benefit test that covers all potential benefits and detriments, including economies of scale. There may be occasions where it is in the public interest to allow a

²⁴ *Competition and Consumer Act 2010*, subsections 45(8) and 47(12).

particular merger to achieve efficient scale to compete globally, notwithstanding that the merger adversely affects competition in Australia.

Nonetheless, the Panel considers that the administration of the merger law can be improved.

There is widespread support for retaining the ACCC's informal merger review process. However, strong concerns have been expressed about the timeliness and transparency of the process.

The Panel considers that it is not sensible to attempt to regulate an informal process which, by definition, operates outside any formal legal framework. The flexibility of the informal process is widely recognised as being beneficial and should not be interfered with. However, the public interest is served by timely merger decisions and by transparency in the public administration of the merger law. The Panel sees scope for further consultation between the ACCC and business representatives, with the objective of developing an informal review process that delivers more timely decisions. The Panel also considers that ex-post evaluations of some merger decisions could be undertaken by the proposed Australian Council for Competition Policy (ACCP) (see Recommendation 44) to draw lessons for future merger reviews (but not to overturn past decisions).

The Panel considers that concerns about the timeliness and transparency of merger review processes can also be addressed through a more streamlined formal exemption process. The current formal exemption processes are excessively complex and prescriptive, being a formal clearance application to the ACCC and an alternative authorisation application to the Tribunal. This has deterred the use of these mechanisms and fuelled complaints about the way the informal process is applied to large mergers that involve contested facts and issues.

The Panel also considers that, if a more streamlined formal exemption process were introduced, it would be preferable for the ACCC to be the first instance decision-maker rather than the Tribunal. Having regard to its composition and powers, the ACCC is better suited to investigation and first-instance decision making in administering the competition law (including mergers), while the Tribunal is better suited to an appellate or review role.

The Tribunal's review of the ACCC's decision should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason. A full rehearing, with an unfettered ability for parties to put new material before the Tribunal, would be likely to dampen the incentive to put all relevant material to the ACCC in the first instance, and may lead to delays if the Tribunal has to deal with large amounts of new evidence. On the other hand, circumstances may arise in which it is reasonable to allow new evidence to be provided to the Tribunal. Further, the Tribunal may also consider that it would be assisted by hearing directly from witnesses relied on by the ACCC, through questioning by the parties and/or the Tribunal.

Creeping acquisitions

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

A legitimate question arises regarding whether, in assessing the likely effect of a proposed merger, the merger provisions of the CCA should also take account of the aggregate effect of the corporation's previous acquisitions within, for example, the prior three years. The complicating factor is that market conditions may have altered materially over the period chosen. Such a change would impose additional costs associated with merger review. On balance, in the absence of evidence of harmful acquisitions proceeding because of a gap in the law on creeping acquisitions, the Panel does not consider that a sufficiently strong case for change has been made.

Recommendation 35 — Mergers

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

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

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

For further detail on mergers, see [Chapter 18](#).

3.13 SECONDARY BOYCOTTS AND EMPLOYMENT-RELATED MATTERS

The negotiation of employment terms and conditions (remuneration, conditions of employment, hours of work or working conditions of employees) has always been excluded from most of the competition law provisions of the CCA by paragraph 51(2)(a). The reason for this exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009*. The policy rationale is that labour markets are not in all respects comparable to other product or service markets. As a general principle, the Panel agrees with that view.

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

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

Secondary boycotts

A strong case remains for the CCA to retain the prohibition of secondary boycotts. A sufficient case has not been made to limit the scope of the secondary boycott prohibition, nor to broaden the scope of the exception for employment-related matters.

The Panel did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exception in the CCA. In the absence of such evidence, the Panel does not see an immediate case for amending the exception. However, if such evidence arises from future boycott activity, the exceptions should be reassessed.

Some industry organisations, especially in building, construction and mining, believe that public enforcement of the secondary boycott provisions is inadequate, a point emphasised in the Interim Report of the Royal Commission into Trade Union Governance and Corruption.²⁵ Timely and effective public enforcement serves as a deterrent to boycott activity and needs to exist both in regulatory culture and capability. The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law.

It would be useful for the ACCC to report the number of complaints it receives about different parts of the CCA, including secondary boycotts, and the manner in which the complaints are resolved.

Further, the Panel sees no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law.

Recommendation 36 — Secondary boycotts

The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.

Trading restrictions in industrial agreements

Section 45E of the CCA prohibits a person (an employer) from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. Section 45EA prohibits a person from giving effect to such a contract, arrangement or understanding. The Panel considers that sections 45E and 45EA are important provisions that protect trading freedoms.

²⁵ Heydon J. D., AC QC 2014, *Royal Commission into Trade Union Governance and Corruption Interim Report*, Volume 2, page 1106.

There appears to be a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and industrial agreements under the Fair Work Act. This issue has been brought into focus by the 2012 decision of the Full Court of the Federal Court, *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108.

It appears to be lawful under the *Fair Work Act 2009* to make awards and register enterprise agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services. The Panel considers it desirable that this apparent conflict be resolved.

