Business Council of Australia

Submission on the Competition Policy Review Draft Report

NOVEMBER 2014

Contents

About this submission

This is the Business Council of Australia submission in response to the Draft Report of the Competition Policy Review.

Appendix 1 of this submission lists the Business Council position against each of the 52 draft Competition Policy Review Recommendations. Appendix 2 of this submission provides supporting analysis on competition law and institutions.

Introduction

The Competition Policy Review is a once-in-a decade opportunity to advance microeconomic reform that will improve Australia's global competitive position and improve competition.

The review panel has rightly identified this as its top priority in the draft report.

Focus on microeconomic reform

In this submission, the Business Council of Australia proposes some reprioritisation of the microeconomic reform agenda the panel has recommended, as well as additional areas the panel might consider. We also offer some suggestions on how it might be effectively implemented.

While our submission makes detailed comment on specific recommendations from the panel that we do not agree with, readers should be clear that we support the bulk of the draft report.

More broadly, we share the panel's ultimate objective for the review, which is to reinforce the essential importance of microeconomic reform in lifting Australia's competitiveness.

It would be deeply unfortunate if attention around the review is diverted into a debate about technical aspects of the law, rather than focusing on the main game of supporting Australia's global competitiveness.

Focus of the Business Council of Australia submission

Where the Business Council agrees with a recommendation we have generally not provided further comment in this submission. Rather, this submission focuses on areas of the draft report where:

- there are issues raised, or questions asked, by the panel on which we wish to comment further, and/or
- we have concerns with a recommendation and ask the panel to reconsider its position for the final report in March 2015.

Our recommendations are summarised below. A table with the Business Council's position on each of the recommendations in the draft report is provided in Appendix 1.

Summary of Business Council recommendations to the panel

The Business Council makes the following recommendations for changes ahead of the final report.

Competition policy

The Business Council recommends that the panel provide further practical advice on the implementation of its competition policy reform agenda.

1. To assist governments to implement competition policy reforms, the panel should present its recommended reforms as a prioritised list and set out a roadmap for implementation:
    1.1 Priority should be given to reforms that have already been identified as delivering considerable economic and employment benefits. The Business Council nominates for prioritisation the panel's recommended reforms to deregulate retail trading hours, reform coastal shipping, complete energy and water market reforms and introduce a new system of road pricing.
    1.2 The panel should make additional recommendations for pro-competitive reforms in these areas: a nationally consistent and streamlined approach to assessing and approving major projects; repeal of the Australian Jobs Act; lifting restrictions on the efficient operation of Sydney Airport; and implementing national occupational licensing reforms.
    1.3 The panel's roadmap should set out: timelines for implementation; the institutional arrangements and; incentives and/or penalty arrangements to achieve the reform.
2. The panel should provide further advice to governments on how to increase competition and choice in the delivery of human services by:
    2.1 Specifying the criteria governments should use to determine if an area of human services delivery is suitable for market-based reforms. The Business Council recommends that sectors where more mature markets already exist should be prioritised (e.g. aged care).
    2.2 Providing more practical advice on how to lift contestability in each area of human services delivery by defining the desired outcomes and designing market and institutional policy settings to achieve them.
    2.3 Linking contestability in a sector to broader regulatory reform to support an efficient, low-cost business environment and promote innovation.

Competition laws

The Business Council has carefully considered the panel's recommendations on competition law and proposes the following changes.

3. Amend the Competition and Consumer Act (CCA) definitions of "market" and/or "competition" to give legislative guidance to the principle that competition analysis should begin with an assessment of market dynamics –

such as the extent of rivalry and barriers to entry – rather than concentration and static market definition.

4. Streamline the formal merger clearance process but retain the separate process of formal authorisation assessed by the Australian Competition Tribunal in the first instance.
5. Do not proceed with the recommendation to change section 46 on the "misuse of market power".
6. Do not proceed with the recommendation to extend section 45 to cover "concerted practices".
7. Remove the 'per se' prohibition on resale price maintenance and replace it with a substantial lessening of the competition test. The notification process currently applying to exclusive dealings should apply to third line forcing and resale price maintenance.
8. Do not proceed with the recommendation to amend section 83 so that it extends to "admissions of fact".
9. Remove the declaration regime under Part IIIA in all cases except for airports and former publicly owned multi-use facilities that do not have an access regime.
10. Include awards and enterprise agreements under sections 45E and 45EA to reduce the apparent conflict between the Competition and Consumer Act (CCA) and Fair Work Act 2009.
11. Issue a Ministerial Direction requiring the Australian Competition and Consumer Commission (ACCC) to review and update its section 155 guidelines to ensure they are consistent with an obligation to frame notices in the narrowest form possible, consistent with the scope of the matter being investigated.
12. The requirement of a person to produce documents in response to a section 155 notice should be qualified by law, rather than by a guideline.

Competition institutions

The Business Council makes the following recommendations for strengthening the panel's advice on institutional arrangements.

13. The Australian Council for Competition Policy (ACCP) should be established to oversee competition policy on a national basis.
14. The market study powers of the ACCP should be more clearly defined. A threshold for commencing a market study should be set with regard to clear evidence of a problem and that the study is in the public interest. Information gathering should be voluntary in the first instance, with any subsequent use of mandatory powers subject to a test of reasonableness.
15. If the ACCP is not established, any market studies power should be allocated to the Productivity Commission and not the ACCC.
16. Introduce an independent ACCC board consistent with the corporate governance arrangements for corporations under the Corporations Act. The Board should be responsible for high level strategic direction and independent

oversight with management responsible for day-to-day decision making. An 'advisory board' would be unlikely to be effective and should not be recommended.

17. The ACCC should be subject to a media code of conduct and be required to publish procedures on media interactions, ideally approved by its board.
18. The Australian Competition Tribunal should be able to conduct a full merits review in relation to Part XIC, Part IIIA and reviews of the ACCC's formal merger clearance decisions.
19. The Business Council supports the establishment of a dedicated national access and pricing regulator as a federally constituted body with a board.
20. Improve the effectiveness of existing alternative dispute resolution (ADR) mechanisms, but do not create a new body solely to handle CCA-related disputes involving small business.

The remainder of this submission comments on the findings and recommendations in the draft report according to the chapter structure of the draft report: "competition policy", "competition law" and "competition institutions".

1. Competition policy

The Business Council strongly supports the majority of the panel's recommendations on competition policy (Recommendations 1–16, 51 and 52 in Appendix 1).

The recommendations could have a significant positive impact on the economy and the welfare of consumers, if they are implemented effectively by governments.

Having made the case for change in the draft report, the panel should provide additional practical advice to governments on implementation in its final report.

The final report would be enhanced by:

- prioritising the competition policy reforms, developing a roadmap for implementation and adding some further recommendations
- providing governments with further advice on increasing competition in the delivery of human services.

Prioritising the recommendations in a roadmap for reform

The panel has put forward a very large reform program. Implementation of each reform will be complex and take time so prioritisation will be important. A clear plan on how to implement the agenda will be required for the community to accept it.

Prioritising reform

Further advice from the panel on the prioritisation of its recommendations will assist governments in implementation. The Business Council recommends that the panel prioritise its recommendations according to the practicality of implementation and by reference to the potential economic benefit.

Priority should be given to reforms that have already been identified as delivering considerable economic and employment benefits under the National Competition Policy framework and by the Council of Australian Governments (the "unfinished business" of microeconomic reform).

Each recommendation should be accompanied by a suggested timeframe for reform. Some will be relatively easy to execute in practical terms (e.g. deregulation of retail trading hours). Others will require more complex policy development (e.g. road pricing reforms).

The Business Council nominates the following recommendations for reform from the Competition Policy section of the draft report (Chapter 2) for prioritisation:

- Deregulation of retail trading hours.
- Removing cabotage restrictions in the Coastal Trading (Revitalising Australian Shipping) Act to move to an open, competitive market for coastal shipping services, with all other Australian laws being observed.
- Finalising the energy reform agenda and recommitting to reform in the water sector.
- Starting a process to introduce cost-reflective road pricing, with pricing subject to independent oversight and revenues linked to road construction, maintenance and safety. Meaningful progress towards systemic and broad-based pricing reform in roads will be gradual. It will need to communicate the benefits of reform to the wider community and a clear implementation plan.

Additional recommendations

In light of the Panel's comment that competition policy is "about making markets work properly", the Business Council suggests that the panel extend its list of recommendations to include these items:

- Complementing the planning and zoning reforms proposed in the draft report by adopting a national approach to assessing and approving major resource, energy, infrastructure and industrial projects:
  - this would see state governments implement a suite of reforms to their strategic planning and approvals processes. The detail of these reform recommendations was published in the Business Council of Australia's *Building Australia's Comparative Advantages* report in July 2013.
- Repeal the Australian Jobs Act, which needlessly mandates government-approved Australian Industry Participation Plans for private investments over $500 million. This requirement imposes unnecessary regulatory costs and arbitrarily falls on large-scale projects.
- Lift restrictions on Sydney Airport by reforming the application of the cap on aircraft movements and permitting the use of quieter and more efficient "new generation" aircraft during curfew periods.

- Specify a timeframe for implementing the National Occupational Licensing Scheme reform by implementing a regulatory model that removes further licensing or proof of competency requirements that currently apply when licence holders move between states.

Roadmap for implementation

The prioritised list of competition policy reforms, along with the recommended implementation timelines and phasing, should be set out in a 'roadmap' that governments can use to implement the panel's reform agenda. The roadmap should nominate the institutional arrangements the Panel believes governments should make accountable for implementation, either within a single jurisdiction or across the federation. The roadmap should include advice on the role of incentive payments for each reform item.

Recommendations

To assist governments to implement competition policy reforms, the panel should present its recommended reforms as a prioritised list and set out a roadmap for implementation:

- Priority should be given to reforms that have already been identified as delivering considerable economic and employment benefits. The Business Council nominates for prioritisation the panel's recommended reforms to deregulate retail trading hours, reform coastal shipping, complete energy and water market reforms and introduce a new system of road pricing.
- The panel should make additional recommendations for pro-competitive reforms in these areas: a nationally consistent and streamlined approach to assessing and approving major projects; repeal of the Australian Jobs Act; lifting restrictions on the efficient operation of Sydney Airport; and implementing national occupational licensing reforms.
- The panel's roadmap should set out: timelines for implementation; the institutional arrangements and; incentives and/or penalty arrangements to achieve the reform.

Increasing contestability in the delivery of human services

The draft report's recommendation to extend competition in the delivery of government-funded human services has the potential to lead to greater diversity, choice and responsiveness in the delivery of government services. (Recommendation 2).

The draft report makes a strong case that Australians would benefit from greater choice and innovation in service delivery if competition is successfully increased in parts of the economy that are not yet fully contestable, such as education, health and infrastructure.

The panel also makes a potentially far-reaching recommendation to extend the CCA into all government commercial activities (Recommendation 19).

For the final report the panel should add to the “guiding principles” in Recommendation 2 by providing more detailed, practical advice to governments on lifting contestability in the delivery of human services.

Building on previous reforms

Most governments in Australia have already started to introduce competition into the delivery of some areas of human services. Increasingly, governments are looking to fund private or not-for-profit organisations to deliver services. They are giving consumers more choice, taking regulation out of government departments and giving it to independent authorities.

These are all elements of market reform and offer benefits for consumers. However, the benefits will only be realised if the market design is fit for purpose for each sector. Governments need to ensure the market that has been created functions as effectively as possible, in the interests of the community.

Features of market design

When governments design a market for the delivery of human services they should first clearly define the outcomes they want to achieve. Market arrangements should be introduced to serve the objectives of policy reform rather than being introduced as a matter of course. In education the outcome may be to encourage participation in post-compulsory schooling. In health, it may be may be to encourage people to focus on disease prevention.

A well-functioning market in the delivery of human services should have four key features:

- The first is choice for consumers, balanced with consumer protection.
- The second is good information so consumers can make informed choices.
- The third is that government funding is targeted to achieving outcomes and is fiscally sustainable.
- The fourth is that the market design facilitates competition between providers.

It is critical to get the market design right. For choice to drive competition effectively, consumers must have easy access to useful information to compare offers, and be able to act on this information.

Institutional and policy settings should facilitate competition between existing providers and new entrants. Structural reforms to existing government-owned service providers may need to be considered to support contestability. Additionally, where it serves the desired policy outcome, competitive neutrality rules should apply so that public organisations do not receive an undue competitive advantage over non-government organisations, including private companies.

Each area of human services is different and each jurisdiction is at varying stages of reform in these sectors. Some already have the features of a well-functioning market and others are further behind. Some have a significant mix of providers

and consumer choice, such as child care. Regulatory responsibilities, such as child protection decisions, should be separate from delivery and remain within government.

For each sector there are different levels of entitlement to services and public funding to take into account. Some services are offered as a universal entitlement, such as public hospitals and public schools. Others, such as social housing, are rationed and allocated to those in greatest need.

For each area of human services delivery, the design needs to start with the current state of the sector. A reform pathway should be carefully designed to enable the market to grow and become well functioning. Increasing contestability should be linked to broader regulatory reform that promotes an efficient, low-cost business environment and innovation in service delivery.

The higher education reforms are a recent example of complex market design. The reforms in the Higher Education and Research Reform Amendment Bill 2014 inject more competition into the market for higher education. The Business Council supports the reforms but argues the market design needs some modification to prevent unintended consequences, particularly in thin markets (Business Council, September 2014).

Contestability may not always be appropriate

The Business Council agrees with the draft report's section on the "limits to consumer choice in human services" that acknowledges markets may not always be the best solution and other factors should be taken into account. For example, it is questionable whether some sectors of human services delivery, such as child protection, would benefit from the introduction of competition.

A blueprint for reform

Given service delivery is generally the primary responsibility of one level of government, we question the suitability of an intergovernmental agreement as the mechanism for implementing reform. We propose that each government commits to the guiding principles proposed by the panel, and develops a blueprint for reform across each of their areas of human service delivery.

Recommendations

The panel should provide further advice to governments on how to increase competition and choice in the delivery of human services by:

- Specifying the criteria governments should use to determine if an area of human services delivery is suitable for market-based reforms. The Business Council recommends that sectors where more mature markets already exist should be prioritised (e.g. aged care).
- Providing more practical advice on how to lift contestability in each area of human services delivery by defining the desired outcomes and designing market and institutional policy settings to achieve them.
- Linking contestability in a sector to broader regulatory reform to support an efficient, low-cost business environment and promote innovation.

2. Competition law

The Business Council agrees with most of the panel's recommendations in the Competition Law section of the draft report.

We agree with the panel that most of the central concepts, prohibitions and structure of Australia's competition law remain appropriate to the projected needs of the economy and should be retained (Recommendation 17).

We also agree that the competition law provisions of the CCA should be simplified, and we support most of the panel's suggestions for streamlining these provisions.

However, we disagree with some of the recommended changes to sections 45, 46 and 83. Our concern is that the recommendations do not meet the government's requirements for a Regulation Impact Statement, set out in the *Australian Government Guide to Regulation*. These requirements include:

- clear evidence of a problem to be fixed
- an explanation of why government action is needed
- an assessment of the costs and benefits of the proposed reform against other options, including the option of no change.

The Business Council is concerned about the costs and risks to the economy from unnecessary regulatory change. We also believe some of the changes would work against the government's deregulation and competitiveness agendas by adding uncertainty and costs without delivering sufficient benefits.

The sections below convey our views on some of the main areas of discussion in the Competition Law chapter of the draft report.

Market definition and competition

Issues

The Business Council supports the panel's recommendation that the definition of "competition" in the CCA should be strengthened to ensure that both actual and potential imports are to be taken into account in a competition analysis.

This recommendation goes some way to addressing our concern that the approach to market definition under the CCA can be unduly narrow and that global sources of competition may not be sufficiently taken into account when defining the relevant market.

However, we remain concerned that competitive analysis under the CCA can be characterised by the adoption of unduly narrow and static market definitions and an overreliance on existing market concentration over other factors that better indicate the level of competition in a market. Such an approach can mean that the impact of new and innovative small entrants or technology that have lowered barriers to entry are not properly taken into account.

While the panel recognises that market concentration is relevant but does not determine the level of competition in the context of the grocery industry, we see

the issue more broadly. There is a clear need for legislative change to avoid an over-reliance on market concentration in determining competitive effects.

The Business Council believes that legislative guidance in line with the relevant section 50(3) on merger assessment factors would be valuable. Legislative guidance should confirm that market definition is a tool in competitive analysis but should not determine the limits of competitive activity to be taken into account. Nor should it exclude the possibility that competitors outside the relevant market may exert competitive force over a longer period. Equally, it should make clear that market definition may not be required where competitive effects can be measured directly.

While legislative guidance is important in providing a clear direction to decision-makers, other aspects of the reforms recommended in the draft report will help to ensure that these principles are applied in practice.

In particular, a board appointed to provide strategic direction and oversight to the ACCC could oversee the development of ACCC guidelines consistent with the legislative guidance. It could also monitor the ACCC's compliance with those guidelines. Periodic reviews of ACCC decisions could also include an assessment of the extent to which the ACCC has acted consistently with its guidelines in its market analysis, and also whether the guidelines had tended to enhance consumer welfare in their application.

These issues are discussed in further detail in Appendix 2.

Recommendation

- Amend the Competition and Consumer Act definitions of "market" and/or "competition" to give legislative guidance to the principle that competition analysis should begin with an assessment of market dynamics – such as the extent of rivalry and barriers to entry – rather than concentration and static market definition.

Mergers

The Business Council welcomes the panel's careful consideration of the informal and formal merger clearance and authorisation processes and its suggestions for streamlining and improving these critical processes.

Informal clearance process

While we agree that regulating the informal process may damage or weaken its essential character, we maintain that the process could be improved. Much more could be done beyond recommending further consultation between the ACCC and business representatives around the issue of timeliness.

It would be appropriate for the proposed ACCC board (see page 27) to be able to call on ACCC staff not involved in the mergers under review, or commission an independent party, to review:

- process issues, such as whether the ACCC's internal steps were conducted in a timely and efficient manner, including publication of Public Competition Assessments (PCAs), and whether it has appropriately tested third party submissions, data and evidence
- substantive issues, including whether the assumptions have been borne out – for example, if the ACCC has relied on a counterfactual to oppose a merger, whether that counterfactual has come to pass. More generally, the review process would assess whether the ACCC was correct in determining that a particular merger resulted in a substantial lessening of competition or not.

Formal clearance and authorisation processes

Some concerns with the informal merger review process can be addressed, in part, through a more streamlined formal clearance process. A more viable alternative to the informal process would be of benefit to all businesses.

However, the Business Council sees substantial benefits in maintaining direct access to the Australian Competition Tribunal for authorisation, and recommends the continuation of two separate processes – formal clearance from the ACCC and authorisation from the tribunal.

Recommendation

- Streamline the formal merger clearance process but retain the separate process of formal authorisation assessed by the Australian Competition Tribunal in the first instance.

Misuse of market power

The draft report's proposal to replace section 46 with a new prohibition against conduct that has the purpose, effect or likely effect of substantially lessening competition would represent a fundamental change to Australia's competition law relating to unilateral conduct.

The Business Council has used the response period to carefully assess the likely impacts of the proposed change and to reassess whether the current section 46 remains 'fit for purpose'. We have consulted with Business Council of Australia members, legally tested the proposal and considered practice around the world. In summary our findings are:

- The current section 46 is consistent with principle and best practice
- The proposed section 46 is uncertain and over-reaching
- The proposed defence is unworkable

- The current section is more closely aligned with international jurisprudence than the proposed change
- There is no evidence of a systemic problem that warrants the costs and risks associated with the proposal.
- The changes would create risk and increase cost and uncertainty.

The proposed section 46 is not only inferior to the current section, it fundamentally changes the law. The proposed section 46 could no longer be accurately titled "misuse of market power" as it would no longer require any use – let alone misuse – of market power. It would replace a provision that remains fit for purpose, and has 40 years of jurisprudence behind it, with an uncertain test that would take years of litigation before it could be understood and applied by businesses and their advisers.

The broad and open-ended nature of the new test would significantly increase the risk of investigation and litigation by the ACCC and third parties. It would introduce uncertainty and delay to a wide range of business decisions and risk discouraging vigorous competition and affecting consumer welfare in many industries across the economy. This would impose considerable costs on the economy and offset the otherwise pro-competitive reforms in the rest of the draft report.

This change could only be justified if the new section were demonstrated to provide a clear improvement over the current section 46, taking into account the relative risks and costs of over-capture, under-capture and the administration of each provision by courts, enforcement agencies and businesses. No convincing argument in principle or practice has been made in favour of the new provision or against the existing section 46. The new section would be an outlier internationally and would be inconsistent with established Australian jurisprudence.

In summary, our assessment is that the section 46 proposal fundamentally changes the law, is not supported by evidence of a problem and would impose costs on the economy that exceed any purported benefits.

This part of the submission summarises section 4 of Appendix 2, which the BCA urges the panel to consider in its entirety given the importance of this issue.

The current section 46 is consistent with principle and best practice

Proponents of a new test have criticised the existing section 46 on the basis of principle – arguing that its language refers to competitors and purposes rather than competition and effects – and in practice, arguing that the test is difficult to prove and has led to inappropriate court decisions. These criticisms are not supported by Australian or international jurisprudence or practical experience.

Unilateral conduct is a specific category of conduct that requires care

It is well recognised that unilateral conduct by a business with market power is a special category of conduct that should be regulated with particular care to ensure that businesses remain free to compete vigorously against each other, while identifying and preventing genuinely anti-competitive conduct.

The current section 46 aims to protect the competitive process by prohibiting specific categories of exclusionary conduct – conduct that has the purpose of eliminating or excluding a competitor or preventing competitive conduct.

Because both vigorous competition and anti-competitive conduct can have exactly the same effect, some analysis of intent, object or purpose is usually necessary to characterise the conduct. In most jurisdictions the ultimate question is whether the conduct has an objective business justification or whether its only rational explanation points to an exclusionary purpose.

