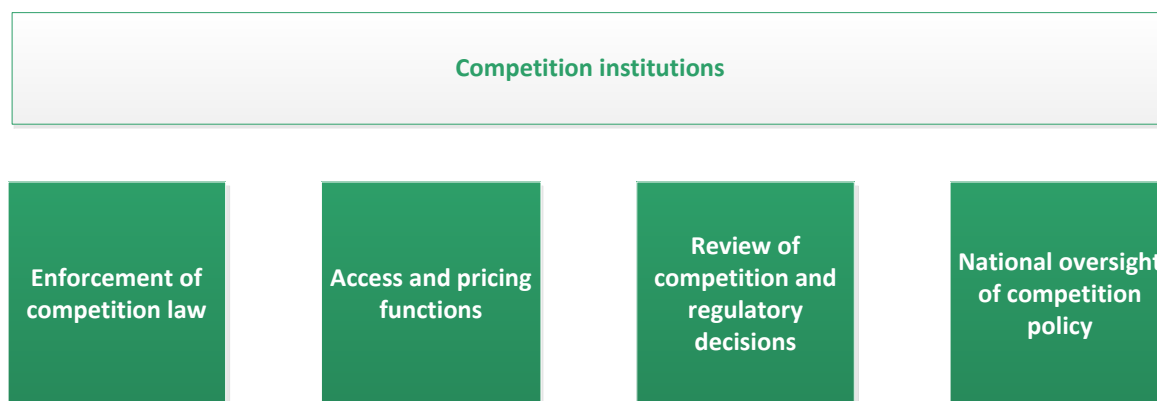


PART 5 — COMPETITION INSTITUTIONS

This Part asks whether our current competition institutions are fit for purpose to operate in the long-term interests of consumers. We also identify the best institutional structure to take forward future reforms to competition policy.

The institutions that currently oversee the competition framework undertake four broad functions.



At the Commonwealth level, competition policy is implemented through the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC), the Australian Competition Tribunal (the Tribunal) and the Federal Court of Australia. In addition, state and territory regulators such as the New South Wales Independent Pricing and Regulatory Tribunal (IPART) implement aspects of competition policy.

Under National Competition Policy (NCP), a range of new regulatory institutions were created. For example, the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) were created to perform functions under a legislative framework focused on the long-term interests of consumers.

The Panel has considered the institutional arrangements that will be needed to implement the reform agenda flowing out of this Review. We identify important factors for the success of a future competition institution, including the need for a national approach, with 'buy in' from all Australian governments, and the ability of the institution to provide independent advice on competition policy.

25 INSTITUTIONAL STRUCTURES FOR FUTURE COMPETITION POLICY

25.1 STRONG INSTITUTIONS TO SUSTAIN REFORM

The Panel believes that effective reform is unlikely to occur without an appropriate institutional regime to support it. The need for leadership in competition policy reform was recognised in the intergovernmental agreements giving effect to National Competition Policy (NCP), but momentum has since flagged. In particular, the National Competition Council's (NCC) role has diminished as reforms agreed two decades ago are finalised or put aside unfinished.

The Panel believes that strong leadership will be required to progress a new round of competition reform and that the multi-jurisdictional nature of reform calls for a body able to represent all jurisdictions. The Panel identifies a number of dimensions to the required leadership, including advocacy, holding governments to account and regularly analysing the state of competition, and assesses whether an existing institution could perform all of these various functions.

25.2 LESSONS FROM NCP

The NCP reforms adopted by the Australian Government and state and territory governments in 1995 went beyond amendments to the *Competition and Consumer Act 2010* (CCA) (then the *Trade Practices Act 1974* (TPA)). They included:

- reforms to public monopolies and other government businesses, including structural reforms and competitive neutrality requirements;
- a national access regime to provide third-party access to essential infrastructure; and
- a legislation review program to assess whether regulatory restrictions on competition are in the public interest.

This was an economy-wide reform agenda with a national focus. It required action from the Australian Government and state and territory governments, at times in concert (for example, the creation of a national energy market) but more frequently requiring individual governments to make or amend their own laws (for example, the legislation review program and structural reforms to public monopolies).

To reflect this national, economy-wide focus, the intergovernmental agreements between the Australian Government and the state and territory governments that underpinned NCP contained a number of governance arrangements, including:

- agreeing to a set of competition principles, with each jurisdiction determining its own priorities and undertaking its own legislation review program;
- establishing the NCC to prepare public assessments of the performance of all governments in meeting their NCP commitments and advise the Australian Government Treasurer on competition payments to the States and Territories — the NCC also provides recommendations to Australian Government and state and territory Ministers in relation to third-party access to infrastructure; and

- the Australian Government making competition payments to the States and Territories in recognition that the Australian Government would gain more revenue than the States and Territories from the reforms.⁷⁴⁶

As the Productivity Commission (PC) noted in its 2005 *Review of National Competition Policy Reforms*:

Distinguishing features of NCP were its national focus, extensive agenda, agreed framework of reform principles, commitments to timeframes, with contingent financial payments from the Australian Government to the States and Territories.⁷⁴⁷

A number of submissions state that an explicit institutional framework will again be necessary to progress the competition policy agenda (see for example, the Business Council of Australia (BCA), sub, Summary Report, page 26 and New South Wales Government, sub, page 10).

The Panel agrees that establishing institutional arrangements to implement the reform agenda coming out of this Review will be crucial to reinvigorating competition policy. The views put to the Panel are in general agreement that the lessons from NCP demonstrate the importance of an institutional framework to deliver competition policy reform.

25.3 A NATIONAL APPROACH TO COMPETITION POLICY

Submissions from businesses, consumers and governments argue that the national, intergovernmental approach adopted under NCP must be reinvigorated and that this requires an institutional competition policy advisor.

But, importantly, the national approach under NCP provided each jurisdiction with flexibility to determine its priorities consistent with the agreed competition policy principles.

The issues highlighted in this Report fall under the responsibility of all three levels of government: Commonwealth, state and territory and local government. There are also a number of areas that will require a cross-jurisdictional approach.

But the starting point for reform will be different across jurisdictions. Progress under NCP varied depending on the different structural features of the state and territory economies and different cultural and social priorities. This was reflected both in the issues that the jurisdictions sought to prioritise and their level of progress in achieving outcomes. These differences will also affect the priorities that the jurisdictions seek to pursue in future.

Successful competition policy reform will require commitment and effort from all three levels of government. Although the Australian Government may have a leadership role in addition to taking action in its own sphere, leadership will also be required from the States and Territories and local governments. As the Reform of the Federation White Paper: Issues Paper 3 points out, 'National interest does not mean Commonwealth interest'.⁷⁴⁸

⁷⁴⁶ The last competition payments to the States and Territories were made in 2005-06. Since then, the role of the NCC has been limited to making recommendations on third-party access to infrastructure.

⁷⁴⁷ Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 127.

⁷⁴⁸ Australian Government 2014, *Reform of the Federation White Paper: Issues Paper 3: Roles and Responsibilities in Health*, Canberra, page 30.

25.4 INDEPENDENT COMPETITION POLICY ADVICE

The NCC's independence is seen as an important contributor to the success of NCP and identified as an equally important component of any institutional arrangements put in place to support future competition policy.

Submissions argue for a broad role to be performed by such a body. The New South Wales Government sets out a number of roles for an independent body:

- independent monitoring of progress in implementing reforms;
- periodically identifying areas for competition reform across all levels of government;
- making recommendations to governments on areas of reform; and
- playing an advocacy role (sub, pages 10-11).

All submissions made on this issue stress the need for independence: that the functions, irrespective of whether they are performed by existing bodies or by a specially created one, be separate from the policy and/or regulatory bodies that would carry out or regulate the specific reforms.

The Panel also considers that transparency is as important as independence. Transparency ensures that decisions and processes are open to public scrutiny. The PC discusses some of the benefits of a transparent process, including that it can aid public understanding of the benefits of reform:

A properly constructed, transparent review process can generate stakeholder engagement and promote public awareness and acceptance of the need for reform, the issues and trade-offs associated with different policy approaches, and the resultant community wide benefits. (sub, page 10)

Drawing on its past experience in implementing NCP, the NCC notes that assessment and accountability processes, including transparency, were one of three main elements behind the NCP's success (sub, page 7).

Given the wide-ranging potential impacts of competition policy on both consumers and businesses, advocacy, education, and independent and transparent oversight of implementation will be important in helping governments meet targets, encouraging public understanding and engagement, and guarding against bias.

The NCC, as a national body, played a vital role as part of NCP. However, as noted in [Chapter 10](#), the review and reform of legislation that may impede competition stalled following the conclusion of the NCC's role in reviewing legislation. The NCC now retains only a limited role in relation to advising ministers on infrastructure and gas access matters. It has not maintained the capacity to readily step into a broader role again.

25.5 COMPETITION PAYMENTS

Under the NCP, the Australian Government made competition payments to state and territory governments to recognise that the Australian Government received a disproportionate share of increased revenue from the larger national income resulting from NCP. This was highlighted in an analysis of NCP undertaken by the PC (then the Industry Commission) that estimated the potential gains from NCP and how it would be reflected in increased revenue at both the Australian

Government and state and territory government levels.⁷⁴⁹ The payments were made, or withheld, by the Australian Government Treasurer following advice from the NCC.

The New South Wales Government comments that vertical fiscal imbalance:

... means that the Commonwealth would receive the largest revenue benefit from the economic growth arising from competition-enhancing reforms (via the increase in tax revenue), though for many types of reform, the expense associated with undertaking reform is largely borne by State governments. (sub, page 12)

Over the course of the NCP from 1997-98 to 2005-06, \$5.3 billion was paid to the States and Territories and \$200 million was withheld.

