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**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Note by Australia --

**17-18 December 2014**

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## AUSTRALIA

### 1 Introduction

1. Certain aspects of Australia's competition law institutional framework are currently under review. In December 2013 the Australian Government announced an independent 'root and branch' review of Australia's competition laws and policy, the Competition Policy Review, chaired by Professor Harper.<sup>1</sup> A Draft Report was released by the Review Panel on 22 September 2014. The last major review of competition policy, including institutional design, was over 20 years ago (the Hilmer Review), and it underpinned the development of the National Competition Policy (NCP) which was implemented in 1995.

2. This paper describes Australia's key current institutions (in section 2) before outlining (in section 3) the key institutional issues canvassed in the Draft Report (the relevant section of the Draft Report is annexed). The Government will consider the Review Panel's Final Report, which is expected to be released in early 2015 following further submissions and consultations. Subject to Government decision, any significant changes are likely to require the passage of legislation through Australia's Commonwealth Parliament.

### 2 The key institutions

3. The institutions of most direct relevance to this submission are the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER). The ACCC's role is to enforce the *Competition and Consumer Act 2010* (CCA) and a range of additional legislation, promoting competition and fair trading, and regulating national infrastructure. The AER is Australia's national energy market regulator and its functions are set out in national energy market legislation and rules<sup>2</sup>. The Australian Energy Market Commission is the rule maker for Australian electricity and gas markets (it also provides market development advice to governments).<sup>3</sup> Two other bodies, the Australian Competition Tribunal and the National Competition Council, are also relevant. Each of these is discussed under sub-headings below. Reference is also made in context to the Federal Court of Australia.

4. Both the ACCC and AER are within the Treasury portfolio and report to a responsible Minister (the Minister) on their respective operations. The current Minister is the Hon Bruce Billson MP, Minister for Small Business. The ACCC and AER also each provide a range of specific reports to other Commonwealth Ministers (e.g. on certain telecommunications matters to the Minister for Communications, on airport monitoring to the Minister for Infrastructure and Regional Development, and on the Carbon Tax to the Treasurer).

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<sup>1</sup> The website for the Review is at: <http://competitionpolicyreview.gov.au/>

<sup>2</sup> The energy market legislation comprises the National Electricity Law, National Gas Law, National Energy Retail Law and the respective Rules and Regulations.

<sup>3</sup> Regulators at state level also have functions in economic regulation (The Economic Regulation Authority of Western Australia, The Essential Services Commission of South Australia, The Essential Services Commission of Victoria, The Independent Competition and Regulatory Commission of the Australian Capital Territory, The Independent Pricing and Regulatory Tribunal of New South Wales, The Queensland Competition Authority, and The Office of the Tasmanian Economic Regulator).

5. To understand the functions of these institutions it is important to note that the Australian Constitution establishes a common law system with a separation of powers between the legislature (with elected representatives), the executive (bureaucracy), and courts. The ACCC and AER are branches of the executive and so do not have power to make laws (which vests in the legislature) or the power to determine what laws mean (which vests in the courts).

## 2.1 *The ACCC*

### 2.1.1 *Functions*

6. The ACCC is an independent Commonwealth statutory authority established in 1995, following the Hilmer review, with the amalgamation of the Australian Trade Practices Commission and the Prices Surveillance Authority to administer the *Trade Practices Act 1974*, the forerunner of the CCA.<sup>4</sup>

7. The ACCC is responsible for enforcing all of Australia's competition laws, including by addressing harm through anti-competitive conduct, assessing and reviewing mergers to prevent structural changes that substantially lessen competition, and considering applications for authorisation and notifications (to allow some anti-competitive conduct where the public benefit outweighs the public detriment). The enforcement of consumer protection and product safety laws is shared between the ACCC and state agencies.

8. The ACCC has a range of regulatory functions in relation to national infrastructure industries as well as a prices oversight role in some markets where competition is limited. These include: assessing access undertakings under the 'National Access Regime', which facilitates third party access to certain services provided by means of significant infrastructure facilities; a number of responsibilities regarding the National Broadband Network; supporting the development and operation of efficient water markets in the Murray-Darling Basin; and assessing notifications of price increases in relation to certain services (regional air services, services to airports and airlines, and certain services provided by Australia Post).

### 2.1.2 *Structure*

9. The ACCC is governed by a Chair and other members of the Commission appointed for terms of up to five years. Commissioners are appointed by the Governor-General on recommendation of the Commonwealth Government. An appointment is made after the majority of state and territory jurisdictions support the selection. The Commonwealth Treasurer may also appoint associate members of the Commission, with the support of a majority of state and territory jurisdictions.

10. The ACCC is currently comprised of seven full-time members including the Chair and two Deputy Chairs, and three associate members (being the Chairs of Australian Communications and Media Authority, the AER and the New Zealand Commerce Commission).