Courts recognise that section 46 protects the competitive process

Australian courts have recognised that section 46 operates to protect the competitive process overall by prohibiting exclusionary conduct directed at particular competitors or competitors generally. Purpose can be inferred from the circumstances, including the likely effect of the conduct and any objective business rationale. Section 46 as interpreted by the courts is very similar to the corresponding laws as interpreted in overseas jurisdictions.

The "take advantage" element has been criticised as unclear or overly reliant on hypothetical analysis. However, analysis of hypothetical and counterfactual scenarios is common in competition law, including every application of the "substantial lessening of competition" (SLC) test. This analysis will often be contentious, but the element is well understood and has been expanded by recent legislation which has yet to be tested. Removing this element would fundamentally alter the character of section 46 and considerably expand its application.

The ACCC has only lost two section 46 cases on the "take advantage" element and in both cases won on other provisions of the CCA. In fact, since the landmark *Queensland Wire* decision in 1990, the ACCC has concluded 18 cases involving a section 46 claim and won 12 on the section 46 issue (66%) and 16 overall (90%). In that time the US Department of Justice has concluded only 10 monopolisation cases. The ACCC has not identified any form of anti-competitive conduct that is not covered by section 46 or other sections of the CCA, or any cases it has decided not to pursue due to perceived difficulties with section 46.

There is no evidence that the current test is not "fit for purpose".

The proposed section 46 is uncertain and over-reaching

By contrast, the test proposed by the ACCC and largely adopted by the draft report is an entirely new one. It would replace 40 years of jurisprudence and established interpretation with concepts and language that are either unknown to Australian and international jurisprudence or have never been applied to unilateral conduct. It is not similar to any provision internationally and would introduce more uncertainty and risk capturing more legitimate conduct than any other provision.

"Substantial lessening of competition" test is unsuitable

Proponents of the new section 46 claim that the new test is directed at exclusionary conduct – that is, "behaviour that excludes others from the market"[1]

[1] R. Sims, ABC *The World Today* program, 2 September 2014.

or "when a business takes steps to prevent competitors from entering a market."[2] Like the current section 46, the proposed test is intended to protect the competitive process by preventing certain conduct directed against competitors. However, while the current section 46 refers explicitly to specific categories of exclusionary conduct and requires proof of subjective or objective purpose, the proposed section is open-ended in its wording and relies on the SLC element to distinguish vigorous competition on the merits from conduct that is properly characterised as anti-competitive and exclusionary – where both may have the effect of increasing concentration in a market, perhaps substantially.

The Business Council is not confident that the SLC test would or could be reliably interpreted by the courts or applied by regulators to make this distinction. The Dawson report considered a very similar test and warned that:

> Since the effect of legitimate competitive activities may result in the lessening of competition in a market, the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct.

Further, there is little in the application of the SLC test in other sections of the CCA to suggest that it is suitable for application to unilateral conduct – or that the loss or exclusion of a significant competitor or competitors due to legitimate competitive activities would never be considered to substantially lessen competition.

In the merger context, the ACCC routinely argues that the loss of a single competitor from a market would have the likely effect of substantially lessening competition. In other contexts it has inferred a substantial lessening of competition directly from damage to competitors, as in the fuel discounts investigation:

> While large shopper docket discounts provide short-term benefits to some consumers, the likely harm to other fuel retailers and therefore to competition and the competitive process for petrol retailing could well be substantial.[3]

The "take advantage" element should be retained

The proposed section 46 would also remove the "take advantage" element, which plays a critical role in connecting the conduct of a business with its market power, and underpins the concept of a misuse or abuse of market power or a dominant position. It is not appropriate to relegate this essential element to any defence, particularly an unworkable one. The new section 46 could no longer be characterised as a provision dealing with the misuse or abuse of market power or a dominant position, since it would require no use of that power or position.

The proposed defence is unworkable

The panel invites comment on the scope of its defence, and in particular "whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence".

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2 ACCC, 'Our Economy Needs More Competition on the Merits', ACCC Media Release, 13 September 2014.

3 ACCC, 'ACCC Concerned about Escalating Shopper Docket Discounts', ACCC Media Release, 29 July 2013.

It is difficult to see how the defence could be too broad, since it appears likely to be almost impossible to satisfy in practice; and it is hard to imagine what conduct might be caught by the provision but exempted by the defence. The first limb replaces the "take advantage" element with new and unfamiliar language as well as reversing the burden of proof of this essential element. The second limb would require a business to prove an aspirational goal in the "long-term interests of consumers", which is suitable for an objects clause but not an operative provision.

Requiring proof of both limbs would result in a narrower defence than any found in international antitrust law and exacerbate the position of the proposed section as an outlier in international jurisprudence.

The current section is more closely aligned with international jurisprudence

It has been asserted that the current section 46 is out of step with other jurisdictions, and that the proposed test would be closer to international antitrust law. These assertions are not supported by an analysis of the relevant laws.

There is a great variety in the language and structure of legislative provisions on misuse of market power internationally. However, there is considerable convergence in their interpretation and application by courts and regulators. The current section 46, as interpreted by the Australian courts, is consistent with the majority of international jurisprudence in both:

- prohibiting specific categories of exclusionary conduct – conduct aimed at damaging or excluding competitors – to protect the competitive process
- distinguishing anti-competitive conduct from competition on the merits by examining objective or subjective purpose.

While "effects" elements are also common internationally, they are most typically required in addition to purpose rather than as an alternative; most tests are "purpose *and* effect" tests.

In the US the requirement to prove a likely anti-competitive effect has been developed as an addition to the requirement to prove an exclusionary or predatory intent. Since *Microsoft*, a defendant now needs to raise a prima facie business justification – that is, a legitimate purpose – but the plaintiff still needs to prove that the predatory or exclusionary conduct has no pro-competitive justification or purpose.[4]

In the EU, Article 102 lists categories of conduct that may constitute the abuse of a dominant position. These categories have been expanded and defined by cases and guidelines issued by the agency responsible for first-instance decisions. In order to distinguish between abuse and competition on the merits, the courts and the commission often rely on subjective or objective purpose or intent – including by examining legitimate business justifications.

The new section 46 proposed in the draft report is not limited to exclusionary or predatory conduct, requires only proof of purpose *or* effect, and does not take into

[5] Department of Justice, Antitrust Division, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act, September 2008.

account objectively legitimate business purposes. It would be an international outlier and would be dramatically over-inclusive compared to any other test.

The case for change has not been made

The changes proposed might be justified if there were a compelling case that the new provision would represent a clear improvement over the current test – taking full account of the risks of over-inclusion and under-inclusion and, critically, the costs of applying or predicting the application of the new test.

As recognised by the US Department of Justice in its guidelines on the equivalent of section 46:

> An efficient legal regime will consider the effects of false positives, false negatives, and the costs of administration in determining the standards to be applied to single-firm conduct under section 2.[5]

The onus rests with the proponents of this change to make this case and to demonstrate that they have weighed the relevant factors. The Business Council does not consider that any such case has been made.

There is no evidence of a systemic problem that warrants the costs and risks associated with the proposal.

Proponents of changes to section 46 have not identified any examples or categories of anti-competitive conduct that are not caught by the current section 46 or by other provisions of the CCA. Neither has it been argued that section 46 has been wrongly applied against neutral or pro-competitive conduct. Proponents have not acknowledged or addressed the impact of uncertainty affecting competition, despite the clear views expressed in the Dawson review and international recognition of this critical factor.

The Business Council has been asked to provide evidence that "effects" tests such as that proposed have presented difficulties in other countries. However, no jurisdiction in the world has a provision that approaches the scope and generality of the proposed section 46, and no jurisdiction examines effects without some reference to purpose. Accordingly, even if the onus were on those opposing the amendment to show that it had failed in other jurisdictions, the inquiry would not be possible as no comparable provision has been adopted in any other jurisdiction.

The current section 46 is based on universally agreed principles; the dispute can only be with the implementation of those principles. Complaints that section 46 refers to purposes and competitors rather than effects and competition are misleading and irrelevant if the section most effectively promotes the competitive process by preventing exclusionary conduct, while maximising vigorous and dynamic competition by providing clear categories of conduct to avoid.

That is, even if section 46 may not catch specific instances of anti-competitive behaviour – and the ACCC has yet to propose a convincing example – it may still be the best rule for regulating unilateral conduct when the relative risks of

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5 Department of Justice, Antitrust Division, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act, September 2008.

over-capture and under-capture, the ease and costs of application and the certainty and predictability of outcome are all taken into account.

Even if is not clear that the current section 46 is the best possible rule, it is a better rule than the one proposed in the draft report.

The changes would increase cost and uncertainty

It is recognised internationally that open-ended effects tests are more uncertain and costly to apply than tests based on particular conduct or objective or subjective purpose. A former US Assistant Attorney-General for the Antitrust Division of the Department of Justice has emphasised "the need to have administrable, relatively clear rules that firms can use based on the information they're likely to have when they make [day-to-day business] decisions".[6]

A business has information about its own purpose and whether its conduct can be objectively justified, and can judge its purpose or justification against the established criteria of the current section 46. The proposed section 46 would require a business to predict the likely effects of its conduct on competitors and competition in every market that might be affected, which is not information it is likely – or should be likely – to have.

The new section provides no guidance on the kinds of conduct that will be prohibited, and the application of the "substantial lessening of competition" test in other contexts is inconsistent and unclear. The ACCC's intentions for the test do not provide certainty to business and would not affect private litigation.

It would take years or decades of expensive litigation for the courts to develop clear and appropriate principles for the new section 46. The abandonment of accumulated jurisprudence would prolong business uncertainty and risk damaging competition in Australia for some time to come.

Pro-competitive behaviour will be muted by the risk of ACCC investigation

Both the new prohibition and the new defence would greatly increase uncertainty as to the risk of ACCC investigation and legal action, and would result in less dynamic, less responsive and more conservative investment, pricing and product decisions by businesses that may be considered to have market power.

Since markets may be defined quite narrowly in terms of product and geography, this may include a wide range of businesses in many markets – including, but not limited to, Australia's most economically significant industries.

Since a "substantial degree of market power" is a lower threshold than the "monopoly" or "dominant position" of other jurisdictions, the new provision would not only apply to monopoly behaviour but would risk dampening competition between large companies in concentrated but competitive markets – the kind of markets that are common in Australia and the kind of competition that has delivered the most substantial and lasting benefits to consumers.

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6 Testimony of R Hewitt Pate, Antitrust Modernization Commission Public Hearing, 29 September 2005.

The Business Council urges the panel to reconsider its position and recommends no change to section 46.

Recommendation

- Do not proceed with the recommendation to change section 46 on the "misuse of market power".

Price signalling and concerted practices

The Business Council supports the draft report's recommendation to repeal current price signalling provisions, which are contrary to the principles that competition laws should: distinguish between pro-competitive and anti-competitive conduct; apply across the economy rather than to specific sectors; and be clear, simple and predictable.

The price-signalling provisions were adopted without a sufficiently rigorous inquiry into the underlying problem thought to arise from the courts' interpretation of the meaning of "understanding" in the CCA. Before replacing these failed provisions with another solution it would be helpful to step back and reassess the problem and all alternative approaches.

Adopting the European concept of "concerted practices" may not be as simple a solution as it appears. In Europe a "concerted practice" covers all forms of coordination or collusion that fall short of an agreement. In a new section 45 as proposed by the panel, it is not clear how the interpretation of "concerted practices" might be influenced by the adjacent and overlapping concepts of "arrangement" and "understanding".

The definitions proposed in the draft report – "a regular and deliberate activity undertaken by two or more firms" or "a regular practice undertaken by two or more forms" – appear to be wider than the European concept. It is not clear how this definition would distinguish conscious parallel action or pro-competitive or neutral information disclosures, or to what extent it would import European jurisprudence or regulatory guidelines.

Crucially, in Europe an otherwise anti-competitive concerted practice may be exempted on the basis that it "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". It is not clear that any similar defence would be available to concerted practices in Australia.

In these circumstances there is a serious risk that spontaneous and pro-competitive conduct would be penalised if the changes proposed by the draft report were made without significant additional thought and consultation.

If a more considered process concludes that a concerted practices element should be added to section 45, the Business Council considers that, at a minimum:

- a more considered legislative definition of "concerted practice" should be developed through public consultation

- the ACCC should develop guidelines setting out its approach to what is to be considered a “concerted practice”, capturing the appropriate nuance of the European jurisprudence, and also through public consultation
- an essential element of proving a contravention should be that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

These issues are discussed in further detail in section 3 of Appendix 2.

Recommendation

- Do not proceed with the recommendation to extend section 45 to cover “concerted practices”.

Third line forcing and resale price maintenance

The Business Council welcomes the proposal to extend the notification process to resale price maintenance. The recommendation would make it simpler and more efficient for businesses to enter into vertical commercial arrangements that provide net benefits to consumers.

We remain concerned that the continuing per se prohibition of resale price maintenance is out of step with competition policy principles, with international jurisprudence as it has evolved in the United States and as it is written in the European Union, and with all of the economic literature in this area, which suggests that resale price maintenance can be pro-competitive.

We believe that there are many circumstances in which resale price maintenance arrangements are efficiency enhancing and not anti-competitive. This is particularly the case in industries where inter-brand competition is more important than intra-brand competition. This has long been the case in many industries and is becoming more frequently the case as manufacturers increasingly vertically integrate at a global level.

We also welcome the panel’s recommendation that the per se prohibition of third line forcing be removed, as has been consistently recommended since the Hilmer review in 1993. Since then, more than 4,000 notifications have been lodged with the ACCC and only a handful have been revoked or challenged, representing a significant waste of resources for both business and the ACCC.

We hope that the panel’s suggestion to remove the per se prohibition of third line forcing is finally implemented this time. We hope it will not take another two decades for resale price maintenance to be judged according to its effect on competition.

We also suggest the panel clarify that the notification process currently applying to exclusive dealings should apply to third-line forcing and resale price maintenance if and when their per se prohibition is removed.

These issues are discussed in further detail in section 6 of Appendix 2.

Business Council of Australia recommendation

Recommendation

- Remove the 'per se' prohibition on resale price maintenance and replace it with a substantial lessening of competition test. The notification process currently applying to exclusive dealings should apply to third line forcing and resale price maintenance.

Admissions of fact (section 83)

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

The draft report recommends amending section 83 so that it extends to *agreed admissions* of fact, in addition to *findings of fact made by the court*.

This raises significant concerns. Agreed admissions (or statements) of fact are presented to the court by parties wishing to reduce the costs and uncertainties of litigation. They have been used in the majority of ACCC legal actions and have accounted for the majority of ACCC penalties awarded.

However, agreed admissions will be substantially less appealing to respondents if they can be used to facilitate private litigation, including class actions, by constituting prima facie evidence in these subsequent actions.

This change could discourage respondents from settling proceedings with the ACCC and lead to more costly alternative settlement procedures.

Recommendation

- Do not proceed with the recommendation to amend section 83 so that it extends to "admissions of fact".

Changes to access regulation

Following the Hilmer review, the national access regime under Part IIIA was introduced to promote competition in markets requiring access to bottleneck infrastructure.

While some parts of Part IIIA have operated reasonably effectively – such as the framework for the ACCC to accept access undertakings lodged by infrastructure owners – the declaration process has proved cumbersome and costly in operation. These costs are clearly acknowledged in the draft report.

The Business Council welcomes the panel's recognition that declaration poses particular risks for export-exposed mining industries.

We support the panel's proposed amendments to the declaration criteria, which provide greater clarity to the test and set a more appropriate threshold for intervention.

However, even with the proposed amendments the framework remains a second-best regulatory solution. We prefer targeted access solutions to the general and uncertain operation of the declaration process.

In some areas – for example, airports – some Business Council member companies consider that the presence of the declaration process has played a role in facilitating the negotiation of reasonable commercial terms of access. In this way, the regime does operate as a valuable 'fallback' regulatory framework, in the absence of any specific or more tailored alternative.

In light of these considerations, subject to an appropriate regulatory impact assessment we support the removal of the declaration framework, except in respect to the following "grandfathered" facilities:

- airports – where it would continue to apply, except or until a comprehensive alternative framework for facilitating terms of access is established
- any other former publicly owned multi-use facilities in which third party access already applies. In some cases, access regimes were not introduced at the time of privatisation because of the potential for future declaration if this was later found to be warranted.

As discussed below, decisions under the Part IIIA that are appealed to the tribunal should be subject to full merits review.

These issues are discussed in further detail in Appendix 2.

Recommendation

- Remove the declaration regime under Part IIIA in all cases except for airports and for former publicly owned, multi-user facilities that do not have an access regime.

Trading restrictions in industrial agreements

The draft report invites submissions on the apparent conflict between section 45E of the CCA, which prohibits trading restrictions in contracts, and the *Fair Work Act 2009*.

The panel observes that industrial agreements which place restrictions on the use of contractors by employers, or which restrict the buying or selling of goods and services from third parties, and which would be illegal under section 45E may instead be legal under the Fair Work Act.

The Business Council is of the view that industrial agreements should not restrict employer flexibility to trade with third parties or to engage contractors or labour hire companies. These restrictions are anti-competitive and prevent productivity

growth and job creation. They add to the costs of doing business in Australia and decrease our global competitiveness.

To reduce this apparent conflict, the Business Council supports amending sections 45E and 45EA, so that the CCA expressly applies to awards and enterprise agreements.

Recommendation

- Include awards and enterprise agreements under sections 45E and 45EA to reduce the apparent conflict between the CCA and Fair Work Act 2009.

Section 155 notices

The Business Council welcomes the panel's recommendations on section 155 notices and has suggestions for further improvement.

We agree with the panel's finding that the costs and resourcing involved in responding to section 155 notices can be significant. This accords with the experience of member companies and is supported by the data that was presented in our first submission.

We consider that the obligation to frame notices in the narrowest form possible, consistent with the scope of the matter being investigated, should be enshrined in section 155 itself. The panel should recommend a Ministerial Direction requiring the ACCC to review and update its guidelines to ensure that they are consistent with this principle, including with regard to the increasing burden imposed by notices in the digital age.

In merger reviews, the ACCC should seek to obtain information and documents through a voluntary request. This would narrow the instances in which section 155 notices would be issued. However, if the ACCC considers it appropriate to issue a section 155 notice after a voluntary request, it should do this as narrowly as possible.

The Business Council also considers that the requirement of a person to produce documents in response to a section 155 notice should be qualified by law, rather than by a guideline. The penalties for breaching section 155 are severe for individuals and proposed to be increased for corporations. Any qualification of that obligation should therefore be set out in the law itself.

Recommendations

- Issue a Ministerial Direction requiring the ACCC to review and update its section 155 guidelines to ensure that they are consistent with an obligation to frame notices in the narrowest form possible, consistent with the scope of the matter being investigated.
- The requirement of a person to produce documents in response to a section 155 notice should be qualified by law, rather than by a guideline.

3. Competition institutions

The "Competition Institutions" section of the draft report sets out recommendations that serve two important purposes:

- First, it proposes institutional arrangements to effectively deliver the draft report's recommended competition policy reforms. The primary recommendation is for the new Australian Council for Competition Policy to oversee the reforms and administer any reward payments across the federation.
- Second, it proposes changes to the institutions that will have an ongoing role in administering competition law and competition policy. These include recommended changes to the governance of the ACCC, a new National Pricing and Access regulator and an ongoing role for the ACCP, including to conduct market studies.

The final report should endorse the critical importance of constituting the ACCC, the proposed ACCP and the Pricing and Access Regulator within economic frameworks that promote growth.

The government has recently introduced two policies to enhance the performance of all economic regulators. The two policies are:

- The issuing of 'statements of expectations' to all economic regulators that align regulator conduct with national goals to grow the economy and create jobs. Regulators are required to take into account the government's policies to reduce the regulatory burden on business when discharging their duties.
- A new regulator performance framework that will require the publication of:
  - an annual report of externally validated regulator key performance indicators, including an assessment of areas for regulator improvement.
  - the results of external reviews of each regulator's performance.

Australian Council for Competition Policy

The Business Council agrees with the panel's observation that two important factors in the success of the National Competition Policy reforms were the strong commitments by governments and the institutional arrangements put in place to carry out a widespread program of reform.

The Business Council strongly supports the panel's recommendation for a new Australian Council for Competition Policy (ACCP). The extensive reforms put forward in the draft report will need a dedicated body that engages all Australian governments to follow through with their implementation.

The Business Council believes the ACCP is needed to:

- consolidate in one body the institutional arrangements to implement competition policy reforms, including absorbing the National Competition Council
- progress the microeconomic reform agenda laid out in the draft report and other reform prioritises that it identifies over time
- fill a gap in Australia's institutional framework – there are no other obvious organisations to effectively discharge the microeconomic reform agenda responsibility
- link microeconomic reform to incentive payments, or the 'competition policy payments' referred to by the panel. In our original submission we similarly proposed the use of productivity payments as a reward for implementing reform.

The Business Council 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.

The ACCP would also have an ongoing role in promoting competition policy and undertaking market studies.

The panel observes that "the lack of a formal market studies power in Australia is generally in contrast with other comparable economies." The Business Council supports the appropriate use of market studies to identify policy reforms that can improve competitive outcomes in markets.

The draft report states that none of the ACCC, Productivity Commission, or state or territory regulators is specifically designed to conduct market studies. The panel recommends that the market studies power should go to the newly created ACCP. We agree with this recommendation.

The ACCP should be constituted with a board that has the function to provide independent oversight, in the same way we propose for the ACCC (see discussion below).

Recommendation

- The Australian Council for Competition Policy should be established to oversee competition policy on a national basis.

Alternative institutional arrangements if the ACCP is not established

The Business Council acknowledges there are costs and risks associated with establishing new institutions. The government will rightly test the need for the ACCP where other organisations could feasibly undertake the roles planned for it.