A common theme in the Panel's meetings with representatives of the States and Territories was that competition payments contributed positively to their ability to implement reform. Although the quantum of the payments was not large compared to total state and territory revenues, representatives consistently argued that the payments provided an additional argument that could be used to support reform. In particular, it was put to the Panel that the possibility of payments being withheld was important to maintain support in the face of opposition to reform.

The NCC's assessment of competition payments is that they:

... in several cases stiffened governments' resolve to undertake reform. Fiscal penalties, in particular, focused attention on failed or excessively delayed reforms. (sub, page 8)

The message from all those making submissions to the Panel on the issue of competition payments is that they assisted governments in delivering their reform agendas. However, their effectiveness across the NCP agenda was limited by not applying to the Australian Government and not consistently being applied to local government.

At times, they also distorted the public message around the need for reform, creating a focus on withholding payments rather than the benefits that would flow from reform. This appears to underlie the position of many stakeholders that progress with competition policy reform waned when the competition payments ceased. Discerning whether this is the case is complicated by the introduction of the Seamless National Economy reform agreement that followed NCP. Although this also included incentive payments, it was overshadowed by the much larger changes in funding for human services.

A number of submissions call for competition payments to be a feature of any future institutional framework to recognise the potentially uneven distribution of reform effort and reward. In the Draft Report, the Panel recommended that competition payments form part of the reform process. Most submissions to the Draft Report that discussed competition payments supported the idea of payments.⁷⁵⁰

749 Industry Commission 1995, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, Canberra.

750 See, for example: ACCC, DR sub, page 88; ACCI, DR sub, page 11; Australian Industry Group, DR sub, page 28; Australian Local Government Association, DR sub, page 3; Australian Motor Industry Federation, DR sub, page 14; Australian National Retailers Association, DR sub, page 14; Australian Newsagents' Federation, DR sub, page 23; Law Council of Australia — SME Committee, DR sub, page 24; National Competition Council, DR sub, page 11; National Farmers' Federation, DR sub, page 16; New South Wales Government, DR sub, page 8; South Australian Government, DR sub, page 22; Spier Consulting Legal, DR sub, page 24; Western Australia Local Government Association, DR sub, page 10; and Woolworths Limited, DR sub, page 24.

The NCC notes:

Based on its experience under the NCP, the Council considers that the inclusion of a type of 'reform payment' for achievement of reform objectives is desirable and the application of these payments to the Commonwealth is a worthwhile extension. (DR sub, page 11)

The New South Wales Government notes:

As the Panel has acknowledged [in its Draft Report], competition payments play a critical enabling role in this institutional framework by encouraging jurisdictions to undertake important reforms where they may otherwise face disincentives from unilateral action. Competition payments are critical as they:

- Redress the misalignment between reform costs and benefits...
- Contribute to the implementation costs of reform that are borne by the States, which are typically upfront while the benefits accrue over time...
- Assist in securing national reform where the benefits of reform are not shared evenly between the States. (DR sub, page 8)

The South Australian Government agrees:

... there is merit in the Commonwealth Government making competition payments to the States and Territories for genuine productivity enhancing reforms...[but there] is the possibility that slow reforming states would benefit from competition payments at the expense of states that have been early adopters of reforms. (DR sub, page 22)

The BCA also argues:

A proposed new incentive model is for a new intergovernmental agreement to be structured essentially as a joint venture where all jurisdictions contribute to the cost of reforms but all share more evenly in the fiscal benefits through productivity payments. (sub, Main Report, page 106)

The focus on sharing benefits was a crucial feature of the NCP payments, which should be reinstated in any future arrangements. The payments should not be misrepresented as an 'incentive' or a 'bribe' for the States and Territories (and local government) to undertake reform. Such an approach has the potential to direct the focus away from the benefits of reform.

However, as with the NCP reforms, the benefits of reform will not necessarily flow in proportion to the effort expended in pursuing and implementing reform. It is therefore reasonable to facilitate a process to rebalance any such revenue effects.

The PC's argument (sub, page 24) that any effects of vertical fiscal imbalance are better addressed directly than remediated through a competition policy payments process is laudable. However, the Panel wants to avoid vertical fiscal imbalance acting as a barrier to a set of reforms that have the potential to significantly enhance the long-term interests of consumers.

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 economic activity and on revenue in each jurisdiction. Payment of any compensation would be contingent on an independent assessment of whether reforms had been undertaken to a sufficient standard. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

25.6 MARKET STUDIES

The competition laws serve an important purpose in discouraging anti-competitive behaviour. However, there are occasions where competition concerns arise within a market that do not fall within the bounds of the law. In these cases, a comprehensive review of the market can help policymakers better understand the competitive landscape and determine whether policy changes are needed.

A market study is one means through which policymakers can delve deeper into the workings of a market in an effort to identify changes that would lead to more competitive outcomes. In its guidance on market studies, the former UK Office of Fair Trading noted that market studies are:

... examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour...

As well as taking a look at particular markets, market studies can relate to practices across a range of goods and services, for example, doorstep selling.⁷⁵¹

In addition to observing businesses operating in a market, market studies can play an important role in examining the role of government. The former UK Office of Fair Trading also noted:

As well as investigating adverse effects on competition caused by business and consumer behaviour, market studies can also examine restrictions on competition that can arise through Government regulation or public policy.

...

As government regulation and policy are not typically susceptible to enforcement action, market studies can be the best response to concerns regarding markets where public restrictions may be distorting a market or chilling competition.⁷⁵²

The absence of a formal market studies power in Australia is generally in contrast with other comparable economies. When looking at overseas comparisons, it is possible to make some generalisations:

- Market studies are most often undertaken by the competition regulator, as a complement to its broader competition enforcement and education priorities.
- Most market studies bodies possess mandatory information-gathering powers — there will usually be policies about how the information collected as part of a market study will be used.
- Most market studies are published, allowing for a broader public discussion of the policy and recommendations relating to the market in question.
- A common outcome of market studies is recommendations for changes to legislation or government policies — as is the case with PC inquiry recommendations and state and territory regulator recommendations.

Submissions generally support introducing a market studies power,⁷⁵³ however, the Panel heard differing views as to whether the ACCC or a different body is best placed to undertake market

751 Office of Fair Trading 2010, *Market Studies: Guidance on the OFT Approach*, London, page 2.

752 Ibid., pages 2-4.

studies. Some submitters, including the ACCC (DR sub, page 88), CHOICE (DR sub, page 34), the Consumer Action Law Centre (DR sub, page 21) and the Australian Communications Consumer Action Network (DR sub, page 6) favour vesting market studies powers with the ACCC.

Reflecting overseas experience, the ACCC notes that it would like the ability to initiate market studies for various reasons:

- as a lead-in to competition or consumer protection enforcement action when anti-competitive behaviour is suspected in a sector but the exact nature and source of the problem is unknown;
- to identify a systemic market failure (instead of ad hoc compliance action against individual firms) and to better target a response (whether, for example, [through] enforcement action or compliance education);
- to identify market problems where affected parties are disadvantaged and either have difficulty making a complaint to the ACCC or accessing the legal system to take private action;
- to address public interest or concern about markets not functioning in a competitive way; the market study could either confirm such concerns, and propose some solutions, or reveal them to be unfounded; or
- to fact-find to enhance the ACCC's knowledge of a specific market or sector, particularly where a market is rapidly changing, and raises issues across the ACCC's functions. (sub 1, page 138)

CHOICE's submission points out 'The international experience overwhelmingly supports aligning market studies with the ACCC' (DR sub, page 34), while the ACCC adds:

A 2003 OECD report found that close to all of the respondent competition authorities conducted general sector investigations or economic studies; a 2012 ICN [International Competition Network] report found that 40 ICN member authorities were using market studies. The performance by the ACCC of a market study function should therefore not be regarded as an unusual suggestion; rather it is a mainstream one. (DR sub, page 91)

Although the market studies function resides with the competition regulator in some countries, the Panel believes that this approach may lead to conflicts between policy and regulation/enforcement functions. As the Monash Business Policy Forum states, 'separation of policy design and implementation is key to effective regulatory agencies ... regulators should be explicitly excluded from policy development' (sub, pages 13 and 17).

Submissions to the Draft Report also recognise potential conflicts of interest. For example, Spier Consulting Legal notes, 'There are potential issues of conflict of roles of the ACCC and [a market study function] diverts the ACCC from its core roles' (DR sub, page 23), while Australian Industry Group submits that it 'understands and supports the separation of Government policy formulation from Government policy implementation, as a general principle of good policy governance' (DR sub, page 26).

753 See, for example: Australian Chamber of Commerce and Industry, DR sub, page 17; Australian Newsagents' Federation, DR sub, page 22; Consumer Action Law Centre, DR sub, page 21; Australian Communications Consumer Action Network, DR sub, page 6; Peter Mair, DR sub, page 1; Australian Automotive Aftermarket Association, DR sub, page 18; Spier Consulting Legal, DR sub, page 23; National Farmers' Federation, DR sub, page 16; Law Council of Australia — SME Committee, DR sub, page 23; Law Council of Australia— Competition and Consumer Committee, DR sub, page 29; and Retail Guild of Australia, DR sub, page 7.

The Panel favours an approach to market studies that is clearly separate from the enforcement function. The market studies function would therefore be separate from the necessarily adversarial nature of enforcement under the CCA. It would seek instead to focus on understanding the range of factors — government or otherwise — that shape the level of competition in a market.