The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, should they choose. Accordingly, the Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent they deal with the remuneration, conditions of employment, hours of work or working conditions of employees.

The Panel considers that the ACCC should be given the right to intervene in proceedings (i.e., to be notified, appear and be heard subject to time limits) before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. The ACCC and Fair Work Commission should establish a protocol to govern these arrangements.

Further, the present limitation in sections 45E and 45EA, such that the prohibition only applies to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation', to deal, should be removed, and the maximum penalty for breaches of these provisions should be in line with those for breaches of the rest of the competition law.

Recommendation 37 — Trading restrictions in industrial agreements

Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

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

These recommendations are reflected in the model provisions in Appendix A.

The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.

The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

For further detail on secondary boycotts, and trading restrictions in industrial agreements, see [Chapter 21](#).

3.14 EXEMPTION PROCESSES

The exemption processes of authorisation and notification included in the CCA are important. They recognise that, in certain circumstances, particular conduct may not harm competition or may give rise to public benefits that outweigh any competitive harm.

Like much of the CCA, the authorisation and notification procedures have become overly complex, which imposes costs on business. Wherever possible, the Panel supports removing unnecessary complexity.

Significant steps can be taken to simplify the authorisation and notification procedures. First, in respect of authorisation, it should be permissible to apply for authorisation of a business arrangement through a single application and without regard to the specific provisions of the CCA that might be contravened by the proposed conduct.

Second, for both authorisation and notification, the ACCC should be empowered to grant the exemption (other than in respect of the 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.

Each of these changes would assist in focusing the exemption process on the issues of substance and away from technicalities.

Recommendation 38 — Authorisation and notification

The authorisation and notification provisions in Part VII of the CCA should be simplified to:

- ensure that only a single authorisation application is required for a single business transaction or arrangement; and
- empower the ACCC to grant an exemption from sections 45, 46 (as proposed to be amended), 47 (if retained) and 50 if it is satisfied that the conduct would not be likely to substantially lessen competition or that the conduct would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.

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

The Panel also considers that the ACCC should be empowered to grant a block exemption in respect of specified conduct in particular market conditions. This would enable the ACCC to create 'safe harbours' for businesses where they engage in conduct that is unlikely to substantially lessen competition, and avoid the time and resources required to seek an authorisation or notification.

Recommendation 39 — Block exemption power

A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA.

This power would enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns, on the same basis as the test proposed by the Panel for authorisations and notifications (see Recommendation 38).

The ACCC should also maintain a public register of all block exemptions, including those no longer in force. The decision to issue a block exemption would be reviewable by the Australian Competition Tribunal.

The Panel's recommended form of block exemption power is reflected in the model legislative provisions in Appendix A.

For further detail on authorisation, notification and block exemption, see [Chapter 22](#).

3.15 ENFORCEMENT AND REMEDIES

The Panel supports the enforcement regime under the CCA, which confers both public and private enforcement rights in respect of the competition law.

In relation to public enforcement by the ACCC, there appears to be general approval of the severity of the sanctions for contravention of the competition law. However, the Panel agrees with the view of the ACCC that the current sanction for a corporation failing to comply with section 155 of the CCA is inadequate.

Compulsory evidence-gathering powers under section 155 of the CCA bolster the ACCC's ability to enforce the CCA. The Panel recommends that the fine a court may award for non-compliance with section 155 be increased to the same level as the fine for non-compliance with notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*. The ACCC should also be able to use section 155 to investigate possible contraventions of court-enforceable undertakings accepted by the ACCC under section 87B of the CCA.

Compulsory evidence-gathering powers can also impose a regulatory burden on recipients of compulsory notices. The Panel acknowledges concerns raised in submissions about the costs of compliance with section 155 notices issued by the ACCC. This is in part due to the increased use of technology leading to more electronic material being retained by businesses that may need to be searched in order to comply with a notice.

Means are available to reduce the regulatory burden associated with section 155 notices. First, the ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated. Secondly, in complying with a section 155 notice, the recipient should be required 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. That requirement could most effectively be introduced into the CCA by a statutory defence based on the criteria of a reasonable search.

Recommendation 40 — Section 155 notices

The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings.

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice.

The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*.

Private enforcement of the competition law is an important right. However, there are many regulatory and practical impediments to the exercise of such a right. It is important to find ways to reduce those impediments.

Section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be prima facie evidence against the corporation in another proceeding (typically a proceeding brought

by a private litigant). Many ACCC proceedings are resolved by a corporation making admissions of fact that establish the contravention, but it is uncertain whether section 83 applies to admissions as well as findings of fact.

The effectiveness of section 83 as a means of reducing the cost of private ‘follow-on’ proceedings would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, as well as findings of fact.

Concerns are expressed in submissions about the impact that extending section 83 to admissions of fact could have on the willingness of respondents to co-operate in cartel matters or settle matters with the ACCC, compromising the effectiveness of public enforcement of the CCA. The Panel doubts that this change to section 83 would materially alter the assessment by a respondent whether or not to settle an ACCC proceeding. Amongst other considerations, section 83 merely makes the admitted fact prima facie evidence of that fact in the follow-on proceeding. The respondent company remains free, should it so choose, to adduce evidence in the follow-on proceeding contrary to the admitted fact.