If the ACCP is not adopted, there will be a need to consider alternative recommendations for allocating the functions it was assigned in the draft report.

The Productivity Commission would seem the most appropriate organisation for a number of the ongoing functions. A dedicated unit could be formed within the Productivity Commission to carry out the ACCP's functions with respect to:

- undertaking research, including the market studies power
- recommending competition policy priorities and reforms
- setting reform targets and timelines
- making recommendations on incentive and other payments to governments that achieve competition reform targets.

Market studies power should not go to the ACCC

If the ACCP is not established, the panel should make clear that the market studies power should be allocated to the Productivity Commission. It should not revert to the ACCC.

The Business Council agrees with the panel that a body separate to the ACCC should have the responsibility of carrying out market studies because:

- broader powers to initiate studies and require information would conflict with the regulator's enforcement responsibilities
- it would risk undue interference in competitive markets in the absence of any clear problems, imposing unjustified costs on market participants, and encouraging 'fishing expeditions'
- it is more efficient to draw on existing institutional knowledge and expertise, such as that of the PC.

The ACCC already has sufficient powers to undertake its own research in the context of its operations. In addition, the government already has the ability to require the ACCC (through the use of the powers in Part VIIA of the CCA) or the Productivity Commission (through the use of the powers in Parts 2 and 3 of the *Productivity Commission Act 1998*) to initiate inquiries into particular problems or public concerns.

Recommendation

- If the Australian Council for Competition Policy is not established, any market studies power should be allocated to the Productivity Commission and not the Australian Competition and Consumer Commission.

Defining the ACCP's market studies powers

The Business Council agrees that all governments should have the capacity to issue a reference to the ACCP to conduct a market study.

If market participants are also able to request a market study, we consider that the threshold for the ACCP commencing them should be set at an appropriate level. Otherwise, there is a risk that the study could be commenced based on one market participant's self-interest, rather than the public interest.

Threshold test for commencing a market study

A market study should only be commenced if (i) there is clear evidence of systemic problems or significant public concerns and (ii) the study would be in the public interest. This would address our concerns about the ACCP conducting a study at the request of a market participant (or regulator) based on their own self-interest.

The panel has sought comment on mandatory information-gathering powers for market studies, particularly whether the Productivity Commission's approach of having mandatory powers but generally choosing not to use them should be adopted by the ACCP. We generally support the approach applied by the Productivity Commission.

Voluntary and low-cost information gathering

We share the panel's concerns regarding the imposition created by section 155 notices in the digital age. We also agree that mandatory information gathering powers are a significant legal imposition that should be used sparingly and that their use may create an adversarial (rather than co-operative) environment which may be counterproductive.

So that any mandatory information-gathering powers of the ACCP do not impose an unnecessary cost on business, the ACCP should be required to request information on a voluntary basis before exercising any mandatory powers.

If a person fails to provide information that was reasonably necessary for conducting a study in an appropriate time frame, the ACCP may then use any mandatory powers.

If the ACCP uses any mandatory powers, the obligation to produce documents should only require the producing party to conduct a reasonable search. What amounts to a reasonable search should be determined having regard to (i) the nature and complexity of the study, (ii) the number of documents that could potentially fall within the scope of the request, (iii) the ease and cost of retrieving

documents, (iv) the significance of any document that may be found, and (v) any other relevant matter.

Recommendation

The market study powers of the ACCP should be more clearly defined:

- A threshold for commencing a market study should be set with regard to clear evidence of a problem and that the study is in the public interest.
- Information gathering should be voluntary in the first instance, with any subsequent mandatory powers subject to a test of reasonableness.

ACCC oversight and administration

The Business Council supports the draft report's view that the governance of the ACCC could be further improved. To achieve this, the panel requests views on how best to obtain this outcome, and suggests either replacing the commission with a board or by adding an advisory board to the commission structure (Recommendation 47).

The Business Council 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.

The Board would operate in accordance with the usual norms and practices of a corporate board.

The board should have a high-level guidance and oversight role, setting strategic direction, approving guidelines and priorities, and assessing the ACCC's performance against its statutory objectives.

The ACCC board would be accountable to the relevant minister for the discharge by the ACCC of its statutory responsibilities. The head of the ACCC (currently designated as the chair) would under this model become the CEO or director accountable to the board.

The chair and board members and the CEO should be statutory roles, with other senior executive management positions appointed by the CEO (and with the option of board approval). The statutory roles of the commissioners can also be maintained, notwithstanding the establishment of the Board.

In accordance with ordinary and well-understood corporate governance, the board would not be involved in the day-to-day decision-making currently undertaken by the commissioners of the ACCC but would periodically assess whether the ACCC was tending to make the right decisions and provide guidance where necessary.

This is similar to the role of management in well run public corporations. Conversely, the ACCC commissioners would not be part of the board but would form an executive committee, led by the head of the ACCC, who again, could be designated CEO or director.

As a further pre-existing governance measure, the planning, performance and reporting requirements under the *Public Governance, Performance and Accountability Act 2013*, which applies to all Commonwealth entities and Commonwealth companies, would continue to apply to the ACCC.

The Business Council encourages the panel to explore in more detail how an ACCC board should work in practice.

Reasons for a board

Boards are used extensively in private and public organisations to ensure an organisation is compliant with its internal and external obligations and to improve performance. Boards typically provide oversight and strategic direction rather than participating directly in the decisions of an organisation.

The panel has described the ACCC as a "well-regarded and effective body" but also recognises the benefit of the perspective of "individuals who do not have responsibility for its day-to-day operations".

ACCC commissioners are currently employed full-time and several oversee specific responsibilities. While this has the benefit of commissioners making decisions based on detailed knowledge of issues and cases, it has the disadvantage of an executive management that can be inwardly focused. The structure would benefit from stronger accountability and exposure to a greater range of views.

Given the nature and frequency of decisions made by the ACCC, it may be difficult for outside parties to participate effectively in the process, and easy for the views of an advisory board to be dismissed.

Accountability and a diversity of views may be best achieved by a corporate-style board whose involvement is focused at a higher level of guidance and oversight.

A board would provide greater independent oversight and enable proper review of the effectiveness of the ACCC's activities and performance in fulfilling its objectives under the CCA. Non-executive directors can bring an independent view when high-level strategy and performance assessments need to be made.

Better governance could improve performance through:

- a greater focus on obtaining compliance through education and encouraging the exploration of conciliatory and mutually agreed solutions as well as legal enforcement
- media comments that take account of due process and the risk of unduly harming company reputations
- a focus on assessing performance against the benchmark of enhancing consumer welfare as well as the number of investigations and actions taken
- better processes to reduce the cost and burden associated with investigations (such as compulsory information provision)

- processes to ensure separation between investigatory teams (staff) and decision-makers (ACCC executive) to enhance decision-making rigour.

The Business Council does not support the option of an advisory board because it would have limited influence and authority and would not materially improve the ACCC's governance. This assessment of the effectiveness of advisory boards was also the view of the Uhrig review (2003).

An advisory board would not be subject to the same rigour and principles as a board operating under the standards of the Corporations Act. The ACCC is already able to establish an advisory board on its own initiative if it wishes.

Structure and role of an ACCC board

The ACCC board should be established to 'add value' to the ACCC's performance in meeting its statutory obligations. It should apply the standards under the Corporations Act and be modelled on boards that operate in the corporate sector.

The *ASX Corporate Governance Council Principles and Recommendations*, which apply to ASX listed entities, provide a best practice framework for designing an ACCC board. Two key recommendations for consideration are:

- Boards should be structured to "add value" by ensuring the board is of an appropriate size and composition, with the skills and commitment to enable it to discharge its duties effectively.
- Boards should be required to disclose the respective roles and responsibilities of the board and of management, and the matters which would be expressly reserved for the board and those delegated to management.

Drawing from best practice in the corporate sector and taking into account the recommendations of the Uhrig review (2003), the board should have these features:

- an independent, non-executive chair
- a majority of independent, non-executive directors
- directors should be appointed on the basis of relevant skills and experience
- the executive would be accountable to the board for its decisions.

Independent directors should not be allied with the interests of management or other relevant stakeholders.

The application of the standards under the Corporations Act means that the rigour and customs of best practice governance in the corporate sector can be applied to the operation of the ACCC board and to the appointment of board members. These are well understood in the community and among potential non-executive directors. This will better enable:

- the attraction of high-quality independent directors with previous board experience, as they will be well aware of their obligations under an ACCC board set up this way
- conflicts of interest to be dealt with using the same well-established protocols and rules that already apply on corporate boards.

The role of the board should be to set ACCC strategy, hold the executive to account, and be accountable itself to the relevant minister for ACCC performance.

The board should initiate regular reviews of the impact of ACCC decisions and action on consumer welfare. The board should not have a role in selecting cases for investigation.

The board should be accountable for ensuring the ACCC meets its obligations under recent governance arrangements announced by the government to apply a stronger, more coherent economic framework to the operations of the ACCC. This includes meeting the obligations in the ACCC's "statement of intent", issued in response to the government's "statement of expectations", and compliance with the ACCC's obligations under the new Regulator Performance Framework.

The panel has raised the suggestion of additional accountability to the parliament through regular appearance before a broadly based parliamentary committee. If a board is introduced we do not see a need for this. Accountability would be clearer where the board is accountable to a single minister, rather than a committee.

Australian examples

The Business Council considers that the example of the Reserve Bank provided in the draft report is not necessarily the best example for the ACCC given the nature and frequency of decisions that would need to be made. Instead, a body such as the Australian Energy Markets Operator (AEMO), which operates national electricity and gas markets, may be a better example.

AEMO operates under the governance of a board comprised of up to nine skills-based non-executive directors and the CEO. Day-to-day management is delegated to the managing director who is appointed by the board. Other board responsibilities include:

- oversight of the company's activities to achieve the objectives set out in the constitution
- setting the company's goals and strategy
- determining the financial, operational, human, technological and administrative resources required by the company to meet its objectives and goals
- establishing and maintaining adequate and effective reporting lines and procedures, which enable all material matters and information to be identified and reported to the board
- reviewing and assessing the performance of the company's management

- reporting to stakeholders of the company.

Since the AEMO governance structure was explicitly developed with reference to the ASX Corporate Governance Principles and Recommendations, it is not surprising that the AEMO Board operates very similarly to the board of a listed public company.

International examples

Internationally, the Office of Fair Trading (OFT) in the United Kingdom is a possible model for the ACCC. In the case of the OFT, the role of the board included: the selection of senior staff; ensuring processes and systems were appropriate; the setting of strategy; annual planning, and holding the executive to account for the implementation of the plan; and the efficient and proper running of the organisation. The Audit Committee and Pay (Remuneration) Committee were sub-committees of the board of the OFT.

The Competition and Markets Authority (CMA) continues this structure. The only operational decision made by the CMA Board – recognising the potentially far-reaching impact of this decision – is to launch a market study or market investigation. Otherwise the CMA Board is responsible for ensuring that the CMA fulfils its statutory duties and functions, establishing the overall strategic direction of the CMA, proposals for the CMA's annual plan, annual performance and concurrency reports, and making rules of procedure for merger, market and special reference groups.

Recommendation

- Introduce an independent ACCC board consistent with the corporate governance arrangements for corporations under the Corporations Act. The Board should be responsible for high level strategic direction and independent oversight with management responsible for day-to-day decision making. An 'advisory board' would be unlikely to be effective and should not be recommended.

Media liaison

The Business Council supports the draft report's recommendation for the ACCC to develop a media code of conduct, as previously recommended by the Dawson review (2003).

We consider that the media code of conduct should be based on the following principles – as articulated by the Dawson review:

- 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.

- The code should cover all formal and informal comment by ACCC representatives.
- While 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.
- 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.
- 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.

There are many international examples from which the ACCC can draw. For instance, the US Department of Justice's antitrust division manual states:

> The policy of the Department of Justice and the antitrust division is that public out-of-court statements regarding investigations, indictments, ongoing litigation and other activities should be minimal, consistent with the Department's responsibility to keep the public informed … Public comment […] should be limited out of fairness to the rights of individuals and corporations and to minimise the possibility of prejudicial pre-trial publicity.[7]

It is critical that ACCC media comments made during ongoing investigations or legal proceedings do not interfere with due process. The Australian Government's Investigation Standards (2011) include media liaison procedures that aim to ensure people's right to a fair hearing or legal process is not prejudiced.

ACCC accountability and relationships with stakeholders would be enhanced if it were required to publish its media liaison procedures.

Given that the ACCC did not appear to act on the recommendations of the Dawson review, we consider it appropriate for the panel to recommend a Ministerial Direction so that the measures are implemented.

Recommendation

- The ACCC should be subject to a media code of conduct and be required to publish procedures on media interactions, ideally approved by its board.

Australian Competition Tribunal

The Business Council considers that, in exercising its responsibilities over the past 10 years, the tribunal has proved to be an effective merits review body. Its recent handling of the AGL–Macquarie Generation merger authorisation also showed it has the ability to come to terms with complex economic and industry issues within the relatively short timeframe of three months.

[7] US Department of Justice Antitrust Division Manual, Chapter VII, H., 2.

However, the Business Council is concerned that the tribunal's responsibilities have diminished over time, particularly in relation to the extent of its merits review function, which has been removed or curtailed in relation to Part XIC, Part IIIA and reviews of the ACCC's formal merger clearance decisions.

The Competition Policy Review presents a timely opportunity to reverse this trend. In particular, with the establishment of a new pricing and access regulator, it is appropriate to restore full merits review of the final decisions that will be made by this new regulator. This should include an ability for the tribunal to review any public interest element in decisions by the minister related to access issues.

The Business Council considers that the tribunal should also be able to conduct a full merits review of all formal merger clearance decisions. This review should not be restricted to a "review on the documents." A full merits review will allow the tribunal to consider all aspects of a merger and both proponents and opponents of a merger to access all available relevant information. Should market conditions or commercial circumstances change, it will also allow the tribunal to make its decision using the best available information.

Recommendation

- The Australian Competition Tribunal should be able to conduct a full merits review in relation to Part XIC, Part IIIA and reviews of the ACCC's formal merger clearance decisions.

New national pricing and access regulator

We support the establishment of a dedicated access and pricing regulator, independent of the ACCC. The new regulator would take over the ACCC's current Part IIIA functions along with its telecommunications, energy and other regulatory functions and activities, as well as any relevant responsibilities currently being undertaken by state regulators (such as the AER's responsibilities under the National Electricity Law and the National Gas Law).

Our preference is that this regulator is a federally constituted body. We agree with the panel that over time if a national framework could be agreed, other currently state-based sectoral functions such as water and rail should be transferred to the new regulator.

An access and pricing regulator would provide welcome consistency and national policy leadership in respect of economic regulation and access policy. It could provide a centre of policy excellence and capability for pricing and access regulation, and facilitate the more consistent development of access regulation nationally.

If the ACCP is instituted according to the panel's recommendations, the Business Council sees benefit in that new body taking on any declaration role [that is retained under Part IIIA], with the new pricing and access regulator being responsible for the ACCC's current role of arbitrating disputes and accepting access undertakings. This would mirror the current separation between the

declaration decision (National Competition Council) and decisions relating to the terms of access (ACCC).

While these issues of structure and governance are important, the Business Council 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 over time (in order to provide transparency and certainty for industry).

Recommendation

- The Business Council supports the establishment of a dedicated national access and pricing regulator as a federally constituted body with a board.

Small business section: Alternative dispute resolution models

The panel recommends that the ACCC should "take a more active approach in connecting small business to alternative dispute resolution schemes where it considers that complaints have merit but are not a priority for public enforcement" (Recommendation 49).

The other part of this recommendation concerns the creation of a specific dispute resolution scheme for small business, which is dealt with separately below.

Wherever possible, non-litigious approaches to resolving disputes should be used because legal action is costly and should only be used as a last resort. The Business Council supports the efficient resolution of disputes involving businesses of all sizes.

The ACCC already assists small business in locating alternative dispute resolution (ADR) schemes. Whether or not the ACCC should take a more active role in connecting small business to ADR schemes is largely a matter for the ACCC.

Specific dispute resolution scheme for small business

The panel has invited views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.

The Business Council does not support an institution that only addresses claims under the CCA. Since claimants may have grievances involving the CCA and another area of the law, it would be more efficient if all grievances could be heard by one body.

Secondly and more importantly, the Business Council considers that a new ADR scheme or court/tribunal is unnecessary. ADR schemes are already offered by

small business commissioners, industry bodies such as ombudsmen, courts and tribunals, and under certain industry codes. There are currently 100 courts or tribunals in existence.[8]

If there is a problem with access to justice, it would be better to address any issues with existing institutions rather than create a new institution.

As noted in the draft report, the Productivity Commission is conducting an ongoing inquiry into access to justice. In April 2014, it released a draft report running to almost 900 pages. A final report was submitted to government in September 2014. The Business Council considers the Productivity Commission's inquiry to be the more appropriate avenue for reviewing access to justice.

The Business Council agrees with the panel that the introduction of "no cost" orders for small businesses in proceedings would be unwise. The ability of a court to award costs is an important tool for it to control the conduct of the parties.

Depriving a court of this tool not only risks an increase in frivolous litigation (as identified by the panel) but also an increase in inappropriate behaviour by parties. "No cost" orders may harm small businesses who are the defendants in frivolous claims brought by other small businesses.

Industry codes

The Business Council supports the use of industry codes and charters where feasible as tools for avoiding disputes to begin with by giving businesses a better understanding of their rights and resolving disputes once they begin by offering ADR.

Industry codes can be divided into two categories: (i) those created under the *Competition and Consumer Act 2010 (CCA)* and (ii) those created independently of the CCA.

The draft report does not address industry codes in detail. It notes that "[a]ny *new* codes *could consider* whether they should apply penalties for non-compliance".

The ACCC has said in submissions that all industry codes created under the CCA should prescribe penalties. We believe the panel's recommendation of a more flexible, less automatically punitive approach is preferred.

Industry codes apply in a wide variety of situations and penalties will not always be the most appropriate form of remedy. Consideration should be given to two-tier models for sanctions to apply under codes. Make-good provisions and other less punitive provisions should be preferred in the first instance, followed by a consideration of whether penalties should apply.

[8] Productivity Commission, *Access to Justice Arrangements*, April 2014, p. 4.

Recommendation

- Improve the effectiveness of existing alternative dispute resolution (ADR) mechanisms, but do not create a new body solely to handle CCA-related disputes involving small business.

Appendix 1: Business Council of Australia position on the Draft Report Recommendations

No		Business Council of Australia position
	Competition Policy	
1	The Panel endorses **competition policy** that focuses on making markets work in the long-term interests of consumers. The following principles should guide Commonwealth, state and territory and local governments in implementing competition policy: • legislative frameworks and government policies binding the public or private sectors should not restrict competition; • governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers; • the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers; • governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities; • government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership; • a right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest; and • independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers. Applying these principles should be subject to a 'public interest' test, so that: • the principle should apply unless the costs outweigh the benefits; and • any legislation or government policy restricting competition must demonstrate that: – it is in the public interest; and – the objectives of the legislation or government policy can only be achieved by restricting competition.	Support

No		Business Council of Australia position
2	Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of **human services**. The guiding principles should include: • user choice should be placed at the heart of service delivery; • funding, regulation and service delivery should be separate; • a diversity of providers should be encouraged, while not crowding out community and voluntary services; and • innovation in service provision should be stimulated, while ensuring access to high-quality human services. Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.	Support and provide more detailed guidance
3	Governments should introduce cost-reflective **road pricing** with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety. To avoid imposing higher overall charges on road users, there should be a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.	Support
4	The Australian Government should repeal Part X of the CCA. A block exemption granted by the ACCC should be available for **liner shipping** agreements that meet a minimum standard of pro-competitive features (see Draft Recommendation 35). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers and the liner shipping industry. Other agreements should be subject to individual authorisation by the ACCC. Repeal of Part X will mean that existing agreements are no longer exempt from the competition provisions of the CCA. Transitional arrangements are therefore warranted. A transitional period of two years should allow for authorisations to be sought and to identify agreements that qualify for the proposed block exemption.	Support

No		Business Council of Australia position
5	Noting the current Australian Government Review of **Coastal Trading**, the Panel considers that cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved.	Support removal of cabotage restrictions under the Coastal Trading Act
6	States and Territories should remove regulations that restrict competition in the **taxi** industry, including from services that compete with taxis, except where it would not be in the public interest. If restrictions on numbers of taxi licences are to be retained, the number to be issued should be determined by independent regulators focused on the interests of consumers	Support
7	The Panel recommends that an overarching review of **intellectual property (IP)** be undertaken by an independent body, such as the Productivity Commission. The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets. The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements. Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.	Support
8	The Panel recommends that subsection 51(3) of the CCA be repealed [exempts commercial transactions involving **IP rights**, including the transfer and licensing of such rights]	Consider in the IP review in Item 7 above
9	Remaining restrictions on **parallel imports** should be removed unless it can be shown that: • they are in the public interest; and • the objectives of the restrictions can only be achieved by restricting competition.	Support

No		Business Council of Australia position
10	All governments should include competition principles in the objectives of **planning and zoning** legislation so that they are given due weight in decision-making. The principles should include: • a focus on the long-term interests of consumers generally (beyond purely local concerns); • ensuring arrangements do not explicitly or implicitly favour incumbent operators; • internal review processes that can be triggered by new entrants to a local market; and • reducing the cost, complexity and time taken to challenge existing regulations.	Support and adopt a national approach to major project approvals
11	All Australian governments, including local government, should **review regulations** in their jurisdictions to ensure that unnecessary restrictions on competition are removed. Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that: • they are in the public interest; and • the objectives of the legislation or government policy can only be achieved by restricting competition. Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators. Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent. The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform. The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny	Support Repeal the Australian Jobs Act due to anti-competitive requirements to produce industry participation plans
12	Given the unique position of **Australian Standards** under paragraph 51(2)(c) of the CCA, the Australian Government's Memorandum of Understanding with Standards Australia should require that non-government mandated standards be reviewed according to the same process specified in Draft Recommendation 11.	Support