A market study should consider the framework, structure and rules that govern a market. This is broader than issues relating to the CCA and could include advice to governments on issues relating to market stewardship and procurement policies. Recommendations could be made to implement changes in any of these areas, either through changes to regulation that directly determine the shape of the market or to regulation that has the unintended consequence of reducing competition in the market; for example, by affecting entry into or exit from the market.

A market study is not necessarily a precursor to enforcement action. Rather, where there are conduct concerns, the market studies body could refer its concerns to the ACCC for appropriate investigation.

Australia has no dedicated market studies body to examine the competitive dynamics of particular markets in a systematic way. Currently, inquiries into these issues are conducted on an ad hoc basis by, for example, the ACCC, the PC or state and territory regulators, but none of these bodies is specifically designed to conduct market studies.

The ACCC's submission notes its role in market studies:

The ACCC currently has some scope to conduct market studies. Under section 28 of the CCA, the ACCC has functions in relation to dissemination of information, law reform and research although the information gathering powers set out in the CCA do not apply to this section. Under Part VIIA of the CCA, the Minister may require the ACCC or another body to hold a price inquiry. The ACCC may also hold such inquiries with the Minister's approval. (sub 1, page 139)

The Panel notes that the ACCC will continue to investigate particular markets as part of its routine assessments. However, allowing the ACCC to conduct formal market studies as described here could encourage the perception that such studies are a precursor to enforcement action. The Panel is keen to avoid creating such a perception.

The usefulness of a market study will depend on the information acquired. Most market studies bodies in other jurisdictions have mandatory information-gathering powers. The rationale for mandatory powers is that they help to ensure that a market study builds an accurate picture of the market.

However, mandatory information-gathering powers are a significant legal imposition and there is a presumption that they should be used sparingly.

The PC has information-gathering powers in relation to its inquiries under section 48 of the *Productivity Commission Act 1998* but generally chooses not to use them, relying instead on information voluntarily submitted by interested parties. That said, the ability of the PC to draw upon these powers if required may act as an incentive for parties to provide information voluntarily.

Submissions are generally in favour of a market studies body having access to information-gathering powers, but note that these powers should be used judiciously. For example, the BCA submits, 'Information gathering should be voluntary in the first instance, with any subsequent use of mandatory powers subject to a test of reasonableness' (DR sub, page 4), while the Australian Chamber of Commerce and Industry (ACCI) states, 'ACCI also supports the [proposed Australian

Council for Competition Policy] being granted similar data collection powers to those granted to the Productivity Commission’ (DR sub, page 17) and the Consumer Action Law Centre notes that information-gathering powers have proved useful in competition investigations (DR sub, page 21).

The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research, while having the power to compel production of information — appears to achieve desired outcomes.

Outcomes of studies

The former UK Office of Fair Trading guidance material notes that options available at the conclusion of its market studies include:

- improving the quality and accessibility of information for consumers;
- encouraging businesses in the market to self-regulate;
- making recommendations to the Government to change regulations or public policy;
- taking competition or consumer enforcement action; or
- making a market investigation reference to the relevant authority.⁷⁵⁴

Importantly, findings and recommendations presented to government allow the market studies body to dispel myths about the market and determine the effects on consumers without limiting the reform options for government. Ultimately, this provides government with valuable information about the nature and extent of any problems but leaves maximum flexibility for policy responses.

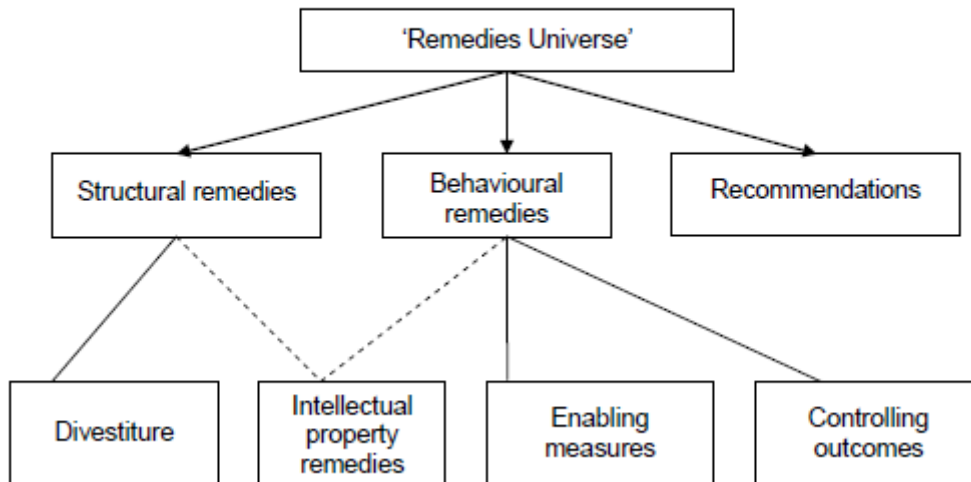
The Panel notes an important distinction between market studies and market investigations as undertaken in the UK. Although market studies generally result in recommendations and/or findings, market investigations go a step further by allowing the market investigation body to impose a wide range of legally enforceable remedies.

The former UK Competition Commission guidelines provide an overview of the possible outcomes from a market investigation:⁷⁵⁵

754 Office of Fair Trading 2010, *Market Studies: Guidance on the OFT Approach*, London, page 3.

755 Competition Commission 2013, *Guidelines for market investigations: Their role, procedures, assessment and remedies*, London, page 79.

Overview of the universe of possible remedies



CHOICE’s submission supports an additional market investigations function (sub, page 56). However, the ACCC disagrees, noting that it does not support the ability of a market investigations body to impose legally enforceable remedies (sub 1, page 139). The Panel believes the ACCC’s view is preferable, as it is consistent with Australia’s Constitution, which gives the Australian Parliament the power to make laws and the judiciary the power to impose remedies.

A wide range of parties may be interested in commissioning a particular market study, including governments (jointly or individually), market participants (including businesses and consumers) and regulators. Business SA notes that it is:

... pleased that the Panel’s proposed [institutional arrangements] will allow small business to raise issues they wish to be the focus of market studies. It is imperative that this mechanism be formally embedded into the governing legislation ... and that genuine requests from small business, including its representative bodies, are given proper consideration. (DR sub, page 11)

The Panel favours an open process where all market participants have the capacity to request market studies. The body vested with a market studies power will have to prioritise requests for studies based on its assessment of where the potential public benefit is greatest.

25.7 EX-POST EVALUATION OF SOME MERGER DECISIONS

A number of submissions call for ex-post evaluation of ACCC merger decisions and/or monitoring of market outcomes.⁷⁵⁶ An evaluation process of this kind would assess the validity and effectiveness of past merger decisions; specifically, whether mergers that were allowed to proceed subsequently resulted in substantial damage to competition, and whether the assessment of markets and entry barriers, on the basis of which mergers were prevented, subsequently proved to be erroneous.

Such evaluations use quantitative and sometimes qualitative techniques to look back on selected past merger decisions to assess whether the conclusions were correct in light of the available

756 See, for example: BCA DR sub, page 37; Retail Guild DR sub, page 8; and Australian Automobile Association DR sub, page 3.

evidence at the time of the decision.⁷⁵⁷ This may also assist in determining whether the ACCC's processes were effective and improve the quality of future decisions. The Panel supports review of previous merger decisions but considers it important that there be no ability to overturn past ACCC, Tribunal or court decisions based on such evaluations.

25.8 A NEW COMPETITION POLICY INSTITUTION

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 Panel believes that no existing institution is able to undertake the functions detailed above. Their importance necessitates creating a new body.

The 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 national Access and Pricing Regulator. The NCC could then be dissolved.

The 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 a national competition policy function as well, its legislation and governance would need significant change.

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. This suggests an agreement between governments and oversight by a Ministerial Council. Given the economy-wide nature of competition issues, this responsibility should be assigned to Treasurers. Governments should agree the functions of the ACCP and the process of appointing its members and funding. Although there should be scope for members to be nominated and appointed by all governments, their role would not be to represent a jurisdictional interest but rather to view competition policy from a national perspective.

25.9 FUNCTIONS OF THE ACCP

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 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.

757 OECD 2011, *Impact Evaluation of Merger Decisions*, Policy Roundtable, Paris, pages 47 and 97.

This would include 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.

A clear advocate for competition policy is needed in Australia's institutional structure. Too often this has fallen by default to the ACCC, which can be an uneasy role for a regulator to fulfil. Advocacy on particular issues may be seen to prejudice the outcome of investigations. Competition policy advocacy and advice will cover market design and stewardship advice in areas such as human services, which are beyond the scope of the CCA. The ACCP's independence and accountability to all governments, as well as its broader policy mandate and lack of enforcement powers, would make it the ideal body to undertake those advocacy functions. The Panel sees advocacy for competition as a central function of the ACCP.

The ACCP should also act as an independent assessor of progress on reform, holding governments at all levels to account. The ACCP would be well placed to assess whether reforms have been undertaken to a sufficient standard to warrant competition payments.

Australian Industry Group notes some concerns in creating the new body, particularly in relation to confusion related to state and territory government and Australian Government responsibilities, as well as potentially complex governance arrangements. Australian Industry Group notes:

Complex governance structures run the risk of ensuring government engagement, at the expense of business engagement. That is, a COAG-based structure might help to attract and engage state government stakeholders in long-term national competition policy, but its complexity might also risk the engagement and support of business and community stakeholders. (DR sub, page 25-26)

It also queries whether responsibility would be better allocated to the Treasury, the PC or the ACCC.

Similarly, a number of submissions to the Draft Report propose that the functions in question be assigned to existing institutions. The Australian Communications Consumer Action Network notes, 'Given the advisory nature of the functions of the proposed national body we do not see a problem with these tasks residing with an existing Commonwealth institution' and goes on to recommend that the market studies power be conferred on the ACCC, for example (DR sub, page 6).