The proposed amendment to section 83 would remove doubt about its operation in the context of factual admissions and reduce the costs and risks of proceedings brought by persons who may have suffered loss and damage by reason of admitted contravening conduct.

Recommendation 41 — Private actions

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

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

In respect of contravening conduct that occurs overseas, a foreign corporation should be subject to Australian competition law regardless of whether it carries on business in Australia. Given that competition laws and policies are now commonplace around the world, there is no reason why private parties should have to seek ministerial consent before launching a proceeding that involves overseas conduct. This is addressed in Recommendation 26.

The Panel considers that small business needs greater assurance that competition complaints can be dealt with. Recommendation 53 deals with small business access to remedies.

For further detail on enforcement and remedies, see [Chapter 23](#).

3.16 NATIONAL ACCESS REGIME

The National Access Regime (contained in Part IIIA of the CCA) was originally established to enable third-party access to identified bottleneck infrastructure where it was apparent that economic efficiency would be enhanced by promoting competition in markets that were dependent upon access to that infrastructure.

The bottleneck infrastructure identified by the Hilmer Review included electricity wires, gas pipelines, telecommunication lines, freight rail networks, airports and ports. Distinct access regimes have emerged for these different types of infrastructure, reflecting their distinct physical, technical and economic characteristics. Those regimes appear to be achieving the original policy goals

identified by the Hilmer Review such that, today, Part IIIA plays only a limited role in regulating that bottleneck infrastructure.

However, the Panel acknowledges that Part IIIA continues to provide a legislative framework upon which industry-specific access regimes are based. Part IIIA is both a model and a ‘backstop’. Accordingly, Part IIIA has an indirect role in supporting many industry-specific access regimes, even though its direct role is only limited.

The Panel has been told of the potential need for future access regulation of airport and port infrastructure. However, imposing an access regime upon privately developed single-user infrastructure is more likely to be inefficient than efficient, and impede the competitiveness of Australian industry.

The Panel agrees with the conclusion of the recent Productivity Commission (PC) inquiry that the National Access Regime is likely to generate net benefits to the community, but that its scope should be confined to ensure its use is limited to the exceptional cases, where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.

In its report, the PC recommended the following changes to the declaration criteria in Part IIIA:

- that criterion (a) will be satisfied if access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market;
- that criterion (b) will be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility;
- as an alternative recommendation, that criterion (b) will be satisfied where it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- that criterion (f) will be satisfied if access on reasonable terms and conditions through declaration would promote the public interest.

The Panel agrees with the PC’s proposed change to criterion (a), but considers that criterion (a) sets too low a threshold for declaration. The burdens of access regulation should not be imposed on the operations of a facility unless access is expected to produce efficiency gains from competition that are significant. This requires that competition be increased in a market that is significant and that the increase in competition be substantial.

The Panel supports the PC’s alternative recommendation in respect of criterion (b). The alternative recommendation maintains the current language for criterion (b), while clarifying that duplication of the facility by the owner of the existing facility is not a relevant consideration.

As recently interpreted by the High Court in the Pilbara rail access case, criterion (b) asks a practical question whether it would be economically feasible, in other words profitable, for another facility to be developed — if it would, the facility is not a bottleneck. The Panel considers that maintaining the ‘economically feasible’ test for criterion (b) will best promote the competition policy objectives underpinning Part IIIA. Under that test, access regulation will only be considered where there is a bottleneck problem that needs to be addressed. Absent a bottleneck problem, competition and economic efficiency will be advanced if market participants are free to negotiate private arrangements concerning access.

The Panel considers that re-framing criterion (b) such that it requires an evaluation of whether a facility is a natural monopoly suffers from a number of shortcomings. These include that it can be trivially satisfied in the case of facilities that have been built with spare capacity and that it requires the decision-maker to evaluate least cost solutions in complex industries, burdened by information asymmetries where the risk of error is high.

The Panel supports the PC's recommendations in relation to criterion (f).

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high. The Panel favours empowering the Australian Competition Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

Recommendation 42 — National Access Regime

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

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

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

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

For further detail on the National Access Regime, see [Chapter 24](#).

4 INSTITUTIONS AND GOVERNANCE

4.1 A NATIONAL COMPETITION BODY

Several lessons may be drawn from Australia’s experience of implementing the National Competition Policy (NCP):

- All jurisdictions need to commit to the policy and its implementation.
- Oversight of progress should be independent and transparent to ‘hold governments to account’.
- The benefits of reform need to be argued and, where possible, measured.

Governance arrangements to implement reforms must be established in the context of Australia’s federal structure. Many of the competition policy reforms outlined in this Report are overseen by state and territory governments. Although the Reform of the Federation White Paper may recommend changes to the way responsibilities are allocated across the Federation, it is reasonable to presume that all levels of government will continue to have a role in implementing competition policy reforms.

All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed.

The Panel believes that reinvigorating competition policy requires leadership from an institution specifically constituted for the purpose. Leadership encompasses advocacy for competition policy, driving implementation of the decisions made and conducting independent, transparent reviews of progress.