No		Business Council of Australia position
13	All Australian governments should review their **competitive neutrality policies**. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities. The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).	Support
14	All Australian governments should increase the transparency and effectiveness of their **competitive neutrality complaints** processes. This should include at a minimum: • assigning responsibility for investigation of complaints to a body independent of government; • a requirement for the government to respond publicly to the findings of complaint investigations; and • annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Draft Recommendation 39) on the number of complaints received and investigations undertaken.	Support
15	To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with **competitive neutrality principles in their annual reports**.	Support

No		Business Council of Australia position
16	State and territory governments should finalise the energy reform agenda, including through: • application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions; • deregulation of both **electricity and gas** retail prices; and • the transfer of responsibility for reliability standards to a national framework. The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration. All governments should re-commit to reform in the **water** sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on: • economic regulation of the sector; and • harmonisation of state and territory regulations where appropriate. Where water regulation is made national, the body responsible for its implementation should be the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).	Support
	Competition laws	
17	The Panel recommends that the central **concepts**, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.	Support
18	The competition law provisions of the CCA should be **simplified**, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions. The Panel recommends that there be public consultation on achieving simplification. Some of the provisions that should be removed include: • subsection 45(1) concerning contracts made before 1977; • sections 45B and 45C concerning covenants; and • sections 46A and 46B concerning misuse of market power in a trans-Tasman market. This task should be undertaken in conjunction with implementation of the other recommendations of this Review.	Support

No		Business Council of Australia position
19	The CCA should be amended so that the competition law provisions **apply** to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce	Support
20	The current **definition of 'market'** in the CCA should be retained but the current definition of 'competition' should be re-worded to ensure that competition in Australian markets includes competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied by persons located outside of Australia to persons located within Australia.	Support and provide legislative guidance
21	Section 5 of the CCA should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on **extra-territorial conduct** in private competition law actions. The in-principle view of the Panel is that the removal of the foregoing requirements should also be removed in respect of actions under the Australian Consumer Law.	Support in principle
22	The prohibitions against **cartel conduct** should be simplified and the following specific changes made: • the provisions should apply to cartel conduct affecting goods or services supplied or acquired in Australian markets; • the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility; • a broad exemption should be included for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services), recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition; • an exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing), recognising that such conduct will be prohibited by section 47 of the CCA (revised in accordance with Draft Recommendation 28) if it has the purpose, or has or is likely to have the effect or likely effect of substantially lessening competition.	Support
23	The CCA should be amended to remove the prohibition of **exclusionary provisions** [as these unnecessarily increase the complexity of the CCA and overlap with other provisions] in subparagraphs 45(2)(a)(i) and 45(2)(b)(i).	Support

No		Business Council of Australia position
24	The **'price signalling'** provisions of Division 1A of the CCA are not fit for purpose in their current form and should be repealed. Section 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.	Support repealing price signalling Reconsider extension to 'concerted practices'
25	The Panel considers that the primary prohibition in section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct. To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question: • would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and • the effect or likely effect of the conduct is to benefit the long-term interests of consumers. The onus of proving that the defence applies should fall on the corporation engaging in the conduct. **The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.** Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined'.	Not supported

No		Business Council of Australia position
26	A specific prohibition on **price discrimination** should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the recommended revisions to section 46, see Draft Recommendation 25). Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include the removal of restrictions on parallel imports (see Draft Recommendation 9) and ensuring that consumers are able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.	Support
27	The provisions on **'third-line forcing'** (subsections 47(6) and (7)) should be brought into line with the rest of section 47. Third-line forcing should only be prohibited where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.	Support

No		Business Council of Australia position
28	Section 47 should apply to all forms of **vertical conduct** rather than specified types of vertical conduct. The provision should be re-drafted so it prohibits the following categories of vertical conduct concerning the supply of goods and services: • supplying goods or services to a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and • refusing to supply goods or services to a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition. The provision should also prohibit the following two reciprocal categories of vertical conduct concerning the acquisition of goods and services: • acquiring goods or services from a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and • refusing to acquire goods or services from a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition.	Support

No		Business Council of Australia position
29	The prohibition on **resale price maintenance** (RPM) should be retained in its current form as a per se prohibition, but the notification process should be extended to include resale price maintenance. The prohibition should also be amended to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.	RPM should cease to be a per se prohibition and be subject to a substantial lessening of competition test. Support extension of notification process to RPM.

No		Business Council of Australia position
30	There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal review process. The formal **merger** exemption processes (i.e. the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use. The specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC. However, the general framework should contain the following elements: • the ACCC should be the decision-maker at first instance; • the ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or it is satisfied that the merger results in public benefits that outweigh the anti-competitive detriments; • the formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information; • the formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties; and • decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.	Support on condition there is no limitation on direct access to the Tribunal for merger authorisation
31	The ACCC should include in its annual report the number of complaints made to it in respect of **secondary boycott conduct** and the number of such matters investigated and resolved each year.	Support
32	Jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA [**secondary boycott proceedings**] should be extended to the state and territory Supreme Courts.	Support

No		Business Council of Australia position
33	The present limitation in sections 45E and 45EA, such that the prohibitions only apply to **restrictions** affecting persons with whom an employer 'has been accustomed, or is under an obligation' to deal with, should be removed. **The Panel invites further submissions on possible solutions to the apparent conflict between the CCA and the Fair Work Act including:** **• a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements which contain potential restrictions of the kind referred to in sections 45E and 45EA, and to intervene and make submissions;** **• amending sections 45E and 45EA so that they expressly include awards and enterprise agreements; and** **• amending sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act.**	Support option 2 to include awards and enterprise agreements
34	The **authorisation and notification** provisions in the CCA should be simplified: • to ensure that only a single authorisation application is required for a single business transaction or arrangement; and • to empower the ACCC to grant an exemption (including for per se prohibitions) if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or that the proposed conduct is likely to result in a net public benefit.	Support
35	**Exemption powers** based on the block exemption framework in the UK and EU should be introduced to supplement the authorisation and notification frameworks.	Support
36	The ACCC should review its guidelines on **section 155 notices** having regard to the increasing burden imposed by notices in the digital age. Either by law or guideline, the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents.	Support. Requirement to produce documents should be qualified by law.

No		Business Council of Australia position
37	**Section 83** should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the court.	Not supported
38	The declaration criteria in Part IIIA should be targeted to ensure that **third-party access** only be mandated where it is in the public interest. To that end: • criterion (a) should require that access on reasonable terms and conditions through declaration promote a material increase in competition in a dependent market; • criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and • criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest. The Competition Principles Agreement should be updated to reflect the revised declaration criteria. The Australian Competition Tribunal should be empowered to undertake merits review of access decisions while maintaining suitable statutory time limits for the review process. **The Panel invites further comment on:** **• the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; and** **• whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.**	Support Recommend removal of the declaration regime except for 1) airports and 2) any other former publicly-owned multi-user assets
	Institutions and governance	

No		Business Council of Australia position
39	The National Competition Council should be dissolved and the **Australian Council for Competition Policy established**. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda. The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories. Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy. The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.	Support
40	The **Australian Council for Competition Policy should have a broad role** encompassing: • advocate and educator in competition policy; • independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually; • identifying potential areas of competition reform across all levels of government; • making recommendations to governments on specific market design and regulatory issues, including proposed privatisations; and • undertaking research into competition policy developments in Australia and overseas.	Support

No		Business Council of Australia position
41	The proposed Australian Council for Competition Policy should have the **power to undertake competition studies of markets in Australia** and make recommendations to relevant governments on changes to regulation or to the ACCC for investigation of potential breaches of the CCA. The Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the PC model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.	Support where (i) there is clear evidence of systemic problems or significant public concerns and (ii) the study is in the public interest rather than market participants' interest. If the ACCP is not established the market study power should not go to the ACCC

No		Business Council of Australia position
42	All governments, jointly or individually, should have the **capacity to issue a reference to the Australian Council for Competition Policy** to undertake a competition study of a particular market or competition issue. All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy. The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.	Support subject to thresholds in our response to 41 above
43	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	Support
44	The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction. If disproportionate effects across jurisdictions are estimated, the Panel favours **competition policy payments** to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform. Reform effort would be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.	Support
45	Competition and consumer functions should be retained within the single agency of the **ACCC**.	Support

No		Business Council of Australia position
46	The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a **single national access and pricing regulator**: • the powers given to the NCC and the ACCC under the National Access Regime; • the powers given to the NCC under the National Gas Law; • the functions undertaken by the Australian Energy Regulator under the National Electricity Law and the National Gas Law; • the telecommunications access and pricing functions of the ACCC; • price regulation and related advisory roles under the Water Act 2007 (Cth). Consumer protection and competition functions should remain with the ACCC. The access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.	Support
47	The Panel believes that incorporating a wider range of business, consumer and academic viewpoints would improve the **governance of the ACCC**. **The Panel seeks views on the best means of achieving this outcome, including but not limited to, the following options:** **• replacing the current Commission with a Board comprising executive members, and non-executive members with business, consumer and academic expertise (with either an executive or non-executive Chair of the Board); or** **• adding an Advisory Board, chaired by the Chair of the Commission, which would provide advice, including on matters of strategy, to the ACCC but would have no decision-making powers.** The credibility of the ACCC could also be strengthened with additional accountability to the Parliament through regular appearance before a broadly-based Parliamentary Committee.	Support an independent board option
48	The ACCC should also develop a Code of Conduct for its **dealings with the media** with the aim of strengthening the perception of its impartiality in enforcing the law.	Support
	Small business	

No		Business Council of Australia position
49	The ACCC should take a more active approach in connecting **small business to alternative dispute resolution schemes** where it considers complaints have merit but are not a priority for public enforcement. **The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.** Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.	No need for a specific scheme Support greater use of ADRs
50	The CCA should be amended to introduce greater flexibility into the notification process for **collective bargaining by small business**. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed (although there ought to be a process by which the businesses covered by the notification from time to time are recorded on the ACCC's notification register). The ACCC should take actions to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses.	Support in principle
	• see Draft Recommendations 13, 14 and 15 on competitive neutrality • see Draft Recommendations 10, 11 and 12 on planning, zoning and regulatory restrictions	
	Retail markets	
51	The Panel notes the generally beneficial effect for consumers of deregulation of **retail trading hours** to date and the growth of online competition in some retail markets. The Panel recommends that remaining restrictions on retail trading hours be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day.	Support
	• see Draft Recommendation 10 on planning and zoning	

No		Business Council of Australia position
52	The Panel does not consider that current restrictions on ownership and location of **pharmacies** are necessary to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy products and services, and the ability of providers to meet consumers' preferences. The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access and quality of advice on pharmaceuticals that do not unduly restrict competition. Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.	Support in principle

Source: Australian Government Competition Policy Review 2014

Appendix 2: Supporting analysis on competition law and institutions

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Business Council of Australia

Submission in response to the Draft Report of the Competition Policy Review

November 2014

Appendix 2 – Competition Law

1 Concepts and simplification

The BCA agrees that the central concepts, prohibitions and structure of the competition law remain appropriate to the current and projected needs of the Australian economy and should be retained (**Draft Recommendation 17**).

The BCA also supports the key questions asked by the Panel in its consideration of the CCA:

- Does the law focus on enhancing consumer welfare over the long term?
- Does the law protect competition rather than individual competitors?
- Is the law as simple as it can be consistent with its purpose? (Or, as formulated in the Executive Summary, is the law as clear, simple and predictable as it can be?)
- Does the law strike the right balance between prohibiting anti-competitive conduct and allowing pro-competitive conduct? (Or, as formulated in the Executive Summary, not interfering with efficiency, innovation and entrepreneurship?)

Further, the BCA agrees that the general form and structure of the CCA is (and should be) as described by the Panel, that is:

- the law prohibits specific categories of anti-competitive conduct, with economy-wide application;
- only conduct that is anti-competitive in most circumstances is prohibited *per se* — other conduct is prohibited only if it has the purpose, effect or likely effect of substantially lessening competition;
- enforcement occurs through a public administrator and through private suit, and contraventions are adjudicated by the court; and
- there is a facility to seek exemption from the law in individual cases on public benefit grounds.

The BCA agrees that the competition law provisions of the CCA should be simplified and that sections 45(1), 45B, 45C, 46A and 46B may be ideal candidates for removal (**Draft Recommendation 18**). The BCA also considers that the principles identified by the Draft Report support:

- the extension of the CCA to all activities undertaken by the Crown in trade or commerce (**Draft Recommendation 19**);
- the expansion of the definition of "competition" in a market to make clear that it includes *potential* imports of goods and services (**Recommendation 20**);
- the extension of the CCA to all conduct that damages competition in Australia, regardless of any business presence in Australia (**Recommendation 21**);

- the refinement of the cartel provisions, in particular the introduction of less technical and more purposive defences for joint ventures and similar collaborations and for vertical supply arrangements (**Draft Recommendation 22**);

- the removal of the vestigial prohibition of exclusionary provisions (**Draft Recommendation 23**);

- the recommendation not to reintroduce a specific prohibition of price discrimination (**Draft Recommendation 26**);

- the removal of the *per se* prohibition of third line forcing (**Draft Recommendation 27**);

- the broader reformulation of section 47 to prohibit any kind of vertical arrangement that is subject to a condition that has the purpose, effect or likely effect of substantially lessening competition (**Draft Recommendation 28**);

- the streamlining of the authorisation and notification processes (**Draft Recommendation 34**); and

- the addition of a new block exemption power for the ACCC to authorise conduct that falls within certain "safe harbours" in particular industries (**Draft Recommendation 35**).

The BCA welcomes the opportunity to comment further on the application of these principles to the remainder of the Draft Recommendations.

2 Market definition and competition

The BCA supports the Panel's recommendation that the definition of "competition" in the CCA should be strengthened to ensure that both actual and potential imports are to be taken into account in a competition analysis (**Draft Recommendation 20**).

This recommendation goes some way to addressing the BCA's concern that the approach to market definition under the CCA can be unduly narrow and that global sources of competition may not be sufficiently taken into account when defining the relevant market. Under the Panel's proposed approach, where there is a truly global market for goods or services, a market would be defined as a market in Australia but competition in that market would include a consideration of actual and potential global competitors. The BCA considers that this is a workable approach.

However, the BCA remains concerned that, as set out in its earlier submission to the Panel, competitive analysis under the CCA can be characterised by the adoption of unduly narrow and static market definitions and an overreliance on existing market concentration over the other factors that better indicate the level of competition in a market. Such an unduly narrow and static approach can mean that the impact of new and innovative small entrants or technology that has lowered barriers to entry are not properly taken into account. The BCA noted that this issue is particularly acute in merger assessments, where the ACCC has over-applied the CCA in certain circumstances.

The BCA is pleased at the Panel's recognition – made in relation to the grocery industry but equally applicable to all industries economy-wide – that "[w]hile concentration is relevant, it is not determinative of the level of competition in a market."[1] The BCA considers that the critical assessment in a competition analysis is whether sustained market power exists, or will exist in the case of mergers. As such, the BCA considers that the most important of the merger factors set out in section 50(3) is factor (f), that is:

> the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins.

[1] Draft Report, p. 181.

The BCA considers that this factor more directly addresses any competitive concerns that may be associated with concentration while avoiding an overly static emphasis on market structure, and is more consistent with the overarching object of section 2 of the CCA to "enhance the welfare of Australians through the promotion of competition".

Accordingly, as in its earlier submission the BCA recommends that the merger factor relating to the level of concentration in the market (s 50(3)(c)) be removed entirely or at minimum changed as follows:

> the likely level of concentration in the market in the long term.

The BCA considers that such a change would allow for a consideration not only of historical or "stock" measures such as the current level of concentration, but also forward-looking "flow" measures such as the likely level of concentration over the longer term.

The BCA again submits that the Panel extend its recommendations related to market definition and competition assessment to give legislative guidance to the principle that concentration should not be considered as a primary consideration of competitive analysis. Such a change would accord not only with the Draft Report but also with the Australian Competition Tribunal's comments in its recent decision to authorise AGL's acquisition of Macquarie Generation:[2]

> There is nothing inherently wrong with a market in which three large firms compete vigorously for market share where there are incentives to steal customers away from rivals. It is behaviour that matters, not structure per se. It appears to the Tribunal that it has been invited to assume that the "Big 3" will not constitute a competitive market principally on the basis of their combined market share immediately post-acquisition on an assumption that competition between them would become muted over time. In the opinion of the Tribunal, oligopolies should not be thus prejudged…
>
> The competitive environment that is likely to exist in that situation may be hostile for small, non-integrated retailers or it may present niche opportunities. However, the Tribunal cannot conclude that a more atomistic market structure that favours a particular class of competitors is intrinsically better for consumers in the long run. It is the competitive mindset that matters, not market structure.

As noted in the BCA's previous submission, legislative guidance might include a new provision in line with the list of merger factors in s 50(3) in the CCA. This guidance should emphasise the importance of dynamic market factors in the definition of "market" and assessment of "competition", such as:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the extent to which substitutes are available in the market or are likely to be available in the market;

(d) the dynamic characteristics of the market, including growth, innovation and product differentiation; and

(e) the nature and extent of vertical integration in the market.

It should also confirm that market definition is a tool in competitive analysis but should not determine the limits of competitive activity to be taken into account or exclude the possibility that competitors outside the relevant market may exert competitive force over a longer period. Equally, it should make clear that market definition may not be required where competitive effects can be measured directly.

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[2] *Re Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1.

This legislative guidance should be supplemented by the guidelines periodically developed by the ACCC through public consultation and ideally approved by the proposed ACCC Board setting out the ACCC's approach to competitive assessments.

The proposed ACCC Board could conduct periodic reviews of the ACCC's decisions in enforcement matters to assess whether the ACCC had appropriately considered all relevant factors in its competitive analysis in compliance with its guidelines.

3 Price signalling and concerted practices

The BCA has some concerns over the Draft Report's treatment of price signalling (**Draft Recommendation 24**).

The BCA supports the Draft Report's recommendation to repeal the current price signalling provisions, which – as the Panel recognises – are contrary to the principles that competition laws should distinguish between pro-competitive and anti-competitive conduct, and should apply across the economy rather than to specific sectors. Removing these provisions would also be consistent with the guiding principle identified by the Draft Report that the law should be "as clear, simple and predictable as it can be".

However, the principle that the law should strike the right balance between pro-competitive and anti-competitive conduct suggests that the law should only interfere with efficiency, innovation and entrepreneurship to the minimum extent necessary to address a clear problem. This suggestion is further supported by the Draft Report's aim of removing "unnecessary restrictions on competition".

3.1 Options for change

As argued in the BCA's original submission to the Review, it is not clear that the existing law needs to be changed in order to deal appropriately with anti-competitive information exchanges. The ACCC has won, and continues to pursue, cases involving information exchanges under the existing section 45. The fact that it has not won every legal action or pursued every borderline case does not by itself demonstrate a failing of the competition law.

The Draft Report itself appears to acknowledge that the argument for change has not been made convincingly:[3]

> The concern originally raised by the ACCC was that a practice of exchanging price information between competitors may not constitute an "understanding" within the meaning of section 45, and thereby not be regulated by section 45. Whether that concern is realistic might be debated (as it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis).

A concern that is only debatably realistic is not a sound basis for the potentially far-reaching change to the law subsequently proposed by the Draft Report:[4]

> Nevertheless, that concern can be readily addressed by expanding section 45 so that it applies to contracts, arrangements, understandings and concerted practices, where a concerted practice is a regular and deliberate activity undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange.

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3 At p 229.

4 At p 229.

The fact that a particular concern can be readily addressed by a particular measure does not suggest that it *should* be so addressed. The BCA remains concerned that the Panel has not met its obligation to evaluate the costs and benefits of all reasonable alternatives, including leaving section 45 as it is.

As the Draft Report recognises, the present price signalling provisions grew out of the ACCC's dissatisfaction with the court's interpretation of "understanding" in section 45.[5] That concern prompted a Treasury Discussion Paper[6] in 2009 which elicited a number of useful submissions, including arguments that the existing law was appropriately framed,[7] that the meaning of "understanding" should be clarified,[8] that a new prohibition against anticompetitive communications be added to section 45,[9] or that the concept of "understanding" be explicitly replaced by "concerted practice".[10]

These arguments were not considered transparently, if at all, before or during the development of the price signalling provisions to address fresh ACCC concerns about price signalling in the banking sector. That process involved separate bills by the Government and the Opposition, both considered by separate House[11] and Senate[12] committees to which most submissions argued that no change was necessary or that an alternative solution was to be preferred. The Government's bill was passed with only superficial amendments and no reference to alternatives.

As a result, the range of reasonable responses to the perceived gap in the law is yet to be properly evaluated, including by the Draft Report. The BCA recommends that the Panel more carefully consider, or recommend a further inquiry to carefully consider, each of the alternatives proposed since the ACCC first raised the issue in 2007, including that:

- the current meaning of "understanding" is in fact appropriate to capture anti-competitive conduct while protecting beneficial information disclosures; or

- if the meaning of "understanding" is inadequate, simple changes to that definition may allow the law to operate more effectively without requiring the development of a new body of Australian jurisprudence; or

- if the Australian jurisprudence is be supplemented from overseas, the US concept of a "facilitating practice" may be more precisely tailored to any gap in section 45. A facilitating practice is any practice – such as information exchange – that is likely to facilitate coordination or collusion, and may be applied in conjunction with parallel behaviour to infer an agreement to fix prices.[13]

A proper consideration of these options could avoid the need to import the concept of a "concerted practice". While this concept is familiar in European jurisprudence, it is not clear how it would be interpreted in the Australian context.

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5 *Petrol prices and Australian consumers: Report of the ACCC inquiry into the price of unleaded petrol*, December 2007.