The national, non-regulatory nature of the ACCP provides a unique position to guide competition policy reform for all three levels of government in Australia compared with an Australian Government body or one that also has regulatory functions. Rather than confusing the policy landscape, the ACCP would provide a single focal point for competition reform in Australia.

However, the BCA notes that it is:

... always conscious of the need to avoid establishing new public bodies without a clear justification. On this occasion the case for the ACCP is strong. We believe the most important outcome of the draft report is recognition of the need for a substantial microeconomic reform agenda. The evidence of past reforms is that a powerful independent body drove the success of those reforms.

The panel's proposal for a new ACCP deals directly with the lack of a strong institution today charged with providing incentives and sanctions to all Australian governments to encourage ongoing reform. There is no obvious alternative institution in Australia to perform this function. (DR sub, page 26)

The ACCP's effectiveness would be enhanced by assigning it a market studies function, which would create a convenient, 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. As previously discussed, the ACCC already undertakes some market research functions under section 28 of the CCA. The Panel recognises the importance of the ACCC continuing to undertake this research to inform its day-to-day operations but considers the proposed market studies function fulfils a very different role and should be vested in the ACCP. Market studies should not be undertaken for the purposes of informing the compliance and enforcement work of the ACCC; instead, they should inform the broader debate on competition policy.

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 call upon the ACCP to undertake market studies of the provision of human services in their jurisdiction as part of implementing the choice and competition principles set out in Recommendation 2.

Mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market, as suggested by the New South Wales Government (DR sub, page 7), and will provide flexibility for the ACCP to conduct its inquiries in the manner best suiting the particular circumstances.

The NCP recognised the principle that the different circumstances in different jurisdictions could lead to different approaches to either the scope or timing of reform. In agreeing with this principle, 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, consumers 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 the Ministerial Council. 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.

The Ministerial Council would need to oversee priorities and resourcing so that the ACCP has the capacity to focus on the priorities of governments and market participants.

Ex-post evaluations of merger processes are relatively common in overseas jurisdictions and are often performed by competition bodies themselves or consultants engaged by those firms. Although internal or consultant evaluations might be expected to assist the ACCC, the Panel envisages that such a function should be performed by the ACCP. This would have the additional benefit of being clearly independent of the ACCC, improving public confidence in the findings.

25.10 GOVERNANCE OF THE ACCP

The governance arrangements of an institution should reflect the functions that institution undertakes. The functions of the ACCP include advocacy, education, oversight of reform progress and undertaking independent market studies. As the Australian Corporate Lawyers Association notes:

... structure, accountability and resourcing will be critical in ensuring the ACCP can appropriately discharge its duties and achieve the stated objectives of providing competition advocacy and leadership and driving implementation of the evolving competition and policy agenda. (DR sub, page 4)

Another feature of the ACCP is that it will be ‘national’ and so accountable to the Australian Government and state and territory governments.

Into the future, each level of government will continue to have responsibility for implementing economic reforms. The establishment of governance arrangements to implement reforms must be undertaken 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. All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed. For example, both the Australian Government and the States and Territories fund, regulate and provide human services. While the allocation of responsibilities across the Federation may change as a result of the Reform of the Federation White Paper, it is reasonable to assume that all levels of government will continue to have some role in the provision of human services.

A national body

The ACCP will be a ‘national’ body — this means that it is not ‘owned’ by any level of government, Commonwealth, State or Territory — but is created through legislation passed in one State and by application in all other jurisdictions. A national body can oversee implementation of the reform agenda by all governments (individually and collectively) as it would not potentially be seen as one government telling another what to do. However, it does require the authority to consider issues in all jurisdictions.

The NCC, which was created by Australian Government legislation, was seen as an Australian Government body, despite the Australian Government needing the agreement of the majority of States and Territories to appoint Commissioners. The Australian Government effectively managed the appointments process and the NCC reported to the Australian Government on state progress in implementing NCP reforms for the purpose of the Australian Government making competition payments.

Similarly, the ACCC is seen as owned by the Australian Government, notwithstanding the States’ role in appointing Commissioners.

In the Draft Report, the Australian Energy Market Commission (AEMC) is cited as an example of a ‘national’ body — it is created by state legislation, the South Australian *Australian Energy Market Commission Establishment Act 2004*.

The AEMC was created to be the rule maker for the national energy market. Like the participating States and the Australian Capital Territory, the Commonwealth is a jurisdiction in the National Electricity Market. Governance of the AEMC is shared by jurisdictions.

The AEMC is also required to comply with a number of South Australian, New South Wales and Commonwealth laws relating to such matters as record-keeping, information disclosure, financial reporting and employment-related matters. For example, the AEMC complies with the *Fair Work Act 2009* (Cth), New South Wales work health and safety laws and South Australian laws such as the *Freedom of Information Act 1991*, the *Public Finance and Audit Act 1987* and the *State Records Act 1997*.

These requirements can impose some limitations on the governance structure; for example whether an individual officeholder is accountable for the expenditure of monies, rather than a board. However, establishing the ACCP under its own legislation does remove some potential limitations on the role of a governing board.

Members of the ACCP

As noted above, consultation between the Australian and state and territory governments on appointments would not be sufficient for an agency to be seen as national rather than Commonwealth.

Given the ACCP involves all nine jurisdictions, requiring each jurisdiction to appoint members would create a governing body that was too large. It could also result in the board members regarding themselves (and being regarded by others) as representing the interests of their jurisdictions rather than the national interest. A potentially more desirable structure would be a limited number of members with all States and Territories having the opportunity to nominate members.

In the 'national' AEMC, the Chair is nominated for appointment by state and territory energy Ministers. There are two other Commissioners, one of whom is appointed by state and territory energy Ministers and the other appointed by the Australian Government energy Minister. The Commissioners are supported by a Chief Executive.

Once nominated by the States and Territories, Commissioners are required to be part of a selection panel process. This can reduce the risk of members being seen as state representatives first rather than members of a national body.

A similar process could be used to appoint Commissioners to the ACCP. Each state and territory government could nominate members for state and territory positions on the ACCP Board, and all nominees would then be required to undergo a selection process under an approved appointment protocol. Ministers would then sign off on the recommended appointments.

The Panel's view is that the ACCP should be governed by a five-member board that would include two state and territory nominees, chosen through a merit selection process, two members selected by the Australian Government and a Chair. The Panel recommends that nomination of the Chair be rotated between the Australian Government and the States and Territories combined.

The nature of its functions also means that the ACCP Board should not require full-time members. As a result, the governance requirements should be met with part-time members. The advocacy role, though, would require a full-time Chair. Funding of the ACCP should be shared among all jurisdictions. The Australian Government should provide half of the funding and States and Territories the remainder proportional to their population size.

The Panel's view

The Panel believes that reinvigorating competition policy reform requires leadership from an institution specifically constituted for the purpose. The Panel therefore proposes establishing the Australian Council for Competition Policy (ACCP) with a mandate to provide leadership and drive implementation of the evolving competition policy agenda. Establishing governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure.

The Panel sees advocacy for competition as a central function of the ACCP. It should also act as an independent assessor of progress on reform and be a place for collaboration.

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

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, which could be undertaken by the ACCP.

The benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Australian Government 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 the economy and revenue in each jurisdiction.

The ACCP could 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 merely undertaking reviews or other processes.

The ACCP must have appropriate governance arrangements in place from its inception. The Panel's view is that the ACCP should be governed by a five-member board, with the Chair serving on a full-time basis and other members on a part-time basis.

As a national body, the ACCP Board should be composed of two state and territory members, drawn from nominations made by state and territory governments, and then formalised by Ministers following a selection process. The two Australian Government members would be directly appointed by the Australian Government.

Funding would be shared by all jurisdictions, with half of the funding to be provided by the Australian Government and the remainder by the States and Territories, calculated according to their population size.

Implementation

Implementation of the ACCP will require an agreement between the Australian Government and all States and Territories. As the Reform of the Federation White Paper will discuss mechanisms under which the Australian Government and the States and Territories will take forward joint initiatives, the Panel does not offer detailed recommendations on the mechanisms or processes to achieve agreement on establishing the ACCP.

However, the ACCP will be crucial to implementing a number of this Review's recommendations. The Panel therefore recommends that the Australian Government and the States and Territories agree implementation arrangements for the ACCP within six months.

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.

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.

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.

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.

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.

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.

25.11 AUSTRALIAN GOVERNMENT POLICY ON THE CREATION OF NEW BODIES

The Panel notes the Australian Government's preference that the creation of new government bodies be limited.⁷⁵⁸ The policy states that, among other considerations:

- Before establishing a new body, it must be asked whether the activity can be pursued, in whole or in part, from within an existing Australian Government entity or Australian Government company. Regulatory functions can be performed from within an existing entity, with legislation providing such independence as is necessary for the regulatory activity.
- It is a strong preference of the Government that new activities should, where appropriate, be undertaken by public service departments. It is also the preference of the Government that functions that are related should be consolidated into the minimum necessary number of bodies, to speed up timeframes and improve the experience of clients who have to interact with any administrative processes.
- Where the activity requires the creation of a new body, an analysis of costs and benefits, risks and potential alternatives to the proposed governance structure will need to be undertaken,

758 Cormann, M (Minister for Finance) 2014, *Smaller Government — Towards a Sustainable Future*, Ministerial Paper, Commonwealth of Australia, Canberra, page 26.

and brought forward to Cabinet for approval. The analysis should compare a minimum of three alternative governance structures for the proposed body.

- As a general principle, where a new body is warranted, an appropriate sunset or reassessment date must be agreed (must be 10 years or less).