11. The background of Commissioners varies with a range of legal, economic, business and technical skills. In practice, the Chair and Commissioners are appointed on a full-time basis.

12. The Minister has specific authority to give directions to the ACCC connected with the performance of its functions or the exercise of its powers under some areas of the CCA (including to monitor prices, costs and profits, and to direct the ACCC to give special consideration to a specified matter).

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<sup>4</sup> The ACCC replaced the Trade Practices Commission, which was responsible for monitoring and enforcement activities under the Trade Practices Act 1974.

### 2.1.3 *Decision-making*

13. Decisions are made by the Chair and Commissioners meeting together (or as a division of the ACCC), save where a power has been delegated to a Commission member. The Chair is also the Chief Executive Officer with public governance, performance and accountability responsibilities.<sup>5</sup>

14. Consideration of issues and decision-making occurs through a committee structure, which provides for more detailed evaluation of issues before consideration by the full Commission. These committees include: Adjudication; Enforcement; Mergers; Infrastructure; and Communications. Staff present submissions, papers and oral reports to these meetings. Each committee is chaired by a Commissioner who manages the agenda and the progress of relevant matters as they are considered by that committee and the Commission. However, that Commissioner does not formally manage staff in the area of work relevant to the committee.

### 2.1.4 *Administrative powers and court determinations*

15. The ACCC does not have the power to decide whether or not there has been a contravention of the CCA. Nor does the ACCC have any power to impose injunctions, monetary penalties, fines or other orders for compensation or redress for breaches of the law. This is the responsibility of an independent judicial body that is separate from the ACCC, namely the Federal Court of Australia (Federal Court). The ACCC's role is to investigate and bring appropriate matters before the Federal Court.

16. The ACCC may use a range of tools at its disposal to achieve compliance with the law. For example, it may accept a court enforceable undertaking from someone involved in a contravention. It may issue infringement, substantiation and public warning notices.<sup>6</sup>

17. The ACCC has power to make administrative determinations, including authorisation, notification and clearance decisions. The authorisation and notification provisions of the CCA allow the ACCC to grant legal protection for potentially anticompetitive conduct when the public benefit outweighs the public detriment, including any lessening of competition. Clearance decisions arise in the context of mergers, on application for formal or informal clearance of a merger, on the question of whether a proposed acquisition is likely to have the effect of substantially lessening competition.

18. The ACCC also has power to assess notifications of price increases (see *Functions* above).

19. These determinations (with the exception of informal merger clearance) are subject to merits review by the Australian Competition Tribunal (see below).

20. As well as enforcing the law, the ACCC undertakes education and liaison programs, media communications, and works with business on specific initiatives to achieve compliance with the law. It is also able to conduct research into matters affecting the interests of consumers and undertake studies on matters that are referred to it by the NCC.

### 2.1.5 *Accountability*

21. The ACCC is subject to external parliamentary scrutiny through the Senate Economics References Committee, which examines the operations and performance of all Treasury portfolio

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<sup>5</sup> Under the Public Governance, Performance and Accountability Act 2013.

<sup>6</sup> The ACCC may issue an infringement notice where it has reasonable grounds to believe there has been a contravention of certain consumer protection laws. It gives the recipient the option of paying a penalty in full or electing to have the matter heard in court. A substantiation notice requires the recipient to substantiate or support a claim or representation made by them promoting the supply or possible supply of goods or services by them or another person. A public warning notice is to alert consumers to a suspected breach of certain consumer protection laws.

agencies as part of the Senate Estimates process that occurs up to three times each year. The ACCC's annual report is tabled in Parliament.

22. Other bodies reviewing the activities of the ACCC, apart from the Federal Court and Australian Competition Tribunal, include the Commonwealth Ombudsman. The ACCC and its staff must also comply with a range of other general rules and guidance such as the *Public Governance, Performance and Accountability Act 2013*, Legal Services Directions,<sup>7</sup> Commonwealth freedom of information framework<sup>8</sup> and general obligations on public service employees.<sup>9</sup>

23. The ACCC, like other executive institutions, is issued with a statement of expectations from the Government, most recently in 2014.<sup>10</sup> This sets out the Government's expectations about the role and responsibilities of the ACCC, its relationship with the Government, issues of transparency and accountability and operational matters. The ACCC has responded with its statement of intent.<sup>11</sup>

## 2.2 *Australian Energy Regulator*

### 2.2.1 *Functions*

24. The AER is an independent entity under the CCA. The staff and facilities of the AER are funded through the ACCC's agency appropriation but the AER has its own financial budget.