6 Treasury, *Discussion paper – Meaning of 'Understanding' in the Trade Practices Act 1974*, 8 January 2009.

7 Law Council of Australia Trade Practices Committee submission, 31 March 2009; American Bar Association submission, 26 March 2009; Business Council of Australia submission, 2 April 2009.

8 Ian Wylie submission.

9 Ian Tonking SC submission.

10 Caron Beaton-Wells & Brent Fisse submission, 7 April 2009.

11 House of Representatives Standing Committee on Economics, *Inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010 and Competition and Consumer Amendment Bill (No 1) 2011*, 22 June 2011.

12 Senate Economics References Committee, *Competition within the Australian banking sector*, May 2011.

13 See *Todd v Exxon Corp*, 275 F.3d 191 (Court of Appeals, 2nd Circuit 2001): "Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement."

3.2 The concerted practices proposal

Article 101 of the Treaty for the Functioning of the European Union (**TFEU**) prohibits agreements between undertakings, decisions by associations of undertaking, **and concerted practices** that have the object or effect of preventing, restricting or distorting competition.

It should be noted that there is no separate concept of "arrangement or understanding" in Article 101, as there is in section 45 of the CCA. As a result, the concept of a "concerted practice" extends to all relevant arrangements that fall short of an agreement between the parties.

The meaning of "concerted practice" is not elaborated in the TFEU but has been developed in case law such as the *Suiker Unie* case:[14]

> The concept of a "concerted practice" refers to a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market…
>
> Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market…
>
> The fact that a vendor aligns his price on the highest price charged by a competitor is not necessarily evidence of a concerted practice but may be explained by an attempt to obtain the maximum profit.

Concerted practices are to be distinguished from conscious parallel behaviour in which firms may independently decide to match other firms' prices with the result that, particularly in concentrated markets, several firms will end up with similar prices.

Crucially, Article 101(3) of the TFEU provides a defence to an otherwise anti-competitive agreement or concerted practice on the basis that it "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". This is essentially an efficiency defence and is critical in helping to ensure that Article 101 does not prevent information disclosures that provide overriding public benefits.

A large body of case law and jurisprudence has built up in Europe over what kinds of information disclosure are likely to constitute a concerted practice, what degree of reciprocity or acceptance is required, in what circumstances unilateral disclosures may be caught, what combinations of market conditions and information disclosures are likely to produce anticompetitive effects, and how efficiency gains from information disclosure may offset any anticompetitive outcomes.

However, the very different legal context in which the European concept of a concerted practice has been developed makes it uncertain to what extent this jurisprudence will apply in Australia.

As noted above, in Europe a "concerted practice" covers all forms of coordination or collusion that fall short of an agreement. In a new section 45 prohibiting contracts, arrangements, understandings **and concerted practices** – as proposed by the Panel – it is not clear how the interpretation of "concerted practices" might be influenced by adjacent concepts.

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[14] Case 40/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 1663.

Further, the phrase "in concert" already appears in several sections of the CCA. Australian case law has found that "the notion of 'in concert' imports elements of combination, co-operation or union"[15] and that "[a]cting in concert involves knowing conduct, the result of communication between the parties and not simply simultaneous actions occurring spontaneously".[16] It is not clear how these existing definitions might affect judicial interpretation of a "concerted practice".

It does appear that the Draft Report's references to "a regular and deliberate activity undertaken by two or more firms" or "a regular practice undertaken by two or more forms" may each be wider than both the Australian and European concepts, as it is not clear how this definition would distinguish conscious parallel action.

The uncertainty and potential breadth of the concept makes an additional test or defence such as the Article 103(1) efficiency defence critical. Authorisation and notification would not provide a meaningful exemption in the context of information exchanges. Indeed, to ensure that information exchanges that promote competition, inform consumers or are otherwise essential to business are not prevented or chilled, the ACCC should bear the onus of proving that there is no legitimate business justification for the disclosure or that it was not in the ordinary course of business.

In these circumstances there is a serious risk that spontaneous and pro-competitive conduct would be penalised if the changes proposed by the Draft Report were made without significant additional thought and consultation.

If a careful evaluative process were to conclude that a concerted practices element should be added to section 45, the BCA considers that, at a minimum:

- a more considered legislative definition of "concerted practice" should be developed through public consultation;
- the ACCC should develop guidelines setting out its approach to what is to be considered a "concerted practice", capturing the appropriate nuance of the European jurisprudence, and also through public consultation; and
- it should be an essential element of proving a contravention that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

4 Misuse of market power

The Draft Report's proposal to replace section 46 with a new prohibition against a corporation with substantial market power engaging in any conduct that has the purpose, effect or likely effect of substantially lessening competition (**Draft Recommendation 25**) would represent a profound change to Australia's competition law relating to unilateral conduct.

The proposed section 46 could no longer be accurately titled "misuse of market power" as it would no longer require any use – let alone misuse – of market power. It would replace a provision that remains fit for purpose, and has forty years of jurisprudence behind it, with an open-ended test that would take years of litigation before it could be understood and applied by businesses and their advisors.

This uncertainty is likely to hinder vigorous and dynamic competition in Australia's most economically significant industries. Since a "substantial degree of market power" is a lower threshold than the "monopoly" or "dominant position" of other jurisdictions, it would not only apply to monopoly behaviour but would risk dampening competition between large companies in concentrated but competitive markets – the kind of markets that are common in Australia and the kind of competition that has delivered the most substantial and lasting benefits to consumers.

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15 *J-Corp v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1992) 44 IR 264.

16 *Tillmans Butcheries v Australasian Meat Industry Employees' Union* (1979) 27 ALR 373.

The BCA remains of the view that no case has been made for any change to section 46, let alone the complete transformation proposed by the Draft Report. The suggestion that the current section 46 protects competitors rather than competition is a misdirection and the suggestion that the proposed section 46 is closer to international jurisprudence does not stand up to scrutiny.

The BCA also has concerns that the defence proposed to "mitigate concerns about over-capture" does little to do so, and that the recommendation as a whole is inconsistent with the principles identified by the Draft Report.

4.1 The case for change

In 1993, the Hilmer Review set out a standard for evaluating proposed changes to section 46 that remains appropriate today:

> [T]he challenge is to provide a system which can distinguish between desirable and undesirable activity while providing an acceptable level of business certainty. **In this respect it is important to stress that uncertainty over the bounds of legally acceptable behaviour may deter efficient and socially useful competitive behaviour.**
>
> In addressing this challenge, the Committee starts from the position that there is already in place a regime which provides a basis for making the appropriate distinctions, that the regime is broadly consistent with approaches in comparable overseas jurisdictions, and that it has been sufficiently interpreted by the High Court to provide a reasonable degree of business certainty as to the limits of acceptable conduct. Moreover, none of the submissions presented to the Inquiry gave practical examples of any particular behaviour that was not proscribed by the current law and yet was dearly unacceptable. The Committee thus considers that **proposals for alternative mechanisms for dealing with misuse of market power should offer a demonstrable improvement over the current regime to justify introducing further uncertainty in this difficult area.**

This standard is consistent with broader principles of best practice regulation, including the Council of Australian Governments' principles:[17]

- establishing a case of action before addressing a problem;
- a range of feasible policy options must be considered… and their benefits and costs assessed;
- adopting the option that generates the greatest net benefit for the community;
- …legislation should not restrict competition unless it can be demonstrated that:
    a. the benefits of the restrictions to the community as a whole outweigh the costs; and
    b. the objectives of the regulation can only be achieved by restricting competition;
- providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear; …and
- government action should be effective and proportional to the issue being addressed.

The recent Australian Government Guide to Regulation issued by the Office of Best Practice Regulation includes similar principles:[18]

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[17] Council of Australian Governments, "Best Practice Regulation: a Guide for Ministerial Councils and National Standard Setting Bodies", October 2007.

- regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option; [and]

- regulation should be imposed only when it can be shown to offer an overall net benefit.

The BCA sees no reason to depart from this approach. As set out in the BCA's original and supplementary submissions to the Review, the BCA does not consider that any case has been made that the existing section 46 is inadequate or that an alternative test would better achieve the objects of the CCA. The Draft Report usefully extends the discussion but in no way makes the case for change.

As set out below, there is no justification in principle for the conclusion that the current section 46 needs to be amended. It should only be amended if it can be demonstrated that, in practice, another test would result in an increase in competition overall – taking into account the anti-competitive conduct that may be captured, the pro-competitive conduct that may be chilled or prevented, and the costs of applying or predicting the application of the new test.

The BCA and its members have been asked to provide practical examples of neutral or pro-competitive conduct that would be caught under the proposed section 46, or of tests similar to the proposed section 46 causing problems in overseas jurisdictions.

With respect, the onus is on the proponents of change to demonstrate that the current law is deficient or that overseas alternatives have provided superior results and would be likely to do so in Australia. They have failed to do so. They must further show – rather than assert – that the proposed solution would not capture or deter legitimate conduct and would not introduce uncertainty so as to outweigh any increased capture of anti-competitive conduct. They have not attempted to do so.

Further, as set out below, no jurisdiction in the world has a provision that approaches the scope and generality of the proposed section 46; and no jurisdiction examines competitive effects without reference to subjective or objective purpose. Accordingly, even if the onus were on those opposing the amendment to show that it had failed in other jurisdictions, the inquiry would not be possible as no comparable provision has been adopted in any other jurisdiction.

4.2 Competitors or competition

The Draft Report appears to consider that the most significant issue is the question of whether section 46 does or should protect competitors or competition:

> The debate whether a subjective purpose test or an objective effects test should be included in section 46 tends to obscure a more significant issue. Presently, the purpose test in section 46 focuses upon harm to individual competitors — conduct will be prohibited if it has the purpose of eliminating or substantially damaging a **competitor**, preventing the entry of a **person** into a market, or deterring or preventing a **person** from engaging in competitive conduct. Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself — that is, the competitive process.

It is axiomatic that competition law is concerned with the protection of the competitive process rather than harm to individual competitors – which is an expected outcome of vigorous competition. These principles have been consistently applied in the Australian case law on the current section 46. The courts have had no difficulty reconciling the ultimate goal of protecting competition and consumer welfare with the proximate mechanism of prohibiting conduct that has the purpose of eliminating, damaging or excluding competitors. As Lockhart and Gummow JJ said in *Eastern Express*:[19]

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[18] Department of Prime Minister and Cabinet, "The Australian Government Guide to Regulation", March 2014.

[19] *Eastern Express Pty Limited v General Newspapers Pty Limited* (1992) ATPR ¶41-167

> Part IV of the Act is designed to promote competition, and the role of Section 46 is to maintain competitive markets by restraining misuses of market power that will produce a non-competitive market.

The current section 46 identifies certain categories of exclusionary conduct – eliminating or substantially damaging a competitor, preventing a person from entering a market, or deterring or preventing a person from engaging in competitive conduct in a market – as particularly likely to produce a non-competitive market. To suggest that the current section 46 is concerned with harm to individual competitors is to misconstrue the section and ignore its judicial interpretation.

This argument appears to be a recent one. According to the International Competition Network, the ACCC has previously considered that there is no inconsistency between promoting competition and preventing exclusionary conduct aimed at competitors:[20]

> The Australian Competition and Consumer Commission ("ACCC") considers that Australia's competition legislation **achieves the purpose of promoting competition by protecting SMEs from larger rival firms that engage in anticompetitive conduct**…
>
> [T]he ACCC notes that its objective of protecting smaller and more vulnerable firms from larger rival firms that **engage in conduct designed to lessen competition** helps to achieve another goal of promoting competition.

ACCC Chairman Rod Sims has explained that the test proposed by the ACCC and largely adopted by the Draft Report is designed to catch "exclusionary conduct", that is, "behaviour that excludes others from the market"[21] or "when a business takes steps to prevent competitors from entering a market."[22] Such a test is no more or less concerned with competitors than the current section 46. Both tests are intended to prohibit conduct that damages the competitive process by excluding competitors.

One difference is that the existing section 46 explicitly prohibits certain categories of exclusionary behaviour, whereas the proposed section 46 assumes that the "substantial lessening of competition" test will capture only the exclusionary conduct that the ACCC is targeting. Another is that the existing section 46 requires an exclusionary purpose and not simply an exclusionary effect – though purpose can be inferred from the circumstances.

4.3 Distinguishing between pro-competitive and anti-competitive conduct

The ACCC has affirmed that the "substantial lessening of competition" test in the proposed section 46 is designed to catch only exclusionary conduct, but it is not obvious that the courts would apply the test in this way, or that the ACCC's definitions of exclusionary conduct – that is, "behaviour that excludes others from the market"[23] or "when a business takes steps to prevent competitors from entering a market"[24] – address the hard case of distinguishing competition on the merits that results in the exit or prevents the entry of a competitor, particularly in the absence of the requirement to prove a subjective or objective anti-competitive purpose.

In a presentation to the International Competition Network, ACCC Commissioner Dr Jill Walker suggested that, "given the risk of error" and the fact that "what may appear to be clearly exclusionary

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20 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007.

21 ABC, "The World Today", 2 September 2014.

22 ACCC Media Release, "Our economy needs more competition on the merits", 13 September 2014. https://www.accc.gov.au/media-release/our-economy-needs-more-competition-on-its-merits

23 ABC, "The World Today", 2 September 2014.

24 ACCC Media Release, "Our economy needs more competition on the merits", 13 September 2014. https://www.accc.gov.au/media-release/our-economy-needs-more-competition-on-its-merits

often turns out not to be", the analytical framework for determining anti-competitive unilateral conduct should involve the following questions:[25]

- what is the firm trying to achieve?
- is anti-competitive exclusion rational?
- is there an alternative explanation for the conduct?
- is the conduct expected to be profit maximising through excluding competition or by promoting efficiency and/or competition?
- is there harm to *competition* and consumers or just to *individual competitors*?

The BCA fully supports this framework but submits that these questions appear to require an analysis of subjective or objective purpose that is more clearly implied by the current section 46, as interpreted by the courts, than by the Draft Report's proposal. Even if the ACCC were to apply this framework to its enforcement of the new section 46, this practice would not provide ongoing certainty to business and would have no effect on the risk of private litigation.

The difficulty in distinguishing between unilateral conduct that may constitute either vigorous "good" competition or unfair "bad" competition – where both can have the immediate effect of removing competitors from the market or deterring market entry – is an ongoing challenge of international antitrust law, with no consensus as to what test or standard to apply. Alternatives include:

- **the profit-sacrifice or no economic sense tests**: these tests are essentially objective purpose tests that prohibit conduct whose only reasonable explanation is an exclusionary purpose. As the US Circuit Court found in *Morris Communications Corp v PGA Tour*:[26]

  > [A]nticompetitive conduct… is conduct without a legitimate business purpose that makes sense only because it eliminates competition.

  These tests mirror the current "purpose" and "take advantage"[27] requirements, but it is not clear that they would apply under the general substantial lessening of competition test;

- **the as-efficient competitor test**:[28] this test provides that conduct will be considered to be competition on the merits unless it would tend to exclude an equally or more efficient competitor – and would therefore be presumed not to result from efficiencies or economies of scale. As the European Commission writes:[29]

  > With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of **hampering competition from competitors which are considered to be as efficient** as the dominant undertaking…
  >
  > If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on

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25 Dr Jill Walker, "ICN Unilateral Conduct Regional Workshop – The Analytical Framework", 24 July 2012.

26 (2004) 364 F.3d 1288. See also See *Aspen Skiing Co v Aspen Highlands Skiing Corp* (1985) 472 US 585; *Matsushita Industrial Co Ltd v Zenith Radio Corp* (1986) 475 US 574; *Brooke Group* (1993) 509 US 209;

27 Katharine Kemp, "Is there unilateral conduct which s46(1) fails to address?" Competition Law Discussion Group, 21 August 2014.

28 (2003) *LePage's Inc. v. 3M*, 324 F.3d 141; *Barry Wright Corp. v. ITT Grinnell Corp.*,(1983) 724 F.2d 227.

29 European Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

> effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure…

This test is also essentially an objective purpose test and also mirrors the "purpose" and "take advantage" elements of the current section 46 – both of which would be removed under the Panel's proposal; and

- **the consumer welfare test**: this test looks directly to the consumer welfare standard to prohibit only exclusionary conduct that causes a net detriment to consumers. As the European Commission writes:[30]

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, **thus having an adverse impact on consumer welfare**, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice…

This test implies that benefits to consumer welfare arising from the conduct will be weighed against the anticompetitive effects of the conduct. In Europe:

> [T]he Commission will also examine claims put forward by a dominant undertaking that its conduct is justified. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by **demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers**.

In Australia it is not clear that overall consumer welfare or even efficiencies can be taken into account in a "substantial lessening of competition" test – as opposed to an assessment of "public benefit" under an application for notification or authorisation.

That is, it is not clear how the "substantial lessening of competition" test would solve the problem of characterising unilateral conduct in any way that the current section 46 does not.

In other contexts, such as mergers, the loss of a single competitor has frequently been alleged to substantially lessen competition, and the different ways in which the ACCC would interpret the test in different contexts – mergers, agreements between competitors or between buyers and sellers, and now unilateral conduct – are not at all clear.

For example, in relation to supermarkets' fuel discount vouchers the ACCC argued that aggressive fuel discounts could result in a substantial lessening of competition simply because they would damage other fuel retailers – without inquiring into whether these discounts were the result of efficiencies or were below any relevant measure of cost:[31]

> "While large shopper docket discounts provide short term benefits to some consumers**, the likely harm to other fuel retailers and therefore to competition and the competitive process** for petrol retailing could well be substantial," Mr Sims said.

In the merger context, the ACCC has opposed the acquisition of a single supermarket site[32] or a single undeveloped site,[33] implying the exit of a single existing competitor and the possible exclusion

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30 European Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

31 ACCC Press Release, "ACCC concerned about escalating shopper docket discounts", 29 July 2013.

32 ACCC Press Release, "ACCC opposes the proposed acquisition of Karabar Supermarket by Woolworths Limited", 25 June 2008.

33 ACCC Press Release, "ACCC to oppose Woolworths' proposed acquisition of Glenmore Ridge site", 6 June 2013.

of a single new competitor respectively. The local markets defined in these decisions had a geographic dimension of a 3–5 km radius and one suburb respectively. In each of these cases the loss of an individual competitor or potential competitor was considered likely to substantially lessen competition.

Even the Dawson Review, in evaluating a proposed section 46 test very like that of the Draft Recommendation – but preserving the "take advantage" element – considered that:

> **Since the effect of legitimate competitive activities may result in the lessening of competition in a market**, the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct. Competitive behaviour would be discouraged by the prospect of proceedings under section 46.

It is certainly possible to disagree with the findings of the Dawson Report, but it is clear that the implications of the substantial lessening of competition test are far from settled, and that there is a risk to business that such a test in the new section 46 would be interpreted in the way the Dawson Report identified, or applied in the way the ACCC has applied the test in other contexts.

In these circumstances, the ACCC's assertion that the test will distinguish pro-competitive from anti-competitive behaviour in all circumstances is not reassuring.

Even if the courts were to come to interpret the proposed test as the ACCC intends, there would be considerable legal uncertainty in the meantime. It is difficult to see how the proposed section satisfies the principle that the law should be "as clear, simple and predictable as it can be".

Nor has it been shown that the new test would appropriately capture conduct that would be permitted by the existing competition law. ACCC Chairman Rod Sims has referred specifically to "buying up all the available land, restricting supplies of essential materials, engaging in predatory pricing or tying up customers in long term contracts with anti-competitive rebates"[34] but it appears that all of these examples would be covered at least as well by the current law.[35]

Similarly, Professor Fels said in his submission to the Panel that an "effects" test is desirable as a matter of principle rather than necessary in practice: [36]

> Let me be clear. I do not think adding an effects test to s 46 in one way or another would make a large difference. So why change it? It is bad to have a law based on a wrong principle.

As set out above, the current section 46 is based on universally agreed principles; the dispute is only with the implementation of those principles. Complaints that section 46 refers on its face to purposes and competitors rather than effects and competition are misleading and irrelevant if in fact the section most effectively promotes the competitive process by preventing exclusionary conduct, while maximising vigorous and dynamic competition by providing clear categories of conduct to avoid.

That is, even if section 46 may not catch specific instances of anti-competitive behaviour – and the ACCC has yet to propose a convincing example of unilateral conduct that the CCA should capture but does not – it may still be the best rule for regulating unilateral conduct when the relative risks of over-capture and under-capture, the ease and costs of application and the certainty and predictability of outcome are all taken into account.

The BCA considers that, even if is not clear that the current section 46 is the best possible rule, it is perfectly clear that it is a far better rule than the one proposed by the Panel in the Draft Report. On

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34 ACCC Media Release, "Our economy needs more competition on the merits", 13 September 2014. https://www.accc.gov.au/media-release/our-economy-needs-more-competition-on-its-merits

35 See Rachel Trindade, Rhonda L Smith & Alexandra Merrett, "Building better mousetraps: Harper's re-write of section 46", *The State of Competition* Issue 20, October 2014.

36 Submission of Professor Allan Fels AO dated 25 June 2014.

this basis, section 46 should be retained in its current form. On this basis, section 46 should be retained in its current form.

4.4 The proposed test

The proposed test is inconsistent with several of the principles and objectives of the competition law identified in the Draft Report.

The Draft Report notes that the guiding principle that "the law should be simple, predictable and reliable" can be met if "the law prohibits **specific categories** of anti-competitive conduct, with economy-wide application".

A merger or acquisition is a specific category of anti-competitive conduct; as is a contract, arrangement or understanding. The existing section 46 prohibits a specific category of anti-competitive conduct: that is, the taking advantage of market power for a particular exclusionary purpose. The prohibition of particular categories such as these allows business decision-makers to identify, carefully consider and seek advice on proposed conduct that falls into those categories, and in all other areas to compete vigorously and without unnecessary restraint.