The Panel believes that the ACCP meets the above criteria — rather than an Australian Government body, it is intended to be truly national in character, with shared governance and funding. There are no bodies that currently exist that are capable of taking on the ACCP's functions. The need for this body to have strong ties to state and territory governments means that it would not be acceptable for its functions to be undertaken within an Australian Government Department. The ACCP's strength derives from its independence, particularly insofar as it relates to the need to provide independent assessment of jurisdictions' progress against agreed reforms.

The Panel has also considered whether there is an existing body that could perform the functions envisaged for the ACCP. The ACCC is not an appropriate agency to undertake the proposed functions. As an enforcement agency, the ACCC is not best placed to advocate for reform, nor to undertake market studies. While the PC could undertake the functions of advocacy and market studies, it is an Australian Government body and to be effective, a body covering competition across the jurisdictions needs to be accountable to all jurisdictions.

26 ENFORCEMENT OF COMPETITION LAW

Enforcement of competition law is crucially important to consumers and therefore to the performance of the economy.

The primary enforcement body is the Australian Competition and Consumer Commission (ACCC), which was created in 1995 by merging the Prices Surveillance Authority and the Trade Practices Commission, and adding some functions from the telecommunications regulator, Austel. The ACCC retained the Trade Practices Commission's Commonwealth consumer protection enforcement functions and subsequently acquired the Australian Energy Regulator (AER) as a constituent component.

Many submissions comment on the role, structure and effectiveness of the ACCC as the central regulatory body for competition law. Issues raised in submissions include:

- whether the ACCC should be responsible for enforcing both competition law and consumer protection law or whether those responsibilities should be separated;
- whether ACCC decision making would be improved by changes to its governance structure;
- whether access and pricing regulatory functions should be undertaken by a body separate from the ACCC; and
- whether the ACCC uses the media responsibly.

26.1 COMPETITION AND CONSUMER PROTECTION FUNCTIONS

The ACCC argues that one of the core strengths of Australian competition policy is that competition enforcement, consumer protection and economic regulation are combined within a single, economy-wide agency with the objective of making markets work to enhance the welfare of Australians (sub 1, page 130). Having a single body fosters a pro-market culture, facilitates co-ordination and depth across the functions, ensures small businesses do not fall between the cracks, provides a source of consistent information to business and consumers about their rights, and provides administrative savings and skills enhancement through the pooling of information, skills and expertise (ACCC sub 1, page 131).

Linking competition and consumer functions has been described as competition law keeping the options open, while consumer protection laws protect the ability of consumers to make informed choices among those options.⁷⁵⁹

However, the Monash Business Policy Forum argues that the competition and consumer functions should be separate:

... combining competition and consumer protection in a single regulatory agency is inconsistent with best practice design of regulatory institutions. (sub, page 33)

Competition regulation is argued to be 'neutral', with the regulator an umpire in day-to-day market activities, while consumer protection re-balances the market towards consumers. In particular, the Monash Business Policy Forum notes that consumer protection matters can be used to raise the

759 Netherlands Competition Authority 2010, *Competition Enforcement and Consumer Welfare: Setting the Agenda Preamble*, Den Haag, page 3.

agency's public profile to the detriment of competition enforcement and that there are likely to be internal divisions of culture. It quotes Bill Kovacic, a former Chairman and Commissioner of the US Federal Trade Commission:

During the [Federal Trade Commission's] deliberations over Google's merger, some Commission officials and staff advocated that the agency use the merger review process to exact concessions from the merging parties concerning their privacy policies and data protection practices. (sub, page 33)

The Panel acknowledges that there are synergies in having competition and consumer functions in the one institution. Within the current structure of the ACCC, the market investigation skills of staff are relevant to a range of the organisation's roles and functions, from the general competition and consumer protection, compliance and enforcement roles to specific competition functions such as mergers, authorisations and notifications. This facilitates staff movement across the agency, the building up of expertise and a common approach to issues.

The Organisation for Economic Co-operation and Development (OECD) identifies three major advantages of retaining the competition and consumer functions in one institution:

- gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments;
- gains from developing and sharing expertise across these two areas; and
- gains in terms of the wider visibility to the community, and understanding in the community, of competition and consumer issues.⁷⁶⁰

Various consumer groups support retaining a combined competition and consumer body, focusing on the ACCC's record of being an active competition and consumer regulator.

Submissions to the Draft Report generally agree that the ACCC's competition and consumer functions should be retained within the one agency. The Consumer Action Law Centre notes, 'competition and consumer policy should be considered by the one body because they are so intertwined as to be essentially two elements of the same area of policy' (DR sub, page 22).

The Australian Communications Consumer Action Network submits that it sees the competition and consumer protection roles of the ACCC as complementary and those roles 'as inextricably linked and important to maintain within the same organisation' (sub, page 9).

CHOICE notes one of the benefits of having a combined competition and consumer regulator is avoiding regulatory over-capture (sub, page 55).

The question for the Panel is whether the claimed cultural benefits of separate regulators outweigh the synergy benefits from combining competition and consumer functions. The Panel is not satisfied, on balance, that separating the competition and consumer functions would deliver an overall benefit. Small businesses, in particular, which sometimes display the characteristics of businesses and at other times of consumers, could 'fall through the cracks'.

For example, currently the ACCC can assess a complaint of anti-competitive behaviour against the misuse of market power provisions, the business unconscionable conduct provisions or the operation of a relevant code. Having these considerations split across different agencies could lead to

760 OECD 2008, *The Interface between Competition and Consumer Policies*, Policy Roundtables, Paris.

additional administrative complexity or, far worse, to duplicate prosecutions of the same conduct under separate parts of the *Competition and Consumer Act 2010* (CCA) by separate agencies.

The Panel's view

The Panel considers that the ACCC should continue to combine competition and consumer regulation.

There are synergies from having the competition and consumer functions within the one regulator. For example, fair trading issues may raise concerns about misuse of market power, unconscionable conduct or unfair contract terms. Having one regulator overseeing all of these functions allows the different courses of action to be considered simultaneously. It also encourages the building of expertise.

Recognising that these synergies come with tensions, the Panel notes that the ACCC should maintain an appropriate balance between its competition-related functions and its consumer protection role.

Recommendation 49 — ACCC functions

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

26.2 ACCC ACCOUNTABILITY AND 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 Commissioner. The Commission is assisted by its staff. The Chairperson and Commissioners are appointed on a full-time basis and effectively perform an executive role.

The ACCC is subject to external parliamentary scrutiny through the Senate Economics References Committee, which examines the operations and performance of all Treasury portfolio agencies as part of the Senate Estimates process that occurs up to three times each year. The ACCC's annual report is also tabled in the Australian Parliament.

Other bodies reviewing the ACCC's activities include tribunals and courts and the Commonwealth Ombudsman. The ACCC and its staff must also comply with a range of other general rules and guidance, such as the *Public Governance, Performance and Accountability Act 2013*, Legal Services Directions,⁷⁶¹ Commonwealth freedom of information framework⁷⁶² and general obligations on public service employees.⁷⁶³

The ACCC, like other executive institutions, is issued with a Statement of Expectations by the Australian Government, most recently in 2014.⁷⁶⁴ This sets out the Government's expectations about the role and responsibilities of the ACCC, its relationship with the Government, issues of

⁷⁶¹ [Legal Services Directions 2005](#).

⁷⁶² [Freedom of Information Act 1982](#).

⁷⁶³ [Public Service Act 1999](#).

⁷⁶⁴ Australian Government 2014, [Statement of Expectations to the ACCC](#), Canberra.

transparency and accountability and operational matters. The ACCC has responded with its Statement of Intent.⁷⁶⁵

The ACCC was constituted in 1995 following the implementation of the Hilmer Review. Since that time the ACCC has had three Chairs and a number of Commissioners. Over that period the economy has become increasingly complex and the ACCC's role has expanded significantly. While the ACCC has been a successful agency, the question for the Panel is whether its governance structure can be enhanced to ensure that it continues to perform well into the future.

The Review's remit includes considering the governance structure of the ACCC and whether improvements may be made to strengthen decision making. Given the fundamental role that 'checks and balances' play in good governance structures, it is appropriate to consider whether checks and balances currently in place are sufficient.

The Panel notes comments by the Chair of the ACCC since the release of the Draft Report that:

... [the ACCC] will closely consider the Draft Report's analysis of institutional issues and look forward to the community discussion it will generate. In this area, we will be particularly interested in better understanding the problems the recommendations are directed towards addressing.⁷⁶⁶

The Panel sees a number of problems with the Commission's current governance. Commissioners appear to be too enmeshed in the ACCC's day-to-day decision making and so act like senior managers of the ACCC rather than independent directors. The Panel notes the ACCC's comments that Commissioners cannot direct staff recommendations (DR sub, page 100); however, this is not the nub of the Panel's concern. The Panel is concerned that enforcement decisions under the CCA are currently susceptible to 'group think' given the strong internal focus induced by the full-time nature of appointments to the Commission. The Panel is also concerned about the emergence of 'silos' in the ACCC's structure, which further narrows the focus of individual Commissioners.

In the Draft Report, the Panel proposed two options to widen the diversity of views available to the ACCC in its decision making:

- replace the current Commission with a Board, comprising a number of members akin to the current Commissioners, who would work full-time in the operations of the ACCC, and a number of independent non-executive members with business, consumer and academic expertise, who would not be involved in the day-to-day functions of the ACCC; and
- impose an Advisory Board without decision-making powers.