The National Competition Council (NCC), which oversaw the NCP, now has a considerably diminished role. It has been put to the Panel that the NCC no longer has the capacity to provide leadership in this domain. Recommendation 50 proposes that the remaining functions of the NCC, associated with the National Access Regime, be transferred to a new national access and pricing regulator. The NCC could then be dissolved.

The Productivity Commission (PC) is the only existing body with the necessary credibility and expertise to undertake this function, given its role as an independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. But the PC’s work is driven by the Australian Government and, if it were to have the competition policy function as well, its legislation and governance would need significant change.

The Australian Energy Market Commission (AEMC) is an example of an independent, national organisation, operating in an area of state government responsibility that has a governance structure supported by the Australian Government and the States and Territories. This is achieved through the AEMC’s establishment under state legislation, which is then applied in other States and Territories and at the Commonwealth level. The national character of the organisation is further strengthened through the composition of the Commission itself, with state and territory Commissioners as well as a Commonwealth Commissioner.

The Panel considers that a new national competition body — the Australian Council for Competition Policy (ACCP) — should be established with a mandate to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP cannot be accountable to just one jurisdiction but must be accountable to them all. Similarly to the AEMC, it should be created by state and territory legislation applied by all participating jurisdictions. The ACCP should have a five-member board, consisting of two state and territory-nominated members and two members selected by the Australian Government, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories. The Chair should be appointed on a full-time basis and other members on a part-time basis.

Although members would be nominated and appointed by governments, their role should be to view competition policy from a national perspective and not to represent jurisdictional interests.

Recommendation 43 — Australian Council for Competition Policy — Establishment

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

The ACCP should be established under legislation by one State and then by application in all other States and Territories and at the Commonwealth level. It should be funded jointly by the Australian Government and the States and Territories.

The ACCP should have a five-member board, consisting of two members nominated by state and territory Treasurers and two members selected by the Australian Government Treasurer, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories combined. The Chair should be appointed on a full-time basis and other members on a part-time basis.

Funding should be shared by all jurisdictions, with half of the funding provided by the Australian Government and half by the States and Territories in proportion to their population size.

4.2 FUNCTIONS OF THE NATIONAL BODY

The ACCP should have a broad role. In particular, the ACCP should advise governments on how to adapt competition policy to changing circumstances facing consumers and business. The ACCP should therefore develop an understanding of the state of competition across the Australian economy and report on it regularly.

The Panel sees advocacy for competition as a central function of the ACCP. Too often this has fallen by default to the Australian Competition and Consumer Commission (ACCC), which can be an uneasy role for a regulator to fulfil.

The ACCP should also act as an independent assessor of progress on reform, holding governments at all levels to account. Priority areas for reform identified in this Report could form an initial program of work for the ACCP.

Recommendation 44 — Australian Council for Competition Policy — Role

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

- advocacy, education and promotion of collaboration 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 issues, regulatory reforms, procurement policies and proposed privatisations;
- undertaking research into competition policy developments in Australia and overseas; and
- ex-post evaluation of some merger decisions.

The effectiveness of the ACCP could be enhanced by assigning it a market studies function, which would create a consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues.

Given the potential for conflicts between the ACCC's investigation and enforcement responsibilities and the scope of a market studies function, the Panel believes it is appropriate to vest such a power with the ACCP rather than the ACCC.

The market studies function would have a competition policy focus and complement, but not duplicate, the work of other bodies, such as the PC. For example, States and Territories could request the ACCP to undertake market studies of the provision of human services in their jurisdiction, as part of implementing the principles of choice and diversity of providers set out in Recommendation 2.

The use of mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market but, on the other hand, may create an adversarial environment where participants show reluctance to co-operate and share information with the market studies body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research, with mandatory legal powers as a backstop — appears to achieve desired outcomes.

For further detail on the establishment and functions of the ACCP, see [Chapter 25](#).

Recommendation 45 — Market studies power

The Australian Council for Competition Policy (ACCP) 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 ACCP should have mandatory information-gathering powers to assist in its market studies function; however, these powers should be used sparingly.

The NCP recognised that different circumstances across the jurisdictions could lead to different approaches to either the scope or timing of reform. In agreeing with this approach, the Panel considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

This would ensure that each jurisdiction has the freedom to identify its own concerns, while allowing the ACCP the flexibility to consider whether those concerns have broader or cross-jurisdictional impacts.

In addition, the Panel considers that all market participants, including small business and regulators, should have the opportunity to raise issues they would like to see become the subject of market studies. Funding could be set aside in the ACCP budget to undertake studies in addition to those referred by governments. The decision would rest with the ACCP as to which of these outside requests it might take up, and it would not be obliged to agree to all requests.

To give the ACCP the capacity to focus on the priorities of governments and market participants, the Ministerial Council on Federal Financial Relations would need to oversee priorities and resourcing .

Recommendation 46 — Market studies requests

All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy (ACCP) 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 ACCP.

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

For further detail on market studies, see [Section 25.6](#).

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment.