By contrast, the proposed section 46 prohibits *any* conduct that has the purpose, effect or likely effect of substantially lessening competition. If this is intended to be a category of conduct, it is not a helpful one. Professor Allan Fels notes in his submission to the Review:

> Years ago, I mentioned it would not/should not make much difference if the Act was reduced to two lines – namely that any behaviour that substantially lessens competition is prohibited unless authorised. **I do not actually believe the Act should be reduced to two lines.**

Unfortunately, the Draft Recommendation appears to take Professor Fels at face value and comes very close to simply prohibiting any behaviour that substantially lessens competition. This would make it difficult and costly for any business to take any action or make any decision.

In fact, the proposed provision goes even further by prohibiting not only conduct that has the effect or likely effect of substantially lessening competition, but also conduct that has that *purpose*. The Draft Report notes arguments that:

> [T]here can be difficulties in proving the purpose of commercial conduct because it involves a subjective enquiry, whereas proving anti-competitive effect is less difficult because it involves an objective enquiry.

However, it seems clear that establishing a purpose of substantially lessening competition is in fact easier than establishing such an effect or likely effect. It requires no economic evidence or predictions of the future, and can be proved from direct evidence of intent or inferred from the objective circumstances including the effect of conduct.

In *Universal Music*, the court found that the respondents' exclusive dealing had the purpose of substantially lessening competition even though it had little or no prospect of success.[37] The Court found that:

> A person may have the purpose of securing a result which it is, in fact, impossible for that person to achieve. That no doubt explains the reference to purpose, in para (a) of s 47(10) of the Act, as an alternative to effect and likely effect. The paragraph is satisfied if the relevant corporation has the requisite purpose, regardless of whether or not that purpose has been, or was or is likely to be, achieved. It may conceivably be satisfied even in a case where the Court finds the purpose could never in fact have been achieved; although that finding would be relevant in determining whether to infer the proscribed purpose.

[37] *Universal Music v ACCC* [2003] FCAFC 193

Prohibiting any conduct by a company with market power that has the *purpose*, effect or likely effect of substantially lessening (or hindering) competition is a remarkably broad and open-ended prohibition.

4.5 The proposed defence

The Draft Report recognises that the proposed section 46 test risks deterring a business from engaging in vigorous competitive conduct, but the defence presented "to allay any such concern" suggests that the Panel may not fully appreciate the nature and consequences of this risk.

As is evident from the tortuous price signalling provisions, it is difficult for any defence to make up for deficiencies in a primary prohibition. Shifting the onus of proof to the business accused of anti-competitive behaviour would compound the burden on businesses to predict not only the effect of their actions on competition and competitors but also the likelihood that their conduct will fall under the defence. Particularly in borderline cases, it will be more likely that the ACCC will take legal action with all the reputational damage to a business that that entails, and that cases will be settled where a business does not have the time or resources to pursue a defence that should be available.

Further, the defence proposed in the Draft Report appears to be particularly uncertain in its application and difficult to make out, requiring a business to prove that both:

(a) the conduct in question would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; **and**

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

While the first limb of the defence is a reasonable distillation of the courts' interpretation of the "take advantage" element, it introduces new language that does not closely match any of the previous formulations of that element by the courts or the legislature. The Hilmer Review considered and rejected a similar reformulation of the "take advantage" element:[38]

> Another proposal was to introduce an additional criterion of liability, that the conduct in question be conduct which a firm in a competitive market would not have engaged in without economic loss to itself. **The Committee was not persuaded that this proposal would add much to the existing interpretation of the phase "take advantage of" market power, but it could increase uncertainty over the operation of the provision.**

Adding this new uncertainty to the concept while reversing the burden of proof would impose considerable costs on business. Judicial interpretation of new language embedded in a defence will also be slower to develop than a concept that needs to be proved to make out a breach, prolonging this uncertainty.

The second limb would further require that the conduct be likely to "benefit the long-term interests of consumers". While promoting consumer welfare is a widely accepted over-arching goal of competition policy and is familiar from the regulatory context, this kind of language is not often used to frame specific conduct provisions of the competition law. In particular, it is unclear what is meant by "long-term interests" or how this element would be judicially interpreted or proved. It is also not clear how a focus on the "long term" would align with any assessment of a substantial lessening of competition, where the relevant timeframe may depend on the circumstances.

Further, requiring that a business prove both that it has not taken advantage of its market power *and* that its conduct will benefit consumers is a manifestly disproportionate response to an open question as to the calibration of section 46. If the "take advantage" element is indeed too difficult to prove positively, then reversing the burden of proof alone would have a significant impact on the prospects of section 46 cases. Reversing the burden of proof, changing the language of the element, requiring

[38] At p 72.

additional proof of consumer benefit, and widening the primary test to include effect or likely effect as well as purpose goes at least three steps beyond what is reasonable.

If a business has not taken advantage of its market power – that is, if it has not *used* its market power – it cannot have abused or misused its market power and its conduct should on that basis be perfectly legal. It should not further have to prove that its conduct would benefit consumers in the long-term. That would hold businesses that may have market power to a very different standard to every other business and would be contrary to the fundamental principles of competition. Competition is the process by which businesses acting proximately in their own (and their owners') interests ultimately benefit consumers. It is generally not necessary or useful for them to also consider or predict the long-term interests of consumers: that is left to the competitive process.

Conversely, if conduct is able to be exempted from the competition law on public benefit grounds then it should not also be necessary to prove that business has taken no advantage of its market power. The BCA supports the proposition also put forward by the Business Law Section of the Law Council of Australia that a "rule of reason", "efficiency" or "public benefit" defence should be available for any conduct under the CCA – but this should be a complete defence and not an additional and conjunctive requirement to a defence specific to section 46.

4.6 International comparisons

It has often been asserted that the current section 46 is out of step with comparable tests in other jurisdictions, and that the proposed test would be closer to international jurisprudence.

It is true that only one country – New Zealand – has a legislative provision that is similar in language and structure to the current section 46. However, no country in the world has a legislative provision similar to the Draft Report's proposed section 46.

There is a great variety in the language and structure of legislative provisions on misuse of market power throughout the world, and those of the most developed jurisdictions in the world – those of the United States and the European Union – appear to be nothing alike. However, there is considerable convergence in their interpretation and application by the courts and regulators, and on this analysis the current section 46, as interpreted by the Australian courts, is consistent with the majority of international jurisprudence in both:

- prohibiting specific categories of exclusionary conduct – that is, conduct aimed at damaging or excluding competitors – in order to protect the competitive process; and

- distinguishing anti-competitive conduct from competition on the merits by examining objective or subjective purpose.

While "effects" elements are common internationally, they are most typically required in addition to purpose rather than as an alternative: most tests are "purpose **and** effect" tests. The clearest way to bring the current section 46 closer to international jurisprudence would be to amend it as follows:

> A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market,

and with the effect, or likely effect, of substantially lessening competition in the relevant market.

By contrast, the new section 46 proposed by the Draft Report would be an outlier in any comparison of international jurisprudence and would be dramatically over-inclusive compared to any other test.

Key provisions are examined below.

(a) United States

In the United States, section 2 of the Sherman Antitrust Act provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…

This prohibition comprises two main forms of prohibited conduct, *unlawful monopolisation* and *attempted monopolisation*. Intent or justification plays an important part of both forms of conduct.

- **unlawful monopolisation** requires proof of:

  (a) the possession of monopoly power in the relevant market; and

  (b) the **willful acquisition or maintenance** of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[39]

  The element of willfulness was originally interpreted to require only subjective intent. More recently it has been satisfied by proof of a predatory or exclusionary effect that has no pro-competitive justification or purpose;[40]

- **attempted monopolisation** requires proof of predatory, exclusionary or anti-competitive conduct with a specific intent to monopolise (which may be inferred from the circumstances) and a dangerous probability of success.[41]

Like the current section 46, the US law prohibits exclusionary conduct on the basis of an objective or subjective purpose – though it additionally requires proof of an exclusionary effect or a dangerous probability of achieving that purpose.

The proposed section 46 is far broader than the US law, in that:

- it applies to *any* conduct by a business with market power – where the US law only applies to exclusionary or predatory conduct (Australian courts may come to restrict a "substantial lessening of competition" to exclusionary or predatory conduct, but this is far from clear);

- it requires either a purpose, effect **or** likely effect of substantially lessening competition – where the US law requires a purpose **and** likely effect; and

- it requires the respondent to prove that its conduct would be a rational decision for a business without market power that would **also** benefit the long-term interests of end-users – where the US law requires the **claimant** to prove that there is **no** pro-competitive justification.

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39 *US v Grinnell*, 384 U.S. 563 (1966)

40 *US v Microsoft* 253 F.3d 34 (D.C. Cir. 2001)

41 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

(b) Canada

Section 79(1) of the *Competition Act 1985* provides that:

> Where, on application by the Commissioner, the Tribunal finds that:
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Section 78 defines an "anti-competitive act" to include:

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

Although these examples are illustrative rather than exhaustive, the court has found that the meaning of an "anti-competitive" act can be inferred from these examples:[42]

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[42] *Canada (Commissioner of Competition) v. Canada Pipe Co* (2006) FCA 233.

> First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary or disciplinary negative effect on a competitor.

As in Australia, purpose can be inferred from the circumstances, and a legitimate business justification may be presented as an explanation for the purpose of conduct.

Like the current section 46, the Canadian law prohibits specific forms of conduct by reference to an exclusionary purpose – indeed, by reference to competitors – though it requires additional proof of an effect of substantially preventing or lessening competition in a market.

The proposed section 46 would be substantially broader than the Canadian law since:

- it applies to any conduct by a business with market power – where the Canadian law applies only to exclusionary or predatory practices many of which are clearly defined;
- it requires either a purpose, effect **or** likely effect of substantially lessening competition – where the Canadian law requires both an exclusionary purpose **and** an effect or likely effect of substantially lessening competition; and
- it requires the respondent to prove that its conduct would be a rational decision for a business without market power that would **also** benefit the long-term interests of end-users – where the Canadian law only requires proof of an objective business justification.

(c) European Union

Article 102 of the Treaty on the Functioning of the European Union provides that:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

While some of the examples listed in Article 102 are exploitative in nature, in practice the jurisprudence has increasingly focused on exclusionary conduct. The European Commission states:[43]

> The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that **undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide**. In doing so the Commission is mindful that what really matters is protecting an effective competitive process

[43] European Commission, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", 2009/C 45/02 at para 6.

> and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.

As set out above, the European Commission tends to identify exclusionary conduct using an "as-efficient competitor" test where applicable, and ultimately by direct reference to consumer welfare. Even exclusionary conduct may be justified on the basis of consumer welfare:

> The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.[44]

Although the primary focus of the jurisprudence and guidelines is on the effect of exclusionary conduct, the Commission and the courts make extensive use of purpose or intent in characterising conduct either as an abuse of a dominant position or as competition on the merits. In assessing whether conduct is likely to lead to anti-competitive foreclosure, the Commission will consider:[45]

> *direct evidence of any exclusionary strategy*: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.

In *Akzo* the court considered that both objective and subjective intention could be relevant in a predatory pricing assessment:[46]

> The exclusionary consequences of a price-cutting campaign by a dominant producer might be so self-evident that no evidence of intention to eliminate a competitor is necessary. On the other hand, **where the low pricing could be susceptible of several explanations, evidence of an intention to eliminate a competitor or restrict competition might also be required** to prove an infringement...

Similarly, in *France Télécom* the Court of Justice adopted an objective purpose test in its analysis of below-cost predatory pricing:[47]

> [P]rices below average variable costs must be considered prima facie abusive inasmuch as, in applying such prices, an undertaking in a dominant position is **presumed to pursue no other economic objective** save that of eliminating its competitors.

Subjective intent is also taken into account in determining whether exclusionary conduct can be excused by a legitimate business justification:

> Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, **such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it**.[48]

Like the US, the test in Europe operates in many cases to require proof of both an exclusionary effect and an exclusionary purpose – though in some cases, such as predatory pricing, intent alone is sufficient; and in other cases the burden may be on the respondent to show that it has a legitimate business purpose despite an exclusionary effect.

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44 At para 30.

45 At para 20.

46 *Akzo Chemie vs Commission* (1991) C-62/86.

47 Case C-202/07 P.

48 *United Brands vs. Commission* (1978) C-27/76.

Like the current section 46, the European law prohibits businesses from excluding their competitors other than by competing on the merits, with the aim of protecting competition and ultimately consumers; and in many cases uses objective or subjective intent to distinguish between pro-competitive and anti-competitive conduct.

The proposed section 46 is substantially wider than the European law:

- it applies to any conduct by a business with market power – where the European law applies only to exclusionary or exploitative conduct;
- it requires either a purpose, effect **or** likely effect of substantially lessening competition in all circumstances – where the European law requires a purpose, an effect, or a purpose and effect depending on the kind of conduct;
- it requires the respondent to prove that its conduct would be a rational decision for a business without market power that would **also** benefit the long-term interests of end-users – where the European law requires prove **either** an objective business justification **or** efficiencies that benefit consumers.

(d) United Kingdom

Section 18 of the *Competition Act 1998* mirrors Article 102 almost exactly, and section 60 requires that courts interpret the section according to the prevailing European jurisprudence:

> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission.

As a result, the position in the UK is effectively the same as in Europe. Office of Fair Trading guidelines confirm that:[49]

> The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably…
>
> [C]onduct may not be regarded as an abuse, even if it restricts competition, where there is an objective justification for the conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the customer. However, it will still be necessary for a dominant undertaking to show that its conduct is proportionate.

(e) Singapore

Section 48 of the *Competition Act 2004* closely mirrors that of the EU and the UK:

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[49] Office of Fair Trading, "Abuse of a dominant position", 1 December 2004.

(1) [A]ny conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —

(a) predatory behaviour towards competitors;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In its only abuse of dominance appeal so far, the Competition Appeals Board decided in the *SITIC* case that the EU and UK case law was "highly persuasive on the legal test for abuse of dominance cases under section 47" and concluded that:[50]

> If an effect, or likely effect, on restricting competition is establish[ed], the dominant undertaking can advance an objective justification. If it can adduce evidence to demonstrate that its behaviour produces countervailing benefits so that it has the net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification.

Assuming that the law continues to be applied with reference to EU and UK jurisprudence, the position in Singapore should be substantially the same as in the EU and the UK.

(f) Hong Kong

Section 21 of the Competition Ordinance, which has not yet come into effect, provides that:

(1) An undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

(2) For the purpose of subsection (1), conduct may, in particular, constitute such an abuse if it involves—

(a) predatory behaviour towards competitors; or

(b) limiting production, markets or technical development to the prejudice of consumers.

As in Australia, object can be inferred by inference. Since the section has not yet come into operation it is not clear how the section will operate, though the Competition Commission has issued Draft Guidelines which further indicate that section 21 is concerned with exclusionary conduct:

> Abusive conduct may particularly result in harm to competition through anti-competitive foreclosure. Anti-competitive foreclosure occurs when effective access of actual or potential competitors to sources of supply or buyers is hampered or eliminated as a result of the conduct of the undertaking with substantial market power. Anti-competitive foreclosure can result in the

[50] *SITIC.com Pte Ltd v The Competition Commission of Singapore,* 1/2010, 28 May 2012.

undertaking with substantial market power being able to charge higher prices or in reduced product quality or choice, to the detriment of consumers.

The Guidelines also suggest that the Commission will take into account legitimate business objectives even where conduct has an anti-competitive effect:

> When investigating cases of alleged abuse of substantial market power, the Commission may consider whether the undertaking is able to demonstrate that the concerned conduct is indispensable and proportionate to the pursuit of some legitimate objective unconnected with the tendency of the conduct to harm competition.

The formulation that the undertaking with market power must not "abuse that power" by engaging in certain conduct is similar to the current section 46 "take advantage" element, and it remains to be seen whether the section will be interpreted to distinguish conduct that has no connection with any market power.

If so, the proposed section 46 is likely to be broader than the Hong Kong provision, since:

- it does not require any connection between a business's market power and its conduct – where the Hong Kong provision contemplates an abuse of an undertaking's market power;
- it applies to any conduct that substantially lessens competition – where the Hong Kong provision suggests, and Commission guidelines confirm, that exclusionary conduct is targeted.

(g) India

Section 4 of the *Competition Act 2002* prohibits the abuse of a dominant position:

> (1) No enterprise or group shall abuse its dominant position.
>
> (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group —
>
> (a) directly or indirectly, imposes unfair or discriminatory—
>
> (i) condition in purchase or sale of goods or service; or
>
> (ii) price in purchase or sale (including predatory price) of goods or service.
>
> Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or
>
> (b) limits or restricts—
>
> (i) production of goods or provision of services or market therefor; or
>
> (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
>
> (c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

According to the Competition Commission of India's guidelines, this list is exhaustive and these forms of conduct are prohibited *per se*:

> The Act gives an exhaustive list of practices that shall constitute abuse of dominance position and, therefore, stand prohibited. Such practices shall constitute abuse only when engaged in by an enterprise enjoying dominant position in the relevant market in India.
>
> Abuse of dominance is judged in terms of the specified types of acts engaged in by a dominant enterprise alone or in concert, and shall remain prohibited. There is no need for any reference by the Commission to the adverse effect on competition (in Indian markets). Rather, any abuse of the type specified in the Act by a dominant firm shall stand prohibited.

However, some of the forms of conduct are expressed in terms of effect or result, such as subsection (2)(c) practices "*resulting in* denial of market access" and subsection 2(b) practices that "*limit*" or *"restrict*", describing an effect. Predatory pricing is defined to include an element of intention:

> "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, **with a view to reduce competition or eliminate the competitors**.[51]

The "meeting competition" defence also introduces an element of purpose or objective justification.

Like the current section 46, the Indian law prohibits a company with market power from engaging in certain forms of exclusionary conduct – though different categories variously require proof only that the conduct has taken place, proof of a particular effect or result, or proof of intention.

The proposed section 46 would be much broader than the Indian law:

- it applies to any conduct by a business with market power – where the Indian law applies only to limited categories of exclusionary conduct; and
- it requires either a purpose, effect **or** likely effect of substantially lessening competition in all circumstances – where the Indian law requires proof of conduct, proof of effect or proof of purpose, depending on the kind of conduct.

(h) South Africa

Section 8 of the *Competition Act 1998* provides that:

> It is prohibited for a dominant firm to –
>
> (a) charge an excessive price to the detriment of consumers;
>
> (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

[51] Section 4 Explanation (b).

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services below their marginal or average variable cost; or

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

The subsections that mirror section 46 most closely are (c) and (d), which prohibit general and specific exclusionary acts whose anti-competitive effects outweigh any technological, efficiency or other pro-competitive gains. Anti-competitive effect can be shown by direct harm to consumer welfare or where the conduct is "substantial or significant in terms of its effect in foreclosing the market to rivals".[52]

Differences between these two subsections reflect the different levels of certainty associated with an enumeration of specific types of behaviour compared to an open-ended prohibition of exclusionary behaviour. Since it is more difficult for a business to predict whether its conduct will be *generally* exclusionary, subsection (c) requires the complainant to prove that anti-competitive effects outweigh pro-competitive gains – and imposes penalties only for repeated breaches. Since it is easier for a business to avoid *specific* exclusionary acts, section (d) requires the business to prove that pro-competitive gains outweigh anti-competitive effects, and substantial penalties apply to a first offence.

Like the current section 46, the South African section 8(d) prohibits specific categories of exclusionary conduct – although it examines effects rather than purpose, it also provides a defence of technological, efficiency or other pro-competitive gains. The proposed section 46 is wider than the South African section 8(d) since:

- it applies to any conduct by a business with market power – where the South African section 8(d) applies only to limited categories of exclusionary conduct;
- it requires either a purpose, effect **or** likely effect of substantially lessening competition in all circumstances – where the South African section 8(d) requires proof of effect; and
- it requires the respondent to prove that its conduct would be a rational decision for a business without market power that would **also** benefit the long-term interests of end-users – where the South African section 8(d) only requires the respondent to prove that pro-competitive gains outweigh anti-competitive detriments.

Like the current section 46, the South African section 8(c) explicitly prohibits exclusionary conduct – although it examines effects rather than purpose, it also requires the claimant to show that anti-competitive effects outweigh technological, efficiency and pro-competitive gains. The proposed section 46 is also wider than the South African section 8(c) since:

[52] *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01

- it applies to any conduct by a business with market power – where the South African section 8(c) only applies to exclusionary conduct;

- it requires either a purpose, effect **or** likely effect of substantially lessening competition in all circumstances – where the South African section 8(c) requires proof of effect; and

- it requires the respondent to prove that its conduct would be a rational decision for a business without market power that would **also** benefit the long-term interests of end-users – where the South African section 8(c) requires the **claimant** to prove that anti-competitive effects outweigh technological, efficiency and pro-competitive gains.

It should be clear from this analysis that any argument that the current section 46 is substantially out of step with international practice, or that the proposed section 46 is better aligned with international practice, is unfounded.

It should also be noted that the threshold requirement of s 46 – that a business has a "substantial degree of power in a market" – appears to be lower than the threshold requirement in most other jurisdictions. The threshold requirement in other jurisdictions is as follows:

(a) Canada – "substantially or completely control... a class or species of business";

(b) EU/UK/Singapore/India – "dominant position"; or

(c) South Africa – "dominant firm".

As a result, in Australia there is a greater risk of deterring competitive behaviour by and between companies that would not be dominant in most other countries.

4.7 Cost and uncertainty of the Draft Recommendation

The Draft Recommendation would remove two of the key filters applied by the Australian courts to distinguish between competitive and anti-competitive conduct and replace them with mechanisms of unproven and doubtful utility.

Both the new prohibition and the new defence would greatly increase uncertainty as to the risk of ACCC investigation and legal action, and would result in less dynamic, less responsive and more conservative investment, pricing and product decisions by businesses that may be considered to have market power. Since markets may be defined quite narrowly in terms of product and geography, this may include a wide range of businesses in many markets.