The Panel notes general support for improving the ACCC's governance arrangements. For example, in his submission,⁷⁶⁷ John Dahlsen states:

Governance arrangements could clearly be improved to establish a chain of accountability superior to what currently exists. It is possible that the strong, independent and non-conflicting influence of directors with clearly mandated powers could improve the situation. (sub, page 131)

765 Australian Competition and Consumer Commission 2014, [Statement of Intent](#), Canberra.

766 Sims, R 2014, [Food and grocery and Australia's competition law](#), Presentation to the Australian Food and Grocery Council Industry Leaders Forum, Canberra, 1 October.

767 John Dahlsen provided a confidential submission to the Review but gave permission for this part of his submission to be quoted in this Report.

The BCA:

... strongly supports the option to introduce a board, but recommends that the board be constituted on similar lines to a commercial board set up under the Corporations Act rather than replicating the current commission structure as proposed in the Draft Report. (DR sub, page 29)

However, the board option receives limited support. Submissions mostly reject one or both of the Panel's proposed options for change. CHOICE is quite direct, stating 'in the absence of evidence of problems with the existing arrangements it is not clear that either of the options presented by the Panel is warranted' (DR sub, page 39).

The Panel accepts concerns raised in submissions. Again, CHOICE notes that the 'proposal to add an advisory board appears to duplicate consultative structures that already exist within the ACCC' (DR sub, page 39). However, the Panel remains concerned that, as currently structured, the ACCC is too internally focused and that a wider range of outside views should be incorporated into its decision making. It is therefore proposed that half of the ACCC Commissioners be appointed on a part-time basis. These part-time positions should be occupied by people who hold other roles in business, consumer advocacy and academia that allow them to bring a contemporary and broader view to the ACCC's decision making. The Chair could be appointed on either a full-time or a part-time basis.

The Panel accepts that this arrangement may give rise to concerns of conflicts of interest arising between the day-to-day roles of the part-time Commissioners and their responsibilities as Commissioners. The ACCC currently manages conflicts of interest through members being required to declare any actual or apparent conflicts of interest. ACCC members are required to provide the Chair with an annual statement of personal interests. The Panel is satisfied that this approach remains sufficient to ensure that conflicts of interest are either avoided or sufficiently declared, even with the addition of part-time Commissioners.

The Panel considers that there should be no Deputy Chairs to avoid the perception that Commissioners are actively engaged in managing the agency. The Chair can nominate a Commissioner to preside as Chair in his or her absence.

Sectoral Commissioners

The Panel notes that the ACCC currently has sectoral Commissioners (both of whom also happen to be Deputy Chairs): a small business Commissioner and a consumer Commissioner. However, these Commissioners are not confined to deciding on matters related to those areas of expertise but are responsible for decision making across the full range of ACCC activities. The Panel notes that these Commissioners are not required by the CCA to represent sectoral interests. Subsection 7(4) of the CCA requires that at least one of the members of the Commission should have knowledge of, or experience in, consumer protection and subsection 10(1B) requires that one of the Deputy Chairs should have knowledge of, or experience in, small business matters.

However, they may in practice be expected to represent sectoral interests. The then Assistant Treasurer's press release announcing a re-appointment to the Commission stated that it 'guarantees

that the Government will continue to deliver on its commitment to ensuring that there is a permanent voice for small business at the ACCC'.⁷⁶⁸

The Panel acknowledges that consumer protection and small business knowledge and experience are important to the ACCC. However, the expectation that these Commissioners represent a particular sector is not congruent with the actual role Commissioners perform. Instead, all Commissioners are involved in all decisions of the Commission. At the same time, the presence of sectoral Commissioners could let other Commissioners 'off the hook' from having to consider the interests of small business and consumers in their decision making.

The Panel is of the view that small business and consumer issues are too important to be 'siloed' and should be the joint responsibility of all Commissioners.

The CCA already requires, at subsection 7(3), the Minister to be satisfied that a person qualifies for appointment because of his or her 'knowledge of, or experience in, industry, commerce economics, law, public administration or consumer protection' and must also 'consider whether the person has knowledge of, or experience in, small business matters'. Accordingly, the Commission is well positioned to consider small business and consumer issues without the need for sectoral Commissioners.

Accountability

The ACCC should also 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 to subject it to additional accountability to the Parliament. In its submissions, the ACCC indicates its support for this proposal (DR sub, page 9).

The Panel's view

ACCC decision making is sound, but the Panel considers there are benefits from further strengthening the ACCC's governance and accountability.

The Panel believes that incorporating a wider range of viewpoints through adopting part-time Commissioners would improve the ACCC's governance. Part-time Commissioners would enrich the ACCC's decision making by adding the perspectives of members whose responsibilities extend beyond the ACCC, including but not limited to roles in business, consumer advocacy and academia.

The Panel proposes abolishing sectoral Commissioners. The Panel believes that, in making appointments to the Commission, the current requirements considered by the Minister — for experience and knowledge of small business and consumer protection — are sufficient to represent these interests in ACCC decision making. The Panel also notes that, in any event, all Commissioners are required to make decisions across the full range of the ACCC's operations.

The ACCC should also make regular appearances to a committee of Parliament, such as the House of Representatives Standing Committee on Economics.

Implementation

Changes to the ACCC's governance to create part-time Commissioners and to abolish the positions of Deputy Chair will require the CCA to be amended.

768 Bradbury, D (Assistant Treasurer) 2013, *Australian Government announces appointments to the Australian Competition and Consumer Commission*, media release 12 April, Canberra.

This should be done in a staged manner to ensure minimum disruption to current arrangements. For example, every second appointment, from adoption of this proposal, could be converted into a part-time appointment until such time as half of the Commissioners, and if the Government chooses the Chair, are part-time appointees.

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.

26.3 ACCC AND THE MEDIA

The ACCC has a long history of using the media to raise awareness of competition issues. However, this important educative role can cross over into advocacy of particular policy positions. An advocacy role can compromise stakeholders' perceptions of the ACCC's impartiality in its enforcement of the law. This is reflected in the BCA's comment:

... business remains concerned about the potential of investigations being prejudiced by the media conduct of interested parties, including the ACCC. (BCA sub, Summary Report, page 24)

As discussed previously, there is a role for competition policy advocacy. The Panel considers it desirable that this function not be undertaken by the ACCC. The ACCC undertaking such an advocacy role can compromise stakeholders' perceptions of the impartiality of the agency in administering and enforcing the competition law.

However, the ACCC should continue to have a role in communicating to the public through the media, including explaining enforcement priorities, educating business about compliance with the legislation and publishing enforcement outcomes.

The Dawson Review recommended that the ACCC develop a media code of conduct and the Panel notes a reference in the Dawson Review that 'The ACCC was conscious of the concerns expressed

and supported the introduction of such a code in order to address them'.⁷⁶⁹ The Panel understands that this recommendation has not been adopted.

The Panel believes that the ACCC should establish, publish and report against a media code of conduct. This should counter the perception of partiality on the part of the ACCC or individual Commissioners or the Chair, especially in enforcement actions.

In supporting the development of a media code of conduct, the BCA suggests that the Dawson Review principles guide its development (DR sub, page 33).

Those principles are:

- 12.1.1 the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance with it. This extends to information about proceedings instituted by it, but an objective and balanced approach is necessary to ensure fairness to individual parties;
- 12.1.2 the code should cover all formal and informal comment by ACCC representatives;
- 12.1.3 whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations;
- 12.1.4 with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way of a formal media release confined to stating the facts; and
- 12.1.5 reporting the outcome of court proceedings should be accurate, balanced and consistent with the sole objective of ensuring public understanding of the court's decision.⁷⁷⁰

The Panel's view

The Panel is of the view that the ACCC should not undertake competition policy advocacy as this may compromise stakeholder perceptions of its impartiality. These functions should be undertaken by the ACCP.

The Dawson Review's recommendation that the ACCC develop a media code of conduct remains appropriate to strengthen the perception of the ACCC's impartiality in enforcing the law.

Implementation

The ACCC should develop and publish a media code of conduct within 12 months.

769 Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, Recommendations 12.1 and 12.2, Canberra, page 182.

770 *Ibid.*, page 190.

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*.

27 ACCESS AND PRICING REGULATION

Economic regulation of monopoly or other infrastructure where there is limited, or no, competition among providers seeks to protect, strengthen and supplement competitive market processes to improve the efficiency of the economy and increase the welfare of Australians.

Economic regulatory functions are currently undertaken by the Australian Competition and Consumer Commission (ACCC) and by state and territory regulators. The ACCC regulates access to and pricing of national infrastructure services, such as telecommunications, energy (through the Australian Energy Regulator (AER) which is a separate but constituent part of the ACCC) and bulk water, and monitors pricing in other infrastructure markets where there is limited competition.

27.1 A SEPARATE ACCESS AND PRICING REGULATOR

The Panel 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 ACCC points to the benefits of having access and pricing regulation undertaken by the competition and consumer regulator. However, the Panel considers that, although synergies between the competition and consumer functions are strong, synergies between competition enforcement and access and pricing regulation are weaker.

The culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. For example, the former is required to have an ongoing and collaborative relationship with the industry it regulates, while the latter is more likely to involve adversarial interactions.

There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision. The latter is required to be based on the likelihood of a particular transaction resulting in a substantial lessening of competition, not on a view of what a particular market structure should be.