This would provide more detail on the specific priority issues or markets that should receive greater attention. It could also include recommending review mechanisms, particularly for more heavily regulated markets, to ensure more burdensome or intrusive regulatory frameworks remain fit for purpose.

Commenting on best practice and international developments would provide opportunities for governments to consider whether the outcomes of different approaches to reform in other jurisdictions apply within their own.

Recommendation 47 — 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.

For further detail on competition analysis, see [Section 25.9](#).

4.3 COMPETITION PAYMENTS

The Panel heard widespread support for the competition payments made by the Australian Government to state and territory governments under the NCP to recognise that the Australian Government received a disproportionate share of the increased revenue flowing from NCP reforms.

Although the quantum of the payments was not large compared to total state and territory revenues, the Panel consistently heard that their existence provided an additional argument that could be used to support reform. However, the Panel was also told that their effectiveness was limited by not being applied to the Australian Government nor consistently to local government.

On the other hand, as noted by the PC, a focus on payments and penalties ‘has from time to time almost certainly misled the community as to the main rationale for reform ...’²⁶ This appears to underlie the observation, made by many stakeholders, that progress with competition policy reform waned once competition payments ceased.

That said, there is a case to be made that the benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Commonwealth and the States and Territories mean that revenue may not flow in proportion to reform effort.

The PC should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction. The ACCP could then assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

Recommendation 48 — Competition payments

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

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

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

For further detail on competition payments, see [Section 25.5](#).

4.4 COMPETITION AND CONSUMER REGULATOR

The Panel believes that enforcement of competition policy and enforcement of consumer protection matters are complementary and recommends both continue to be administered by one body.

Having a single body:

- fosters a pro-market culture;

²⁶ Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 152.

- facilitates co-ordination and depth across the functions;
- provides a source of consistent information to business and consumers about their rights; and
- provides administrative savings and skills enhancement through pooling information, skills and expertise.

A single body also ensures that the issues of small business are not overlooked, as could be the case if the competition and consumer functions were separated into different bodies.

However, the Panel notes that tensions can also arise between the two functions, so it is important that the ACCC continues to maintain an appropriate balance between its competition-related regulatory tasks and its role in protecting consumers.

Recommendation 49 — ACCC functions

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

For further detail on ACCC functions, see [Section 26.1](#)

4.5 ACCESS AND PRICING REGULATOR

The Panel accepts that the functions of competition, consumer protection and economic regulation have synergies that can assist the ACCC to perform its functions and allow it to develop both wide and deep skills in understanding the operation of markets.

However, the culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision.

The Panel therefore sees benefit in focusing the ACCC on its competition and consumer functions and separating out its current access and pricing functions into a separate, dedicated regulator. Amalgamating all Australian Government price regulatory functions into a single body will sharpen focus and strengthen analytical capacity in this important area of regulation.

The new body would subsume the access and pricing functions of the ACCC including: declaration and access arbitration functions under the telecommunications access regime in Part XIC of the *Competition and Consumer Act 2010* (CCA); price monitoring functions under the *Water Act 2007*; and access arbitration functions under the National Access Regime.

It would also include the functions of the Australian Energy Regulator (AER). The Panel notes strong support, especially in consultation with state governments, for energy regulation to be separated out from the ACCC. Including these functions in a new Access and Pricing Regulator would avoid the possibility of an industry-specific regulator being susceptible to 'capture' by the regulated industry. Therefore, the new body should not have responsibility for only one industry.

The proposed body would also take on the NCC's functions under the National Access Regime and under the National Gas Law, which would allow the NCC to be dissolved. This would result in the Access and Pricing Regulator undertaking both the declaration function under the National Access Regime and the current ACCC role in arbitrating the terms and conditions, where a facility is declared but terms and conditions are not able to be commercially negotiated.

The Panel does not foresee any conflict in a single regulator performing both functions and anticipates that there may be benefits. The Panel notes that, under the current telecommunications access regime (in Part XIC of the CCA), the ACCC performs both the declaration and arbitration functions.

The Access and Pricing Regulator could, over time, assume responsibility for other functions, if and when they were elevated into a national framework. For example, submissions propose the rail and water sectors as potential candidates for transfer, should States and Territories choose to do so.

Recommendation 50 — Access and Pricing Regulator

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

Other consumer protection and competition functions should remain with the ACCC. Price monitoring and surveillance functions should also be retained by the ACCC.

The Access and Pricing Regulator should be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) should be appointed on a part-time basis.

Decisions of the Access and Pricing Regulator should be subject to review by the Australian Competition Tribunal.

The Access and Pricing Regulator should be established with a view to it gaining further functions if other sectors are transferred to national regimes.

For further detail on functions of the proposed Access and Pricing Regulator, see [Chapter 27](#).

4.6 ACCC GOVERNANCE

The ACCC is established under the CCA as a statutory authority. It is governed by a Chairperson and other persons appointed as members of the Commission (usually called Commissioners). Decisions are made by the Chairperson and Commissioners meeting together (or as a division of the Commission), save where a power has been delegated to a member of the Commission. The Commission is assisted by its staff. The Chairperson and Commissioners are appointed on a full-time basis, resulting in their performing executive roles — although this isn't conferred by legislation.