The risks to the competitive process of overly broad or uncertain laws against unilateral conduct are widely recognised. The US Department of Justice and Federal Trade Commission has argued that:[53]

> [I]t is often difficult to distinguish illicit conduct from legitimate competition, and that a mistake can result in costs that extend far beyond the particular case by chilling the legitimate conduct of other firms.

Even supporters of "effects" tests point out the costs that these tests can impose on businesses, agencies and the competitive process:[54]

> The effects-based approach tends to lead to a more accurate assessment of a particular case. However, because this approach generates fact-driven outcomes, it tends to lead to greater delays and costs for the agency and those under investigation. The approach also makes it

[53] International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007.

[54] International Competition Network, *Unilateral Conduct Workbook,* April 2012.

more difficult for business planners and counsel to predict whether specific conduct is likely to result in an infringement decision. This uncertainty may result in a chilling effect, as firms avoid conduct that may in fact be procompetitive and lawful.

As set out in the US Department of Justice's 2008 guidelines on section 2 of the Sherman Act:[55]

> Standards of section 2 liability that overdeter risk harmful disruption to the dynamic competitive process itself. Being able to reap the gains from a monopoly position attained through a hard-fought competitive battle, or to maintain that position through continued competitive vigor, may be crucial to motivating the firm to innovate in the first place. Rules that overdeter, therefore, undermine the incentive structure that competitive markets rely upon to produce innovation. Such rules also may sacrifice the efficiency benefits associated with the competitive behavior.
>
> **Importantly, rules that are over-inclusive or unclear will sacrifice those benefits not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well. Firms with substantial market power typically attempt to structure their affairs so as to avoid either section 2 liability or even having to litigate a section 2 case because the costs associated with antitrust litigation can be extraordinarily large. These firms must base their business decisions on their understanding of the legal standards governing section 2, determining in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.**

These guidelines were withdrawn in 2009 after the incoming Obama administration appointed a new Assistant Attorney-General for the Antitrust Division who considered that deregulation and inadequate antitrust enforcement had contributed to the contemporary financial crisis.[56]

The withdrawal of these guidelines has been criticised,[57] and the reasons for their withdrawal may not apply to economies such as Australia's. Further, although the tests proposed in the guidelines do not reflect current US antitrust enforcement priorities, these principles remain unassailable – as do the authorities cited by the guidelines, including the US Supreme Court in *Trinko*:[58]

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs… Mistaken inferences and the resulting false condemnations "are especially costly because they chill the very conduct the antitrust laws are designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.

The International Competition Network and its members have considered in detail the importance of transparency and predictability in unilateral conduct cases:[59]

> The New Zealand agency's reply to the issue of over- and under-deterrence highlighted that good enforcement norms should balance not only the risks of over- and under-deterrence, but also **the need to avoid high transaction costs and uncertainty in compliance and enforcement**. A similar idea is expressed in the Italian agency's reply, which states that "[e]conomic analysis is becoming more and more sophisticated, but at the same time companies need simple rules in order to be able to follow them ex-ante. We believe that this is

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55 Department of Justice, Antitrust Division, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, September 2008.

56 Christine A Varney, "Vigorous antitrust enforcement in this challenging era", Remarks as prepared for the US Chamber of Commerce, 12 May 2009.

57 Richard A Epstein, "A giant step backward in antitrust law", *Forbes* 19 May 2009.

58 *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004)

59 International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007.

> the most difficult trade off to solve." As these contributions suggest, sound unilateral conduct rules and enforcement norms should strive to minimize error costs, both from over-deterrence as well as under-deterrence, as well as the costs of compliance and enforcement. **Agencies should thus be concerned not only about correct outcomes that are consistent with applicable policy goals, but also, and even equally, by rules that are transparent and outcomes that are predictable.**

As the International Competition Network further recognised:[60]

> The cost of over-enforcement is a lessening of procompetitive behaviour on the part of dominant firms. This may result in static efficiency losses from the dominant firm's reduced incentives to cut prices or compete hard, as well as from competitors having to compete less vigorously in response. It can also result in the loss of dynamic efficiency due to the dominant firm's lessened incentives to innovate and make initial investments. The negative effects of over-enforcement are, in some jurisdictions, amplified by the presence of strong private litigation.

This last point is particularly relevant to Australia, where private litigation has resulted in a number of landmark section 46 cases such as *Queensland Wire v BHP*, *ASX v Pont Data*, *Melway v Robert Hicks*, *NT Power Generation v Power and Water Authority*, *Seven Network v News Limited*, *Singapore Airlines v Taprobane Tours, Eastern Express v General Newspapers* and *Victorian Egg Marketing Board v Parkwood Eggs.*

The International Competition Network has also identified that the relative costs of over-enforcement and under-enforcement of unilateral conduct will have different effects on different kinds of markets:[61]

- in **dynamic markets** characterised by good capital markets, active consumers and strong entrepreneurship, over-enforcement has a high error cost as it may punish efficient leaders and reward inefficient firms, while under-enforcement has a low error cost as dynamic markets will address most problems;

- in **sluggish markets** characterised by heavy regulation of entry, a history of state monopoly and weak consumers, over-enforcement has a lower error cost as it can stimulate the competitive process, while under-enforcement has a high error cost as it can lead to the persistence of monopoly profits.

The BCA considers that, after 40 years of competition law, extensive microeconomic reform and strong enforcement by the ACCC, Australia's markets are better characterised as dynamic rather than sluggish, with the result that over-capture presents significantly greater risks than under-capture.

These risks have been identified by every previous review of Australia's competition law that has included a proposal to broaden section 46 by introducing an "effects" test, even though not every proposal has been in the terms of the Draft Recommendation. The Hilmer Review noted:[62]

> The [Trade Practices Commission] proposed that unilateral conduct should be prohibited if it has the effect of substantially lessening competition. Such a test would not, in the Committee's view, constitute an improvement on the current test. **It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct.**
>
> As the High Court has observed, the very essence of the competitive process is conduct which is aimed at injuring competitors… Firms should be encouraged to compete aggressively by taking advantage of new and superior products, greater efficiency and innovation. There is a

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60 International Competition Network, *Unilateral Conduct Workbook,* April 2012.

61 International Competition Network, *The Objectives of Unilateral Conduct Rules",* 30 May 2007.

62 At p 70.

> serious risk of deterring such conduct by too broad a prohibition of unilateral conduct. The Committee takes the view that an effects test is too broad in this regard...
>
> **The current provision has the advantages over an effects test of an appropriate interpretation and a greater level of certainty for businesses.**

The Dawson Review considered alternative effects tests, including one very similar to the Draft Recommendation, and decided:[63]

> Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour...
>
> The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency...
>
> **The introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.**

In the United States, at least one member of the Antitrust Modernization Commission recognised the need for competition law to be certain enough to be applied by business, as the transcript reveals:[64]

> COMMISSIONER WARDEN: Does any member of the panel, other than Professor Salop, believe that his two-page [consumer welfare effects] test that he supplied for unilateral refusals to deal is something that business executives can readily conform their conduct to on a day-to-day-management of their business?
>
> [No response.]
>
> COMMISSIONER WARDEN: Does anyone on the panel believe that the general concept of exclusionary conduct under Section 2 is clear in the minds of those operating the business enterprises of this country?
>
> PROF. SALOP: I would say I think the ones who are well counseled understand it.
>
> COMMISSIONER WARDEN: So, every day, you're supposed to have Rick Rule at your elbow, while you run your business—is that your position?
>
> PROF. SALOP: I would not begin to respond to that.

Former Assistant Attorney General for the Antitrust Division Charles F "Rick" Rule gave evidence that uncertain antitrust laws risked preventing or deterring pro-competitive behaviour:[65]

> I will say that I do think there are—and in my experience, there have been—times when business-people wanted to do things that, frankly, I thought were, on balance, beneficial and enhancing of consumer welfare that they didn't undertake, or they didn't undertake in a way that was as efficient as it might have been, because of the *in terrorem* effect of certain antitrust rules and wanting to avoid them.
>
> Now, that's not true of all clients. It depends on the situation the client's in. But I do think that it actually does have a negative impact on doing things that probably, at the end of the day, would have been beneficial, but they don't do it because of the cost that it would entail.

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63 At p 70.

64 Antitrust Modernization Commission Public Hearing, 29 September 2005.

65 Antitrust Modernization Commission Public Hearing, 29 September 2005.

Another former Assistant Attorney General for the Antitrust Division, R Hewitt Pate, also gave testimony on the need for antitrust rules to be clear and applicable by business:[66]

> I'm just a regular working lawyer who's trying to give advice to clients who are trying to decide how to make decisions day to day when they run their businesses.
>
> So therefore, my short testimony, predictably, was based on the need to have administrable, relatively clear rules that firms can use based on the information they're likely to have when they make those decisions. I think if you strive for rules like that you'll have the additional benefit of adopting rules that will avoid chilling procompetitive conduct by firms with high market shares, but at least you'll have that practical benefit.

Mr Pate considered these issues in comparing the "consumer welfare" test (an effects test) and the "no economic sense" test (an objective purpose test) for identifying anti-competitive unilateral conduct:[67]

> The traditional criticisms of the consumer welfare effects liability standard are correct. The test is too difficult for businesses to apply, it gives rise to too much uncertainty, it creates too high a risk of "false positives," and it leads to costly, lengthy litigation in which judge and jury are left with too little guidance. By contrast, the only objection to the "no economic sense" test that I credit is that it does not capture all anti-competitive single-firm conduct. That admitted defect is not enough to scuttle a test that is not only intelligible to and administrable by courts and businesses, but that also carries a much lower risk of deterring pro-competitive, pro-consumer "hard competition." "No economic sense" is a better test.

The risks to competitive markets of overly broad and uncertain prohibitions on unilateral conduct are well recognised. Even the Draft Report notes that:

> The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct.

However, the Draft Report does not explain how the "substantial lessening of competition" test will reliably make this distinction. It recognises the potential of the test to capture pro-competitive conduct but purports to address these concerns with a defence that would introduce additional uncertainty. It does not adequately balance the risks of over-inclusion, under-inclusion and cost of administration, and does not investigate the certainty and predictability of either the new section or the defence.

The BCA considers that the Draft Recommendation on section 46 is both substantially broader and substantially more uncertain than the current section 46.

The proposed section 46 removes the requirements to prove a specific exclusionary purpose and a taking advantage of market power, and replaces them with the broader requirement to prove a purpose, effect or likely effect of substantially lessening competition. It also requires the respondent to prove that the conduct would be a rational decision by a company without market power and would be in the long-term interests of consumers.

The meaning of "substantial lessening of competition" has not been considered by the Australian courts in the context of unilateral conduct, and the application of the concept by the ACCC in other contexts suggests that it may be very broad. As well as effectively reversing the burden of proof on the "take advantage" element, the defence introduces new and untested language, and because both limbs must be proved the defence is likely to be extremely narrow on any judicial interpretation.

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66 Antitrust Modernization Commission Public Hearing, 29 September 2005.

67 R Hewitt Pate, "Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts", Testimony before the Antitrust Modernization Commission, 29 September 2005.

As a result, the Draft Recommendation presents a severe risk of deterring competitive conduct by simultaneously expanding and blurring the boundaries of prohibited conduct.

5 Private enforcement and admissions of fact

The Draft Report's recommendation to amend section 83 of the CCA to extend to agreed admissions of fact, in addition to findings of fact made by the court (**Draft Recommendation 37**), raises significant concerns.

The Draft Report summarises the position as follows:

> Section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be prima facie evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant). Many ACCC proceedings are resolved by a corporation making admissions of facts that establish the contravention, but it is uncertain whether section 83 applies to admissions. The effectiveness of section 83 as a means of reducing the costs of private actions would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of facts.

Accordingly, it recommends that:

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

The distinction between agreed admissions and findings made by a court is an important one in both principle and practice, and this distinction should not be removed simply because doing so would reduce the costs of private actions.

The courts' reluctance to extend section 83 to agreed findings, even where such an order has been sought by the parties, recognises the principles that underlie this distinction. As Finkelstein J recognised in *ACCC v ABB Transmission (No 2 – Distribution Transformers*):[68]

> It is not clear whether a judge who acts on formal admissions is making findings of fact. I rather think he is not, because the purpose of an admission, such as may be made in a pleading, is to dispense with the need to prove the admitted fact. That is quite different from a case where the judge hears evidence and makes findings based on that evidence.

Goldberg J came more firmly to the same conclusion in *ACCC v Leahy Petroleum (No 3)*:[69]

> [I]t would seem, as a matter of principle, that where evidence has not been tendered, but the parties rely upon statements of agreed facts which have not been the subject of critical analysis by the Court, it is inappropriate to make orders that would allow for an extended use of findings of fact, particularly use of those facts as prima facie evidence in related proceedings as envisaged by s 83.

These decisions recognise that there is a qualitative legal difference between the evidentiary findings of a court and facts agreed for the purpose of a settlement, and that findings that have not been forensically tested should not be binding on a party for the purposes of subsequent proceedings that may occur at any later time. This is a fundamental evidentiary principle and should not be dislodged.

In recent cases the ACCC has agreed with parties that facts agreed and admissions made in these statements are made for the purpose of the present proceedings only. As a result, in a significant

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68 [2002] FCA 559

69 [2005] FCA 265

number of cases concluded by the ACCC, the intention of both the ACCC and the parties, and the likely effect of the law, is that findings of fact are not available to be relied on by private litigants.

Agreed admissions or statements of fact are presented to the court by parties wishing to reduce the costs and uncertainties of litigation. They have been used in the majority of ACCC legal actions and have accounted for the majority of ACCC penalties awarded. However, agreed admissions will be substantially less appealing to respondents if they are used to facilitate private litigation including class actions by constituting prima facie evidence in these subsequent actions.

Although only the ACCC can seek penalties, under section 82 private litigants may seek compensation for loss or damage resulting from a breach of Part IV and, particularly in the case of class actions, the compensation sought may approach or exceed the penalties imposed. For example, in the Visy–Amcor cardboard packaging price-fixing case, the ACCC agreed a $36 million penalty against Visy (while exempting Amcor under its immunity policy), while a subsequent class action was settled for a $95 million, of which Amcor paid two thirds, and $25 million in costs.

As a result, the ability for respondents to mitigate the scope of third-party damages risk is an important factor in encouraging them to settle proceedings with the ACCC – and has become a key element in the ACCC's enforcement and cooperation policies. The BCA notes that the Draft Report's recommendation does not appear to be supported in any ACCC submission.

Further, it is common in negotiating settlements with the ACCC to admit more facts than the ACCC may be able or likely to prove, in order to provide a coherent statement of facts and to establish the agreed penalties to a standard that will be accepted by the court. Parties would be far less willing to agree to these facts if doing so would expose them to unforeseeable damages in subsequent actions, and this would seriously undermine the settlement process.

Private litigants already derive considerable benefits from proceedings settled by the ACCC and will continue to do so even if section 83 is not extended to cover admissions or statements of agreed facts. Although private litigants will still have to prove the facts establishing a contravention, a statement of agreed facts will them exactly what to look for. The additional advantage that might be provided by the recommendation is not worth overturning the principles identified by the courts or the clear benefits of effective settlement to the enforcement process.

6 Third-line forcing and resale price maintenance

The Draft Report recommends that the *per se* prohibition of third-line forcing be replaced with a substantial lessening of competition test (**Draft Recommendation 27**). It recommends that the *per se* prohibition of resale price maintenance remain, but that in addition to authorisation the conduct should be able to be exempted through the simpler and more timely process of notification (**Draft Recommendation 29**).

The BCA fully supports the Panel's position on third-line forcing. It also welcomes the proposal to extend the notification process to resale price maintenance, which would make it simpler and more efficient for businesses to enter into vertical commercial arrangements that provide net benefits to consumers.

However, the BCA remains concerned that the *per se* prohibition of resale price maintenance is out of step with well-accepted competition policy principles. Indeed, the Draft Report notes that a key objective of the law is that "only conduct that is anti-competitive in most circumstances is prohibited *per se* — other conduct is only prohibited if it can be shown that the conduct has the purpose, effect or likely effect, of substantially lessening competition."[70]

As set out in the earlier submission, the BCA considers that there are many circumstances in which resale price maintenance arrangements are efficiency-enhancing and not anti-competitive. This is

[70] At page 187.

particularly the case in industries where inter-brand competition is more important than intra-brand competition – as has long been the case in many industries and is becoming more frequently the case as manufacturers increasingly vertically integrate at a global level. In this respect, the BCA notes that in the US it has been recognised that:[71]

> [E]conomics literature is replete with pro-competitive justifications for a manufacturer's use of resale price maintenance… A single manufacturer's use of vertical price restraints tends to eliminate intra-brand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between… Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands.
>
> Manufacturers are increasingly selling directly to the public either online or through vertically integrated retail outlets. Resale price maintenance is a legitimate business strategy to align the interests of the non-vertically integrated manufacturers with their distributors and retailers, enabling them to implement a competitive distribution channel in competition with vertically integrated brands. Further, the per se prohibition on resale price maintenance can force businesses into distribution models that they would not otherwise efficiently engage in, such as agency distribution models. The fact that the prohibition can be avoided, through a change in distribution model from one based on sale to a distributor and resale to one based on supply to an agent for sale on behalf of the supplier, points to the absence of a strong rationale for the prohibition and the unnecessary costs that it can impose on business.

The ACCC recognised the potential benefits of resale price maintenance in its recent grant of the first authorisation for resale price maintenance since that avenue for exemption was made available in 1995. On 21 October 2014 the ACCC granted conditional authorisation for importer and wholesaler Tooltechnic to set minimum resale prices on Festool products, on the basis of strong interbrand competition and the potential for resale price maintenance to prevent free-riding by discounters and improve pre-sales and after-sales service for highly differentiated, complex products.[72] In particular:

> The ACCC considers that Festool products are complex products which are highly differentiated in terms of their attributes and quality, and the provision of services to customers is important in the sale of Festool products. These services include pre-sale explanations, demonstrations and 'try-before-you-buy' of Festool products and post-sales services such as repairs, loan tools and training in use of a product. Full service retailers are well placed to effectively and efficiently explain and demonstrate these attributes to potential customers, and to provide after-sales service to existing customers. However, customers can access retail services from one retailer but then purchase the product from another retailer (which may not provide retail services) at a discount. That is, some retailers can gain the benefit of, or free ride on, the services offered by other retailers.
>
> In this case, the ACCC accepts that there is a market failure caused by free riding by some Festool retailers. That is, there is a material risk that full service retailers will not achieve a sufficient return on the sales of Festool products to continue to provide these pre- and post-sales services, or to provide a sufficient level of these services.

The reasons for authorisation set out by the ACCC are hardly unique to the power tools industry but would apply equally to many products in many markets. The free riding issue identified by the ACCC is becoming more of a problem not only for retailers who offer a high degree of service. Oxford Dictionaries recently shortlisted "showrooming" for its 2013 Word of the Year, defining it as:

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71 *Leegin Creative Leather Products, Inc. v. PSKS, Inc*. 551 U.S. 877 (2007) at 886.

72 ACCC Draft Determination, Application for authorisation A91433 lodged by Tooltechnic Systems (Aust) Pty Ld in respect of resale price maintenance, 21 October 2014.

the practice of visiting a shop or shops in order to examine a product before buying it online at a lower price.

To prevent "showrooming", many clothing stores in the US and UK – and some in Australia – require shoppers to pay a "try on" or "fitting" fee, which although refundable against purchases have provoked considerable consumer resentment.

With advances in mobile internet services and the sophistication of mobile devices, together with the rise of online shopping and price comparison websites and apps, showrooming and other free-rider problems are becoming ever more acute: you only have to take a picture of the product that a trained salesperson has spent an hour demonstrating to you and Amazon will show you its cheapest price and let you order it in a click before you have left the showroom. In these circumstances resale price maintenance may be the only way to compete on any basis other than price.

The BCA considers that no case has been made that resale price maintenance should be prohibited *per se* or that a change to a substantial lessening of competition test would fail to capture any anti-competitive conduct. On the contrary, the evidence shows that in many cases, resale price maintenance can enhance efficiency with no overriding public detriment. Maintaining the *per se* prohibition on retail price maintenance is therefore contrary to the principle that "only conduct that is anti-competitive in most circumstances is prohibited *per se*".

If the Draft Report's other recommendations were implemented, resale price maintenance would be the only form of conduct prohibited *per se* in the CCA apart from the recognised categories of hard-core cartel conduct: price-fixing, bid-rigging, market-sharing and restricting output. This is surely an anomaly.

A comparison with the prohibition of third line forcing suggests a clear path from absolute prohibition of vertical conduct with no exemptions to the extension of first the authorisation process and then the notification process to that conduct and ending with calls to assess that conduct under the substantial lessening of competition test.

However, the removal of the *per se* prohibition of third-line forcing has been recommended since the Hilmer Review in 1993. Since then, more than 4,000 notifications have been lodged with the ACCC and only a handful revoked or challenged, representing a significant waste of time and money for both business and the ACCC. The BCA hopes that the Panel's suggestion to remove the *per se* prohibition of third line forcing is finally implemented this time; but hopes it will not take another two decades for resale price maintenance to be judged according to its effect on competition.

Accordingly, the BCA considers that the Panel should also recommend that the *per se* prohibition on resale price maintenance be removed.

In relation to both resale price maintenance and third-line forcing, even where *per se* prohibition is removed in favour of a substantial lessening of competition test, the notification process should remain available in order to provide legal certainty to arrangements and for consistency with other vertical arrangements under the CCA.

7 Mergers

The BCA welcomes the Panel's careful consideration of the informal and formal merger clearance and authorisation processes and its suggestions for streamlining and improving these critical processes (**Draft Recommendation 30**).