The Monash Business Policy Forum proposes the creation of an 'Australian Essential Services Commission' to bring all pricing and access regulation into one agency. The body would:

... bring together the current regulatory functions of the ACCC, ACMA [Australian Communications and Media Authority], the regulatory functions of the Murray-Darling Basin Authority, and groups such as the Australian Energy Regulator (AER). (sub, page 36)

The Monash Business Policy Forum stresses the importance of co-locating functions by similarity of analytical approach rather than by industry:

Colocation by industry increases the likelihood of capture. It creates regulatory inflexibility as 'industry specialists' rather than 'analytical generalists' dominate regulators. It risks the creation of a regulatory culture that views the particular industry that is the focus of regulation as 'special' and 'separate' from broader economic and social considerations. (sub, page 17)

States and Territories have called for the AER to be separated out of the ACCC. The 1 May 2014 Council of Australian Governments (COAG) Energy Council meeting communique notes 'state and

territory Ministers reiterated their support for separation of the AER from the Australian Competition and Consumer Commission. The Chair agreed to communicate these views to the Australian Government'.⁷⁷¹

The Energy Networks Association argues:

... the separation of the AER into a stand-alone independent industry-specific regulatory body would assist it in having the flexibility to further develop its specialist expertise in the energy sector, provide greater autonomy and give better scope for development of an organisation culture focused on providing appropriate, predictable and credible long-term signals for efficient investment ... (sub, page 6)

On the other hand, the ACCC advocates that the AER should be retained within the ACCC's current structure, arguing that locating the AER within the ACCC creates efficiencies, particularly in relation to sharing corporate functions such as legal resources.

The Consumer Action Law Centre supports this view, submitting:

... there are significant benefits from keeping the ACCC and AER together. Not only are there operational efficiencies in the AER and the ACCC sharing resources (the two regulators share many functions and it means that the AER is able to be represented in a number of state capital cities), it is also our view that regulators that focus narrowly on one industry are at significant risk of becoming 'captured' by industry interests. (sub, page 27)

Other submissions, without speaking directly to the issue of separating the AER, note the need for greater clarity in respect of the AER's role within the ACCC. The Australian Energy Market Operator states that it is important to maintain the AER's market functions (DR sub, page 3).

In its Draft Report, the Panel suggests that only the AER's roles in the National Electricity Law and the National Gas Law would transfer to the proposed national Access and Pricing Regulator (APR). The AER points out that most of the National Energy Retail Law's functions are regulatory, rather than consumer or competition functions (DR sub, page 6), so also transferring them to the APR would be consistent with the Draft Report's preference for the APR to have a regulatory focus.

Nevertheless, under this approach, some residual consumer functions (for example, in relation to energy customer hardship programs) would also transfer to the APR. It would be overly complex to separate out these residual consumer functions from the APR and, accordingly, the Panel proposes moving the AER into the APR as an integrated unit.

The Department of Communications notes, 'the Vertigan Panel expresses the view, shared by the Department, that "the need for industry-specific regulation will not diminish, at least in the near to medium term"' (DR sub, page 6). The Panel does not disagree with this view (though addresses whether there is an ongoing need for Part XIB of the *Competition and Consumer Act 2010* (CCA) in [Section 19.1](#)) but notes the Vertigan Report's view:

These factors do not suggest reverting to an industry-specific regulator. Even though many aspects of telecommunications regulation will remain 'bespoke', there are now sufficient commonalities between regulated industries — for instance, the reliance on

771 Council of Australian Governments Energy Council 2014, [Meeting Communiqué](#), 1 May, Brisbane.

what amounts to a ‘building blocks’ model of price-setting — as to create opportunities for economies of scale and scope in network access regulation.⁷⁷²

The Panel agrees with the Vertigan Panel that the case has not been made for an industry-specific regulator for telecommunications. Industry-specific regulators are at risk of capture, or perceptions of capture, by the regulated industry, which undermines their independence. An industry-specific regulator may become resistant to change or may be perceived as unduly favouring incumbents (or new entrants) to the detriment of competition.

The Panel considers that access and pricing regulation would be best performed by a single independent agency. The benefits of such an arrangement include that a single agency:

- will have the scale of activities that enables it to acquire broad expertise and experience across a range of industries, and acquire and retain staff who have that expertise;
- regulating a range of infrastructure industries reduces the risk of capture; and
- will reduce the costs associated with multiple regulators and regulatory frameworks and promote consistency in regulatory approaches.

The Panel’s proposal would see the following regulatory functions transfer to the APR:

- those currently undertaken by the ACCC in energy (through the AER), water and telecommunications; and
- those currently undertaken by the NCC in relation to the National Access Regime and the National Gas Law.

Most consumer protection and competition functions associated with regulatory functions would remain with the ACCC — the exception being residual consumer functions undertaken by the AER under the National Energy Retail Law, which would transfer to the APR.

Including the NCC’s functions under the National Access Regime and the National Gas Law within the APR would allow the NCC to be dissolved. This would result in the APR undertaking both the declaration functions under the National Access Regime and the National Gas Law and the current ACCC role in arbitrating the terms and conditions where a facility is declared, but where terms and conditions are not able to be commercially negotiated.

The Panel notes the APA Group’s concerns (DR sub, page 2) about potential conflicts of interest where a single body undertakes the declaration and arbitration functions. The PC has also noted that there is ‘a need for particular caution in guarding against any potential for unwarranted extension of the scope of the [National Access] Regime’ and that separating the advisory and regulatory functions provides ‘an important safeguard’.⁷⁷³ The Panel does not foresee any conflict in a single regulator performing both functions and anticipates there may be benefits. The Panel also notes that, under the telecommunications access regime (in Part XIC of the CCA), the ACCC currently performs both the declaration and arbitration functions.

The Panel also notes the Department of Communications’ concerns (DR sub, page 8) regarding the number of regulators with which the telecommunications sector may need to engage as a result of this change. However, the Panel considers that it is not so much the number of regulators but the

772 Australian Government 2014, *NBN Market and Regulation Report, Volume 1 –NBN Market and Regulatory Report*, Canberra, page 141.

773 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 291.

presence of significant gaps or overlaps among regulators that imposes the greater burden on business. The Panel also notes that it is not unusual for businesses to face a number of regulators.

Further functions which could, over time, be conferred upon the national access and pricing regulator include rail regulation. Asciano notes that it:

... operates its above rail operations under six different access regimes with multiple access providers and multiple access regulators. This multiplicity of regimes adds costs and complexity to rail access for no benefit, particularly as many of the access regulation functions are duplicated across states. (DR sub, page 7)

27.2 GOVERNANCE

As outlined previously in relation to the ACCC and the proposed ACCP, the governance arrangements instituted for the APR will need to be appropriate to its functions. The APR will be undertaking functions of a legislative and analytical nature and require an ongoing engagement between it and the industries it is intended to regulate.

The governance arrangements would further need to reflect that the APR would administer Commonwealth functions, such as telecommunications, and functions contained in state and territory legislation, such as energy.

The Department of Communications submits that:

... the Constitution prescribes communications services as a Commonwealth responsibility (section 51(v)). An industry-specific communications sector regulator would avoid potential governance issues arising from combining telecommunications with other network industries where responsibility is shared or resides with the states or territories. (DR sub, pages 7–8)

The Panel acknowledges this concern but notes that the ACCC has managed such issues since the establishment of the AER — a constituent component of the ACCC with functions conferred upon it by state and territory legislation. The composition of the members should be able to address these issues and effectively ensure national decision making is retained along the division of Constitutional responsibilities.

The Business Council of Australia (BCA) notes that it:

... considers that the quality of substantive decision making by the new regulator would be most improved by:

- the establishment of a board, for the same reasons outlined for the ACCC
- the re-introduction of full merits review for final decisions
- the establishment of a new requirement that the access and pricing regulator consult upon, and periodically publish, a strategy document. This document would set out its regulatory objectives, including how it plans to reduce regulatory burdens. (DR sub, page 36)

The Panel recommends that the APR 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 nominee) would be appointed on a part-time basis.

The Chair and the Australian Government-appointed members would have responsibility for telecommunications and other Commonwealth-only functions. The Chair and the state and territory-nominated members would have responsibility for energy functions, largely reflecting current arrangements of the AER as it currently operates within the ACCC. The creation of the APR will allow staff more easily to share experience in regulating networks and ways to engage with industry.

The APR will be an Australian Government body within the portfolio of the Treasurer, with functions currently performed in the ACCC and NCC being transferred to it. The role of the Treasurer would largely relate to the administrative functions of the body, with sector-specific legislation and functions (such as energy) still being conferred on the regulator through the relevant Commonwealth, state and territory legislation.

27.3 STATE AND TERRITORY ACCESS AND PRICING REGULATION

Each State and Territory has a regulator that undertakes access and pricing regulation analogous to that proposed to be undertaken by the APR. These regulators perform various functions, such as determining regulated prices for retail energy, water and transport services and access to essential services or infrastructure. Some of these regulators also provide economic policy advice to governments. For example, the Western Australian Economic Regulation Authority recently completed an inquiry into microeconomic reform.⁷⁷⁴

State or Territory	Regulator
New South Wales	Independent Pricing and Regulatory Tribunal
Victoria	Essential Services Commission
Queensland	Queensland Competition Authority
Western Australia	Economic Regulation Authority
South Australia	Essential Services Commission
Tasmania	Office of the Tasmanian Economic Regulator
Australian Capital Territory	Independent Competition and Regulatory Commission
Northern Territory	The Utilities Commission of the Northern Territory

Submissions note that, when state access and pricing regulators are added in, Australia has 11 separate competition-related regulators (BCA sub, Main Report, page 20). Australia’s seven water regulators serve a population of 23 million while, by comparison, the UK’s single water regulator (Ofwat) serves more than 60 million people.

The multiplicity of regulators results in fragmented regulatory oversight. For example, IPART identifies that:

- IPART regulates 3 valleys for State Water. The Murray-Darling basin is regulated by the ACCC.

774 Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final Report*, Perth.