The Panel considers that the ACCC is a well-regarded and effective body, but its performance would be strengthened by including a more diverse range of views and experience at the Commission level. This can be achieved by introducing part-time Commissioners whose commitments beyond the ACCC

— including, potentially, in business, consumer advocacy and academic roles — would broaden the Commission’s perspective. The part-time Commissioners would, of necessity, be non-executive members of the Commission, standing apart from the agency’s day-to-day operations.

The Panel recommends that half of the ACCC Commissioners be appointed on a part-time basis, that Deputy Chair positions be abolished and that the Chairperson be appointed on either a full-time or a part-time basis.

The Panel sees no need to continue sectoral Commissioner positions within the ACCC, noting that all Commissioners are required to exercise decision-making functions across the range of the ACCC’s operations. Furthermore, under section 7 of the CCA, the Minister is already required to consider whether nominees have knowledge of, or experience in, consumer protection and small business matters for all potential appointments to the Commission. The Panel feels this is sufficient to ensure appropriate consideration of sectoral interests in appointments.

The ACCC should report regularly to a broad-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics, to build profile and credibility for the agency as well as subjecting it to direct accountability to the Parliament.

Recommendation 51 — ACCC governance

Half of the ACCC Commissioners should be appointed on a part-time basis. This could occur as the terms of the current Commissioners expire, with every second vacancy filled with a part-time appointee. The Chair could be appointed on either a full-time or a part-time basis, and the positions of Deputy Chair should be abolished.

The Panel believes that current requirements in the CCA (paragraphs 7(3)(a) and 7(3)(b)) for experience and knowledge of small business and consumer protection, among other matters, to be considered by the Minister in making appointments to the Commission are sufficient to represent sectoral interests in ACCC decision-making.

Therefore, the Panel recommends that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

The ACCC should report regularly to a broad-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics.

For further detail on ACCC governance, see [Section 26.2](#).

Some submissions criticise the ACCC’s use of the media as undermining the perceived impartiality of the agency in undertaking enforcement action. Advocating for competition policy would become the responsibility of the new ACCP, if established, but the ACCC would continue to communicate with the public through the media, including explaining enforcement priorities, educating business about compliance, and publishing enforcement outcomes.

The Panel believes the ACCC should establish, publish and report against a Media Code of Conduct in line with the principles laid out in the Dawson Review. This should counter the perception of partiality on the part of the ACCC, especially in enforcement actions.

Recommendation 52 — Media Code of Conduct

The ACCC should establish, publish and report against a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law. The Code of Conduct should be developed with reference to the principles outlined in the 2003 *Review of the Competition Provisions of the Trade Practices Act*.

For further detail on ACCC and the media, see [Section 26.3](#).

5 SMALL BUSINESS

Small business makes a vital contribution to Australia's economy. The Panel has been especially mindful of the concerns and interests of small business in the context of the Review.

During the course of consultations, the Panel met in forums with more than 150 small businesses. These meetings supplemented written submissions made to the Review.

The issues raised in forums and submissions were broad-ranging, including: unequal bargaining power in dealing with larger businesses (including concerns about collective bargaining); the compliance burden of regulation; and difficulties in competing with (local) government-run enterprises, particularly where government is also the rule-maker.

This Report contains a number of recommendations that address these and other concerns of small business.

Specifically, the Panel proposes changes to strengthen the 'misuse of market power' provisions of the *Competition and Consumer Act 2010* (CCA) at Recommendation 30, and sets out its views on the unconscionable conduct provisions in [Section 19.3](#). We also consider other issues affecting small business, such as standards (see Recommendation 11), licensing, planning and zoning (see Recommendation 9) and competitive neutrality (see Recommendations 15 - 17) elsewhere in this Report.

In this chapter, we consider access to remedies, collective bargaining and industry codes.

5.1 ACCESS TO REMEDIES

Submissions express concern that, for various reasons including resource priorities, the Australian Competition and Consumer Commission (ACCC) is unable to pursue all small business complaints. They further submit that small businesses either lack the time and financial resources to take action themselves or are concerned about the impact this might have on their ongoing business relationships.

The Panel notes the report of the Productivity Commission's (PC's) review of *Access to Justice Arrangements*, establishment of the Small Business and Family Enterprise Ombudsman, and the current proposal to extend unfair contract terms to small business contracts.

The Panel considers that small businesses need greater assurance that competition complaints can be dealt with. Understandably, the ACCC is not able to take proceedings in respect of all complaints brought to it. However, the ACCC should place some priority on its response to small business complaints concerning the competition law.

If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, the ACCC must communicate clearly and promptly its reasons for not acting and direct the complainant to alternative dispute resolution schemes.

Where the ACCC considers a complaint has merit but is not a priority for public enforcement, it should take a more active role in connecting small business with dispute resolution schemes. The ACCC should also test the law on a regular basis to assure small business that the law is being enforced.