7.1 Informal process

The BCA agrees with the Panel's view that "the informal process works quickly and efficiently for a majority of mergers" but that "issues of transparency and timeliness arise with the informal process when dealing with more complex and contentious matters".

The issues of transparency and timeliness have been raised in a number of submissions made to the Panel. In particular, the BCA provided detailed data around the average review days in informal merger reviews, showing that they had effectively doubled from 2009 to 2014, rising from 30 to 55.

The BCA also provided analysis of calendar days elapsed because this metric can be critical to businesses working to an agreed completion timetable, and suggests that the ACCC should publish both review days and calendar days in its annual report both to give businesses an idea of what range of timeframes to expect and allow the ACCC to look at ways to improve both measures – including by examining its scaled information requests. These figures should also indicate what proportion of time is spent in pre-assessment to assist business and ensure that the pre-assessment process is working as intended.

Even taking into account only review days, the average review timeframe has doubled over the past six years. While the introduction of the two letters to merger parties outlining market concerns is likely to explain some of the increase in the average review timeframes, it is unlikely to explain all of it. Other explanations may be that the ACCC is taking unnecessary internal steps, is reviewing transactions in more detail than in the past due to the general drop in merger activity, or is under-resourced. The BCA cannot comment on the latter. However, in regards to the former two reasons, the BCA notes the following in relation to the ACCC's process stages:

- **the pre-assessment stage**: the introduction of pre-assessment around five years ago appears to have added to the average timelines of reviewed mergers. It appears that the ACCC "triages" all mergers through the pre-assessment team in the first instance. A pre-assessment stage is a valuable step but it should not be over-applied in this way. As noted in the BCA's first submission, pre-assessments should be done on the papers. To the extent that there is a question about the extent to which a merger will impact on competition in a market, or if market inquiries need to be conducted as the ACCC has no background in the industry in question, these matters should be conducted by the investigations team. Such an approach would eliminate the issue of "double handling" where a matter is extensively pre-assessed but then passed on the investigations team at a later stage; and

- **the review stage**: while there is flexibility in terms of the interaction between the ACCC and merger parties, such as through the scaled approach to information requests, there may be less flexibility in terms of the internal steps the ACCC takes in assessing mergers. While the BCA does not have insight into the ACCC's inner workings, it understands that it prepares internal papers for consideration by Commissioners and senior management that are in a standard form. It may be that in some circumstances, a considerably shorter form paper would be appropriate.

In its first submission, the BCA also submitted that there are issues with transparency in the informal merger review process. While there are more opportunities provided in informal merger review processes to respond to assertions and concerns raised in market inquiries, there continue to be real information asymmetries. This is particularly critical in circumstances where the ACCC has been provided with data or analysis by third parties in support of their submissions. Generally, this data and analysis will not be open to critical evaluation or testing by either the merger parties or any other market participant. In Europe, where access to the record is available, issues around flawed data and analysis can be resolved promptly by informing the European Commission of the flaws and/or providing alternate data and analysis for the Commission's consideration.

An issue that the BCA did not raise in its first submission that relates to both timeliness and transparency is the timing of the release of Public Competition Assessments (**PCAs**). A review of the latest matters for which a PCA was issued on the ACCC Mergers Register reveals that the average time between the decision date and the PCA publication date is 160 calendar days or 5 months:

Matter	Decision date	PCA publication date	Time between dates
Healthscope Limited – proposed acquisition of Brunswick Private Hospital	12-Jun-14	27-Aug-14	76 calendar days
BlueScope Steel Limited – proposed acquisition of OneSteel Sheet & Coil business from Arrium Limited	6-Mar-14	4-Aug-14	151 calendar days
BlueScope Steel Ltd – proposed acquisition of Fielders Australia Pty Ltd	30-Jan-14	4-Aug-14	186 calendar days
BlueScope Steel Ltd – proposed acquisition of Orrcon Steel	5-Dec-13	4-Aug-14	242 calendar days
Sonic Healthcare Limited – proposed acquisition of assets of Delta Imaging Group	17-Jan-14	30-Jul-14	194 calendar days
Melbourne International RoRo & Auto Terminal Pty Ltd (a wholly owned subsidiary of Wallenius Wilhelmsen Logistics AS of Norway) – proposed acquisition of automotive terminal at the Port of Melbourne	27-Mar-14	21-Jul-14	116 calendar days
Peregrine Corporation –- proposed acquisition of 25 BP Australia petrol retail sites in South Australia	8-May-14	Yet to be published	Unknown
Average time			160 calendar days

The BCA notes that this is a fairly recent issue. Prior to 2012-13, the ACCC used to publish PCAs within a one to two month period of the matter concluding, even in complex cases. For instance, after the review of FOXTEL–Austar concluded on 24 May 2012, the PCA was issued around 6 weeks later on 6 July 2012. Similarly, the Asahi–P&N matter was completed on 11 August 2011 and a PCA was published just one month later on 13 September 2011. Prior to this, the ACCC's PCAs were published on an even more timely basis and were typically released within one month. Indeed, in some cases, such as Westpac–St George and CBA–BankWest, the PCA was published on the same date as the ACCC's decision.

The question is – how do you address the issues of timeliness and transparency without compromising the flexibility of the informal merger review process? The BCA considers that regulating the informal process may damage or weaken its essential character, but that does not mean that the process should not be improved. The BCA is of the view that more could be done beyond recommending further consultation between the ACCC and business representatives around the issue

of timeliness alone. This recommendation does not directly address the issues that are significant and of real concern to business, in either an effective or a meaningful way.

For example, a more appropriate means to address these issues may be to institute a regular review process, ideally determined by the ACCC Board, under which ACCC staff not involved in the mergers under review, or an independent party commissioned by the Board, would review both:

- process issues, including whether the ACCC's internal steps were conducted in a timely and efficient manner including whether it has been timely in publishing PCAs and whether it has appropriately tested third party submissions, data and evidence; and

- substantive issues, including whether the assumptions that were made have been borne out – for example, if the ACCC has relied on a counterfactual to oppose a merger, whether that counterfactual has come to pass – and more generally, whether the ACCC was correct in determining that a particular merger was or was not a substantial lessening of competition.. This form of ex-post review is international best practice with both the European Commission and the Federal Trade Commission in the US conducting these reviews regularly.

The ACCC cannot be expected to always conduct merger reviews within a short timeframe nor can it predict the future with complete accuracy, however a regular review of this nature would help improve the ACCC's approach and analysis and, more importantly, will markedly increase public confidence in the ACCC's process and approach to analysis.

7.2 Formal processes

The BCA agrees with the Panel that concerns about the timeliness and transparency of the informal merger review can in part be addressed through a more streamlined formal exemption process.

As the Panel has found, the current formal clearance application process is excessively complex and prescriptive and, consistent with the BCA's previous submissions, its historical lack of use indicates that it does not provide a real alternative to the informal process. The BCA is of the strong view that a robust and time-limited alternative to the informal review process plays an important role, first by providing an alternative to informal clearance, particularly for contentious mergers, and, second in creating incentives for the efficient administration of the informal process.

Although there have been a limited number of Tribunal applications for merger authorisation, the BCA considers that the option of bypassing the ACCC and obtaining authorisation from the Tribunal has provided a valuable alternative in some cases. This is particularly so in cases where the merger proponents are aware that they will require the opportunity to directly challenge the information put forward by opponents or views already held by the ACCC.

Accordingly, the BCA recommends keeping the formal clearance process with the ACCC and the formal authorisation process with the Australian Competition Tribunal in the first instance. The BCA supports the Panel's Draft Recommendation 30 insofar as it relates to the formal clearance process, in particular that:

- *the formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information* (subject to the BCA's comments on the ACCC's investigative powers below)*;*

- *the formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties*; *and*

- *decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.*

In respect of the last point, the BCA submits that the review of formal clearances should be a full merits review and not restricted to a "review on the documents." This will allow the Tribunal to consider all aspects of a merger and both proponents and opponents of a merger to adduce all available relevant information. Should market conditions or commercial circumstances change, it will also allow the Tribunal to make its decision using the best available information.

The BCA supports the Panel's view that the specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC.

8 The ACCC's investigative powers

The BCA agrees with the Panel's finding that the costs and resourcing involved in responding to section 155 notices can be significant. This accords with the BCA's experience and is supported by the data that was presented in its first submission.

The BCA also agrees with the Panel that "the ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated"; and that the recipient of a section 155 notice should only be required to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving those documents (**Draft Recommendation 36**).

However, the Panel's view that the ACCC should frame section 155 notices narrowly does not appear to be adequately reflected in the Draft Recommendation, which merely suggests that the ACCC "should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age".

The BCA considers that the obligation to frame notices in the narrowest form possible, consistent with the scope of the matter being investigated, should be enshrined in section 155 itself; and that the Panel should recommend a Ministerial Direction requiring the ACCC to review and update its guidelines to ensure that they are consistent with this principle, *including* with regard to the increasing burden imposed by notices in the digital age.

The BCA considers that the ACCC should change both its general section 155 guidelines and its merger-specific process guidelines insofar as they relate to section 155 notices. The latter should be changed from its current position, which is as follows:

> The ACCC will, where appropriate, also use its statutory information gathering powers under s. 155 of the Act to compel merger parties (and in some limited cases, third parties) to provide documents or information to the ACCC or to compel certain persons to appear before the ACCC to provide evidence under oath or affirmation. The ACCC will seek information in this way only when it considers it will be the most effective and/or efficient way of gathering the information necessary for the ACCC to make its decision. Examples of where the ACCC may use these powers include, but are not limited to:
>
> - Merger reviews in which critical information required by the ACCC will most efficiently be sought through the use of s. 155 notices.
> - Where the ACCC considers certain information would be unlikely to be provided in response to a voluntary request for information.
> - Where third parties would prefer to be compelled to provide certain information or documents rather than providing them voluntarily (for example where a third party fears reprisal or commercial damage if it provides information voluntarily).

To a position that is more consistent with the older guidelines, which were as follows:

> While s. 155 notices are not generally issued in merger matters, the use of this statutory power is a well recognised and accepted tool often used in pursuit of the ACCC's enforcement activities. If the ACCC believes it is necessary to seek information or documents which relate to a merger or proposed merger it will usually approach the relevant party first, seeking voluntary provision of information and documents. However, from time to time, the ACCC may determine that issuing s. 155 notices to a merger party is appropriate. In considering this option, the ACCC will have regard to factors including time pressures and any inability, refusal or failure to comply fully with a voluntary request.

The Panel's recommendation around using the section 155 power narrowly should also be considered in a broader context. That is, in merger reviews, the ACCC should typically seek to obtain information and documents through a voluntary request. This would narrow the instances in which section 155 notices would be issued. However, if the ACCC considers it appropriate to issue a section 155 after a voluntary request, then it should also do this as narrowly as possible.

The BCA also considers that the requirement of a person to produce documents in response to a section 155 notice should be qualified by law, rather than by a guideline. The penalties for breaching section 155 are already severe for individuals and are proposed to be raised for corporations, and any qualification of that obligation should be set out in the law itself.

This will ensure that the qualification cannot be later diluted by the ACCC and, if necessary, can be examined and interpreted by the courts. However, the ACCC in consultation with the public should develop guidelines setting out the way it will apply the legal qualification that a search need only be reasonable in the circumstances to comply with a section 155 notice.

9 Part IIIA and regulated access

This chapter is structured in three parts:

- comments on the operation of Part IIIA, including the Panel's request for responses on its scope;
- a response to the Panel's proposal for a new "access and pricing regulator" separate to the ACCC; and
- some observations about the important role of merits review, in the context of Part IIIA and other access regimes.

9.1 The scope and operation of Part IIIA and the role of the declaration process

The BCA agrees generally with the Panel's high level characterisation of the history and experience of Part IIIA:

> Part IIIA of the CCA was originally enacted to provide a common framework for access to infrastructure within each of [the identified industries requiring the use of "bottleneck" infrastructure]. However, it soon became clear that each industry had distinct physical, technical and economic characteristics and that it was preferable to address access issues on an industry-by-industry basis. Distinct access regimes have subsequently emerged.

Part IIIA was intended as both a "fall-back" general regime for infrastructure that did not become the subject of more specific sectoral regimes, and as a framework to support the development of consistent State-based arrangements (through the certification process). It also provided a framework for the development of more tailored solutions through individual access undertakings.

Regulated access to infrastructure continues to play an important role across a number of sectors of the economy. The BCA shares the Panel's view that in most of the obvious areas – as identified by the Hilmer Review – this has now been implemented through sectoral arrangements, such as those

applying in electricity, gas and telecommunications. However, there remain some sectors identified by Hilmer where sector specific access arrangements are not in place or are more limited, notably airports and ports.

While some parts of Part IIIA – such as the framework for the ACCC to accept access undertakings lodged by infrastructure owners[73] – have operated reasonably effectively, the declaration process has, in most cases, proved cumbersome and costly in operation. It is also questionable whether the declaration framework has delivered the intended degree of consistency across States and access regimes, noting the very different and sometimes inconsistent State approaches adopted towards facilities such as ports, rail infrastructure and water infrastructure.

The BCA therefore welcomes the Panel's evaluation of the costs and benefits of the National Access Regime and in particular the declaration process. The costs associated with the declaration process include both the direct costs and delay currently associated with *using* the declaration process (for applicants and owners), as well as potential indirect costs of access, such as:

- the uncertainty and risk associated with the potential for 'ex post' regulation of infrastructure, which particularly influences new capital and investment decisions in 'Greenfield' projects, expansions, or participation in privatisation processes; and

- the potential negative and costly implications for the operation of facilities associated with introducing third party access, particularly where this involves private infrastructure which has not previously been subject to any third party use.

These are issues and risks that have been recognised on a number of occasions over the years, including most recently by the High Court.[74]

Since declaration applies only to facilities of national significance – by virtue of size, importance to constitutional trade or commerce or importance to the national economy[75] – the costs of inappropriate access declaration will by definition be nationally significant. As a consequence, declaration should only be used sparingly and in very clear cases. The BCA therefore supports the Panel's proposed amendments to the declaration criteria, which provide greater clarity to the test and set a more appropriate threshold for intervention.

However, even with the amendments proposed to the declaration criteria, the framework remains a second-best regulatory solution.

The BCA prefers targeted access solutions to the general and uncertain operation of the declaration process. If Commonwealth or State Governments consider regulation is warranted, they should identify this "up front" and develop and use targeted arrangements, rather than rely on the potential for future declaration – which creates considerable uncertainty for owners, investors and users. This is particularly the case in the context of privatised infrastructure.

BCA also welcomes the Panel's recognition that declaration poses particular risks for export-exposed mining industries, where it has been sought to be applied to facilities which has been developed through private investment, and which has never been publicly owned. These facilities should be excluded from any declaration framework.

In some areas – for example, in respect of airports – some BCA members consider that the presence of the declaration process has played a role in facilitating the negotiation of reasonable commercial

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73 Division 6 of Part IIIA.

74 *Australia's Export Infrastructure*, Report to the Prime Minister by the Exports and Infrastructure Taskforce, May 2005; Productivity Commission Inquiry Report, *National Access Regime,* 25 October 2013; *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (14 September 2012).

75 Sub-section 44G(2)(c).

terms of access, and that in this way the regime does operate as a valuable 'fall back' regulatory framework, in the absence of any specific or more tailored alternative.

In light of these considerations, subject to an appropriate regulatory impact assessment BCA supports the removal of the declaration framework, except in respect of the following "grandfathered" facilities:

- airports – where it would continue to apply, except or until a comprehensive alternative framework for facilitating terms of access is established; and

- any other former publicly-owned multi-user assets, given that in some cases access regimes were not introduced at the time of privatisation because of the potential for future declaration if this was later found to be warranted.

BCA acknowledges that this would mean that declaration would not apply to any future privatised assets. However it sees this as an incentive for State governments to provide improved certainty around access issues 'up front', including for example by addressing these issues to be addressed through conditions in State leases or other project concessions and approvals[76] – in this regard, the BCA acknowledges similar concerns raised by the ACCC.

The BCA supports the retention of a framework in Part IIIA for asset owners to submit access undertakings, which has proved a useful tool. This mechanism balances flexibility and the need to shape regulatory arrangements to suit the relevant facility with the need for regulatory oversight.

9.2 Access and pricing regulator

The BCA supports the establishment of a dedicated access and pricing regulator, independent of the ACCC – taking over the ACCC's current Part IIIA functions along with its telecommunications and energy (and perhaps transport) functions and activities. BCA agrees with the Panel that over time transferring other currently State-based sectoral functions such as water would be welcome, if a national framework could be agreed.

An access and pricing regulator would provide welcome consistency and national policy leadership in respect of economic regulation and access policy. It could provide a centre of policy excellence and capability for pricing and access regulation and facilitate the more consistent development of access regulation nationally.

The BCA accepts that more detailed work will be needed in relation to its structure and governance of any new body, and so wishes to make only limited observations on these issues at this early stage.

However, if the Australian Council for Competition Policy (**ACCP**) is instituted according to the Panel's recommendations, the BCA sees benefit in that new body taking on any declaration role [that is retained under Part IIIA], with the new pricing and access regulator being responsible for the ACCC's current role arbitrating disputes and accepting access undertakings. This would mirror the current separation between the declaration decision (NCC) and decisions relating to the terms of access (ACCC). This approach has the added benefit of vesting any declaration power in a body (ACCP) that involves the States and the Commonwealth, recognising that a number of the facilities which are potentially the subject to regulated access under Part IIIA are State-owned or formerly State-owned assets. This was one of the important original features of the NCC's constitution.

While these issues of structure and governance are important, the BCA considers that the quality of substantive decision making by the new regulator would be most improved by:

- the re-introduction of full merits review for final decisions (see below); and

[76] This has been done, for example, in respect of rail infrastructure operated by the Australian Rail Track Corporation in New South Wales and Victoria and several projects in Western Australia. A similar requirement is included in the State lease for the Dalrymple Bay Coal Terminal in Queensland.

- the establishment of a new requirement for the access and pricing regulator to consult upon, and periodically publish, a strategy document setting out its regulatory objectives, including how it plans to reduce regulatory burdens over time (in order to provide transparency and certainty for industry).

Given the potential costs associated with regulation of access to infrastructure, it is essential that all regulators involved in this regulation operate according to best practice principles of timeliness, accountability and transparency.

For example, in the United Kingdom the Department for Business Innovation and Skills has developed strategy and policy statements for each regulated sector to set out regulators' priorities and desired regulatory outcomes. UK regulators have implemented this guidance in clear and detailed annual statements of their objectives and planned actions, which have given industry participants increased certainty and involvement in regulatory priorities.

In Australia, the Commonwealth has recently released its final Regulator Performance Framework proposing key performance indicators for all regulators and providing for periodic internal and external assessment according to the framework.[77] As with the UK model, the key performance indicators are based on outcomes for the regulated industry, rather than on process metrics such as number of investigations or interventions, and are designed to ensure that:

- regulators do not unnecessarily impede the efficient operation of regulated entities;
- communication with regulated entities is clear, targeted and effective;
- actions undertaken by regulators are proportionate to the risk being managed;
- compliance and monitoring approaches are streamlined and coordinated;
- regulators are open and transparent in their dealings with regulated entities; and
- regulators actively contribute to the continuous improvement of regulatory frameworks.

The ACCP and the new pricing and access regulator should be required to implement the framework even if their eventual structure involves State governments, and the metrics to be adopted by the framework should be subject to thorough industry consultation.

9.3 Merits review

Merits review has rightly been identified as an important and effective feature of Australia's approach to administrative decision making. In particular, the Vertigan Review recently found in relation to the Part XIC telecommunications access regime:[78]

> [T]he panel is concerned that the wide-ranging discretions that the regime vests in the ACCC mean that the risks and costs of regulatory error are potentially very high, with virtually no checks and balances in place to curb any resulting harms. As a matter of principle it is inappropriate, and offensive to the norms of good government, that regulators should be left to regulate themselves.
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> That is not to dispute the fact that regulatory delay itself carries cost for both industry and end-users. However, bad decisions taken quickly are not preferable to ensuring good decisions are taken, especially given the role those decisions play in determining the future of Australian

[77] Australian Government, Regulator Performance Framework, October 2014.

[78] Independent Cost-Benefit Analysis of Broadband and Review of Regulation, Statutory Review under Section 152EOA of the *Competition and Consumer Act 2010,* 30 June 2014.

telecommunications. Moreover, the panel believes that even were there reviews initially, and associated delays, the decisions reached in those reviews would help guide the process from then on, so that delays would not persist. Finally, the absence of appropriate control mechanisms may reduce regulators' incentives to ensure the quality of their decisions, underscoring the importance of ensuring effective oversight of the regulators themselves.

All of these factors have contributed to the quality of decisions made under the competition provisions of the CCA, which have long been subject to full merits review (for instance, in respect of merger authorisation). The precedents set in those reviews have been of great importance in enhancing the predictability and effectiveness of those provisions.

BCA agrees that the Tribunal has proved an effective merits review body and is concerned with the whittling away of merits review in relation to access and pricing decisions over recent years, including:

- amendments in 2010 to Part IIIA to confine the scope of information which the Tribunal is permitted to take into account;
- removal of merits review entirely from a number of decisions under the telecommunications regime in Part XIC of the CCA;
- the decision of the High Court in the *Pilbara Railways* case, which identified that the Tribunal has limited scope to take into account new material in reviewing declaration decisions, and appears to substantially prevent any meaningful review of the "public interest" elements of the Minister's decision; and
- the changes introduced to the merits review process under the National Electricity Law and National Gas Law following its review by the COAG Standing Council on Energy and Resources – including a new requirement that applicants demonstrate a prima facie case for a "materially preferable" outcome in seeking leave to review.

BCA submits that the establishment of the new pricing and access regulator would provide a timely opportunity to reverse this trend, and re-establish full merits review from all final decisions of this regulator. This should include an ability for the Tribunal to review any public interest element in decisions that continue to be made by the Minister and are related to access issues.