- IPART regulates around 21km of the Hunter Valley Coal rail network. The ACCC regulates the remaining 650km of track. (sub, page 30)

A multiplicity of regulators can also be administratively costly, and lead to gaps and overlaps in regulatory responsibility. Business may have to engage with more than one regulator.

The Panel believes that state and territory agencies should continue to have responsibility for those sectors with which they are, by geography and institutional arrangements, better placed to deal. But, as with the Murray-Darling agreement and the energy legislative regime, States can refer regulation to a national body to ensure consistent regulation across Australia.

The subsidiarity principle that no higher-level agency should assume responsibility for functions which a lower-level agency may be better placed to undertake means that a national body should not necessarily assume responsibility for all access and pricing functions undertaken in Australia. For example, regulation of public transport fares may be better dealt with by state and territory agencies but the regulation of rail networks may be better undertaken by a national regulator.

This need not mean that all access and pricing regulation will be done nationally.

If national markets are established in the future, they should move to a national regulator under the same conditions as energy functions have transferred previously to the AER — the functions would remain in state and territory applied legislation, which recognises necessary jurisdictional differences, but be administered by an Australian Government agency.

The Panel received a number of submissions naming particular sectors which could be transferred to a national framework, including rail regulation (see Asciano, DR sub, page 7) and water (see BCA, DR sub, page 35). The Panel supports States and Territories transferring those functions as and when national frameworks are developed. The Panel notes other submissions arguing that transfer to a national regulator may be premature, including the Water Services Association of Australia (DR sub, page 7) and IPART (DR sub, page 2). The Panel agrees that immediate transfer is premature but notes that it may still be a desirable objective over the longer term.

The Panel's view

The Panel proposes the creation of an Access and Pricing Regulator (APR) to oversee all industries currently regulated for the Australian Government by the ACCC, noting the energy functions in question are conferred by state and territory legislation.

The following regulatory functions would be transferred from the ACCC and the NCC and be undertaken within the APR:

- 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 AER 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.

While consumer protection and competition functions would largely remain with the ACCC, the Panel accepts that some of those functions, particularly those performed by the AER, should move to the APR for pragmatic governance reasons.

Price surveillance and price monitoring functions should remain with the ACCC as these are often conducted on an economy-wide basis.

The Panel recommends that the APR 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) would be appointed on a part-time basis.

The APR should be established with a view to it gaining further functions as other sectors are transferred to national regimes. The Panel supports a continuing role for state and territory economic regulators. However, a move to national regulation as national markets are established should be encouraged, including, for example, in the case of water.

Implementation

The Australian Government should create the APR within 12 months of accepting the Panel's recommendation. This should be achieved through amending the CCA to create the APR (in similar fashion to the provisions establishing the AER within the CCA), noting that the energy functions would continue to be contained within state and territory applied legislation.

The Panel notes the COAG Energy Council's announcement⁷⁷⁵ of a Review of Governance Arrangements for Energy Markets to commence in 2015. The review should be undertaken with regard to the recommendations of this Report and consider how best the new APR could interact with the other energy market institutions.

A separate process could be undertaken in parallel to the creation of the regulator to determine which functions States and Territories may agree to confer.

775 Council of Australian Governments Energy Council 2014, Meeting [Communique #2, 11 December](#), Adelaide.

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.

27.4 AUSTRALIAN GOVERNMENT POLICY ON THE CREATION OF NEW BODIES

As discussed in [Section 25.11](#), the Australian Government has set out a policy for creating new bodies. The Panel is strongly of the view that the APR be created as a new body. To strengthen both the ACCC and the APR, it is essential that they be independent bodies to focus on their particular remits. The Panel notes that continuing regulation of the energy functions within the ACCC would not satisfy energy Ministers' expressed preference for the AER to be a stand-alone body.⁷⁷⁶ Furthermore, the Panel considers it is not appropriate for regulatory functions to be undertaken within a policy Department.

776 Council of Australian Governments Energy Council 2014, [Meeting Communiqué](#), 1 May, Brisbane.

28 REVIEW OF COMPETITION AND REGULATORY DECISIONS

28.1 FEDERAL COURT OF AUSTRALIA

Australia's competition law is enforced through proceedings in the Federal Court of Australia. Proceedings may be brought by the Australian Competition and Consumer Commission (ACCC) or by a person harmed by contraventions of the law.

The Federal Court has jurisdiction to determine whether a contravention of the competition law has occurred. The Federal Circuit Court also has jurisdiction to determine matters arising under section 46.

Competition law proceedings frequently involve disputes about the dimensions and attributes of markets within which particular businesses trade and the nature and extent of the sources of competition within those markets. It is often relevant for the court to hear from expert economic witnesses about those issues. For that reason, it is appropriate that competition law proceedings be determined in courts that, over time, can develop expertise in the types of issues that must be resolved.

The Panel received limited feedback on potential procedural practices that would be beneficial in resolving competition law proceedings in a just and cost-effective manner. The ACCC submits that, although complex competition law proceedings present significant procedural challenges to the court and to parties, Federal Court judges have the tools at their disposal to direct procedures competently (DR sub, pages 104-105).

In other jurisdictions, notably New Zealand, the court is able to draw on the assistance of an economist who presides over the proceeding alongside the trial judge.

Although innovative and well regarded, the New Zealand approach may not be possible in Australia. In a workshop presentation *The Judicial Disposition of Competition Cases*,⁷⁷⁷ the Chief Justice of the Federal Court⁷⁷⁸ notes the constitutional constraints preventing Australia from appointing lay court members in the same manner as New Zealand — namely, that judicial power must be exercised by a judge, and federal judges under section 72 of the Constitution cannot be part-time or acting.⁷⁷⁹

Chief Justice Allsop notes that, instead, Australian courts can use 'referees' (including expert economists) to inquire into and report on one or more questions arising in court proceedings.⁷⁸⁰ The relatively recent *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* provides for rules in relation to the use of referees in the Federal Court. The Chief Justice notes that the referee system has been used very successfully in the Supreme Court of New South Wales.

The Panel supports the use of referees to assist the court in resolving questions, including complex economic issues, in competition cases.

777 Allsop, J 2009, *The judicial disposition of competition cases*, paper presented at the 7th Annual University of South Australian Trade Practices Workshop, Adelaide, 17 October.

778 Then President of the New South Wales Court of Appeal.

779 *WWF v TW Alexander Ltd* (1918) 25 CLR 434.

780 *Federal Court of Australia Act 1976* (Cth), section 51A.

28.2 THE AUSTRALIAN COMPETITION TRIBUNAL

The Australian Competition Tribunal (the Tribunal) is created by Part III of the *Competition and Consumer Act 2010* (CCA). Various powers have been conferred on it to review competition and economic decisions, including:

- decisions of the ACCC under the CCA to grant authorisations or withdraw notifications;
- decisions of the Minister to declare or not to declare an infrastructure service under Part IIIA of the CCA;
- decisions of the ACCC to arbitrate terms and conditions of services declared under Part IIIA; and
- pricing regulatory decisions of the Australian Energy Regulator (AER) made under the National Energy Law and the National Gas Law.

Accordingly, the Tribunal performs a very significant role in Australia's competition and regulatory framework.

The particular strength of the Tribunal lies in its composition. For the purposes of hearing and determining a matter before it, the Tribunal must be constituted by a presidential member (who is a Federal Court judge) and two members who are not presidential members. A person appointed as a member of the Tribunal must be qualified by virtue of his or her knowledge of, or experience in, industry, commerce, economics, law or public administration. In practice, the Tribunal is usually constituted with at least one member who is an economist.

In its first submission, the ACCC recognises the important role of the Tribunal:

The ACCC supports the OECD assessment that: 'The Australian Competition Tribunal plays an important role as a merits review body, and the economic content in its determinations has made a significant contribution to both the legislative and judicial development of the law.' (sub 1, page 139)

The Tribunal currently has a role as a first-instance decision maker in authorising mergers, in addition to its review functions. First-instance decision making requires an investigative role that the Tribunal, with its predominant review function, is not well placed to deliver. The Panel considers that the Tribunal would be more effective if it were constituted solely as a review body. This is discussed further in [Chapter 18](#).

The nature and scope of the review function performed by the Tribunal varies and is dependent upon the powers granted to it in respect of different review tasks. In reviewing the ACCC's authorisation decisions, the Tribunal is able to hear directly from business people concerned in the application and expert economists.

However, in respect of the review of access pricing decisions, the Tribunal's powers are often confined to considering the materials before the original decision maker; the Tribunal is unable to hear from the business people and expert economists who authored those materials. Although these restrictions enable reviews to be conducted more quickly, they also reduce the depth of the review the Tribunal is able to undertake.

In a merger review context, BHP Billiton supports the Tribunal being able to hear directly from relevant witnesses rather than only being able to rely on the material before the ACCC (DR sub, page 2). This approach is generally supported by the ACCC, which also notes that the ability to call

further evidence should be balanced against the risk that parties may fail to provide relevant information up-front (DR sub, page 62-63).

The Panel notes trade-offs in deciding how limited the merits review process ought to be in competition contexts. A more limited review provides faster, less costly decisions and better incentives to provide all information at first instance; whereas, a full review provides greater scope for considering all available evidence and may increase the likelihood of a correct decision.

The Panel's view

The Panel considers that the Tribunal performs an important role in administering the competition law. Although it is important that review processes be conducted within restricted timeframes, the value of the review process would be greatly enhanced if the Tribunal were empowered to hear from relevant business representatives and economists responsible for reports relied upon by original decision makers.

The Panel considers that a merits review process should maintain incentives to ensure all relevant material is provided to the first-instance decision maker, with the ability for the Tribunal to receive further information that materially bears on the Tribunal's review. This is discussed in greater detail in [Section 18.5](#).