The Panel supports submissions' positive comments about the efficacy of the various state and Commonwealth small business commissioners, small business offices and ombudsmen services and does not consider that a separate tribunal is warranted to deal specifically with competition issues.

The Panel also endorses a number of recommendations contained in the PC's *Access to Justice Arrangements* report.

The Panel considers that, as implementation of a number of small business related recommendations do not require legislative change, consultation on these changes could commence following agreement by the Australian Government.

Recommendation 53 — Small business access to remedies

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

Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

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

Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

The Panel endorses the following recommendations from the Productivity Commission's *Access to Justice Arrangements* report:

- Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;
- Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;
- Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;
- Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and
- Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.²⁷

For further detail on small business access to remedies, see [Chapter 23](#)

²⁷ Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.

5.2 COLLECTIVE BARGAINING

Submissions broadly support the exemption process for collective bargaining by small business, which is designed to recognise unequal bargaining power between parties to a business transaction. The process of exemption through notification should be capable of addressing a number of the issues raised by small businesses in their dealings with big businesses.

However, the provisions are not being used as frequently as they might. Various improvements could be made, including increasing the flexibility of collective bargaining and improving the framework as it relates to collective boycott activities. For example, one change is to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed.

Raising awareness of these provisions, including but not limited to raising awareness of co-operatives, will promote their use and potentially strengthen the bargaining position of small businesses dealing with large businesses.

Recommendation 54 — Collective bargaining

The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business.

Reform should include allowing:

- the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members;
- the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- different timeframes for different collective bargaining notifications, based on the circumstances of each application.

Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public.

The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions.

The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.

For further detail on collective bargaining, see [Section 22.2](#).

5.3 INDUSTRY CODES

Codes of conduct play an important role under the CCA by providing a flexible regulatory framework to set norms of behaviour. Codes of conduct complement the provisions of the CCA and generally apply to relationships between businesses within a particular industry. Codes also provide a mechanism to implement industry-specific dispute resolution frameworks.

The Panel notes that the CCA was recently amended to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes. The first code to incorporate the new civil penalties is the new Franchising Code of Conduct, which took effect from 1 January 2015.²⁸ Experience with administering these new provisions is needed before determining whether they should be applied more broadly.

For further detail on industry codes, see [Section 19.4](#).

5.4 COMPETITIVE NEUTRALITY

For many small businesses, competitive neutrality persists as an area of concern. Governments often have an undue advantage when they compete with small businesses, enabling them to penetrate markets more deeply and charge artificially lower prices than private sector competitors.

The Panel considers that transparency of current competitive neutrality arrangements should be improved and obligations on governments not to breach competitive neutrality principles should be strengthened. The Panel makes three recommendations in this regard (see Recommendations 15-17).

For further detail on competitive neutrality, see [Chapter 13](#).

5.5 REGULATORY RESTRICTIONS

The ability of small businesses to compete will also be enhanced by a number of the Panel's recommendations to remove regulatory restrictions.

In particular, the Panel notes that recommendations concerning planning and zoning and a review of regulatory restrictions will assist small business (see Recommendations 8, 9 and 11).

For further detail on regulatory restrictions, see [Chapter 10](#).

28 Australian Competition and Consumer Commission 2015, *New powers for ACCC will strengthen franchising industry*, media release, 21 January, Sydney.

6 RETAIL MARKETS

Competition in retail markets has been an important focus for submissions and the Review. This includes issues relating to how competition is operating in grocery and fuel retailing, regulations on planning, zoning and trading hours, and specific regulations, such as those affecting pharmacy and liquor retailing.

Some of these issues are dealt with elsewhere in this Report, which includes specific recommendations on planning and zoning (see Recommendation 9) and pharmacy (see Recommendation 14). Retail liquor licensing should be reviewed as part of the general process of regulatory review (see Recommendation 8).

6.1 SUPERMARKETS

A large number of submissions raise issues relating to supermarkets. However, on further investigation, most turn out to concern policy and legal issues that apply more broadly than just to supermarkets. Accordingly, many of the Panel's recommendations to deal with these broader issues also apply to supermarkets.

Some small supermarkets allege that the major supermarkets chains misuse their market power, including through 'predatory capacity' and targeting particular retailers. Suppliers also raise concerns about misuse of market power and unconscionable conduct by the major chains.

The Panel cannot adjudicate instances where breaches of the *Competition and Consumer Act 2010* (CCA) are alleged to have occurred but notes that the CCA generally prohibits conduct that harms the competitive process, not individual competitors.

The Panel recommends strengthening the misuse of market power provisions of the CCA at Recommendation 30. The current unconscionable conduct provisions appear to be working as intended to meet their policy goals, but active and ongoing review of these provisions should occur as matters progress before the courts. In this context, the Panel notes that in December 2014 the Federal Court, by consent, made declarations that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers in the supermarket sector.²⁹

Introducing a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently. The Panel notes that the Australian Government has announced a Food and Grocery Code of Conduct, covering grocery suppliers and binding those retailers and wholesalers that agree to sign on to the Code.³⁰

Removing barriers to entry and other regulatory barriers would strengthen competition in the supermarket sector. Planning and zoning restrictions are limiting the growth of new entrants such as ALDI and, as the ACCC has identified, more broadly affect the ability of independent supermarkets to

29 [Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd \[2014\] FCA 1405 \(22 December 2014\)](#)

30 Billson, B (Minister for Small Business) 2015, [Grocery Code to improve relationships between retailers, wholesalers and suppliers](#), media release 2 March, Canberra.

compete. The Panel recommends changes to address concerns about planning and zoning rules (see Recommendation 9).

Trading hours restrictions and restrictions preventing supermarkets from selling liquor impede competition. The Panel recommends that restrictions preventing supermarkets from selling liquor be reviewed as part of a new round of regulation reviews (see Recommendation 8) and that retail trading hours be deregulated (see Recommendation 12).

Supermarket operation has undergone a number of structural changes, including: greater vertical integration and use of 'home brands'; an increase in the range and categories of goods sold within supermarkets; and greater participation by supermarket operators in other sectors.

Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of other parties. The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community.

While the Panel is sensitive to these concerns, they do not of themselves raise issues for competition policy or law.

For further detail on supermarkets, see [Section 15.1](#).

6.2 FUEL RETAILING

The Panel makes no specific recommendations in relation to fuel retailing, although a number of recommendations are relevant to submissions made in that context.

Petrol discount shopper dockets are a source of considerable concern, particularly for small competitors in the context of grocery and fuel markets. These discounts were up to 45 cents per litre³¹ but are now limited to 4 cents per litre through undertakings to the ACCC.³²

The Panel is not persuaded that consumers are made worse off by, rather than benefitting from, the availability of discounts at their current levels. The Panel notes the undertakings accepted by the ACCC. Further, the Panel recommends changes to the misuse of market power provisions of the CCA (see Recommendation 30), which should assist if future competition concerns emerge in this context.

Stakeholders express concerns that prices are higher in certain regional areas. On the information before it, the Panel does not consider that differences in pricing between regions are explained by any clear shortcoming in the competition law or policy. The Panel notes the 17 December 2014 Direction from the Minister for Small Business to the ACCC issued under the prices surveillance provisions of the CCA to monitor 'prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia for three years'.³³ This will provide further information to assist in assessing any competition concerns in the sector, including in regional areas.

The Panel expresses no view as to the effect the Informed Sources pricing information sharing service has on competition. More generally, the Panel recommends that section 45 of the CCA be extended

31 Sims, R 2013 *Thoughts on market concentration issues* speech to the Australian Food and Grocery Council Industry Leaders Forum, Canberra, 30 October.

32 Australian Competition and Consumer Commission 2013, *Coles and Woolworths undertake to cease supermarket subsidised fuel discounts*, media release 6 December, Canberra.

33 Explanatory Statement, *Competition and Consumer Act 2010 — Monitoring of the Prices, Costs and Profits Relating to the Supply of Unleaded Petroleum Products in the Petroleum Industry in Australia (09/12/2014)*.

to cover concerted practices which have the purpose, effect or likely effect of substantially lessening competition.

Submissions raise concerns about the New South Wales Government mandate requiring that a certain proportion of petrol sold in that State contain ethanol. The Panel considers that this mandate should be reviewed as part of the proposed new round of regulation review (see Recommendation 8), and repealed unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the policy can only be achieved by restricting competition.

In relation to the regulation of petrol price display boards, the Panel considers that the case for wider regulation to require the undiscounted price (only) to be displayed has not been made. The Panel notes that differences in regulations across jurisdictions create a 'natural experiment', which will provide evidence to assist Ministers in determining whether these regulations have any effect on competition and whether they are in the public interest.

In relation to proposals to introduce a national scheme based on Fuelwatch in Western Australia, the Panel considers that further evidence, both of a problem needing to be addressed and of the benefits and costs of addressing it in this way, would be necessary before making any decision to proceed.

For further detail on fuel retailing, see [Section 15.2](#).

7 IMPLEMENTATION

Reforming Australia's competition policy, laws and institutions represents an ambitious agenda, which will require action by all levels of government. Although some recommendations can be implemented by jurisdictions acting independently, the Panel believes outcomes will be enhanced through co-operation between governments. Competition reform will have economy-wide impacts and therefore merits national action.

To commence consideration of a national competition reform agenda, this Report should be discussed with state and territory governments as soon as practicable. This will allow all governments to make considered responses, including identifying aspects of the agenda where they see value in collaboration.

Recommendation 55 — Implementation

The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.

Recommendation 48 is that the Productivity Commission (PC) be tasked with modelling the revenue effects in each jurisdiction of reforms agreed by governments in the wake of this Review. However, prior to that modelling exercise, the Panel believes that governments would benefit from modelling the economic effects of the recommendations in this Review. This modelling will assist governments in determining the gains from proposals and the prioritisation of reforms.

Recommendation 56 — Economic modelling

The Productivity Commission should be tasked with modelling the recommendations of this Review as a package (in consultation with jurisdictions) to support discussions on policy proposals to pursue.

A 'road map' in [Section 29.3](#) illustrates recommendations that can be implemented by different levels of government. For further detail on implementation see [Part 6](#).