25. The AER's functions, which mostly relate to energy markets in eastern and southern Australia, include:

- setting the prices charged for using energy networks to transport energy to customers (electricity poles and wires, and gas pipelines)
- monitoring wholesale electricity and gas markets to ensure suppliers comply with the legislation and rules, and taking enforcement action where necessary
- regulating retail energy markets in certain states<sup>12</sup>
- publishing information on energy markets, and
- assisting the ACCC with energy-related issues arising under the CCA, including enforcement, mergers and authorisations.

26. The Australian Energy Market Agreement 2004 sets out the cooperative legislative framework of the states/territories and the Commonwealth. South Australia is the lead legislator, and the other jurisdictions then apply the national energy legislation.

27. The ACCC and AER both have roles in regulating infrastructure under their respective legislative frameworks. The AER's role is confined to energy and includes enforcing compliance with specific energy markets legislation and rules, while the ACCC enforces compliance with the general

<sup>7</sup> Legal Services Directions 2005.

<sup>8</sup> *Freedom of Information Act 1982*.

<sup>9</sup> *Public Service Act 1999*.

<sup>10</sup> See [www.accc.gov.au/system/files/ACCC\\_Statement\\_of\\_expectations.pdf](http://www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf).

<sup>11</sup> See [www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%2026%20June%202014.pdf](http://www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%2026%20June%202014.pdf).

<sup>12</sup> The National Energy Customer Framework is the final stage in the transition to national regulation of energy markets and will move consumer protections for energy customers in Queensland, New South Wales, the Australian Capital Territory (ACT), Victoria, Tasmania and South Australia into a single framework enforced by the AER. The states currently covered are the ACT, South Australia, Tasmania (electricity only) and New South Wales.

competition and consumer provisions of the CCA. Where appropriate, the AER mirrors the ACCC's practices, procedures or policies, to promote an efficient and consistent approach to principles of good government administration and public policy. Examples include similar approaches to internal budgeting and risk management frameworks, general approaches to regulatory pricing considerations, and general principles for enforcement policies.

28. The AER and ACCC also coordinate responses to issues of common interest under the CCA and the energy laws, such as door knocking by energy company marketers.

29. The model of two independent decision makers, with shared resources and staff, supports a common approach across regulated infrastructure sectors.

30. The AER reports on its work activities to the Council of Australian Governments' Energy Council (COAG Energy Council) which is responsible for pursuing priority issues of national significance in the energy and resources sectors. The COAG Energy Council is chaired by the Commonwealth Minister for Industry, and its membership is comprised of Commonwealth, state/territory and New Zealand Ministers with responsibility for energy and resource matters.

### 2.2.2 *Structure*

31. The AER Board consists of two state/territory members and one Commonwealth member. The Commonwealth member is also a Commissioner of the ACCC. The other two state/territory members attend relevant ACCC meetings when energy-related matters are considered. One AER Board member is currently a member of the ACCC's Infrastructure Committee.

32. One of the AER members is appointed as the Chair but must be recommended by the relevant Commonwealth and state/territory Ministers under the Australian Energy Market Agreement 2004.

33. The AER Board has extensive energy sector and infrastructure regulation experience.

### 2.2.3 *Decision-making*

34. The AER Board makes statutory decisions, sets strategic direction, approves major policy submissions and guides staff. Decisions are made by the Chair and Board members meeting together. Like the ACCC, the AER makes all major decisions but does not formally manage staff. Staff present submissions, papers and oral reports to these meetings.

35. Each Board member provides their views on all issues. The ACCC Commissioner is able to share expertise gained from considering similar regulatory matters in other regulated industries under the CCA.

### 2.2.4 *Administrative powers and court determinations*

36. The AER can take enforcement action such as issuing infringement notices,<sup>13</sup> accepting voluntary or court enforceable undertakings and instituting proceedings in the Federal Court in relation to breaches of obligations under the energy market legislation. The AER can also revoke gas and electricity retailer authorisations. The AER's investigatory powers include powers to obtain and exercise search warrants, and compulsorily require the production of information and documents.

37. The AER also has power to make administrative determinations such as regulatory determinations for gas and electricity network business.

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<sup>13</sup> The AER may issue an infringement notice where it has reason to believe that a civil penalty provision has been breached. It gives the recipient the option of paying a penalty in full or electing to have the matter heard in court.

## 2.3 *The Australian Competition Tribunal*

### 2.3.1 *Functions*

38. The Australian Competition Tribunal is a review body that hears applications for review of:<sup>14</sup>

- determinations of the ACCC granting or revoking authorisations in relation to anti-competitive conduct
- certain determinations of the ACCC in relation to notices given by the ACCC regarding exclusive dealing
- determinations of the ACCC granting or refusing clearances for company mergers and acquisitions<sup>15</sup>
- applications for authorisation of company mergers and acquisitions on public benefit grounds which would otherwise be prohibited under the CCA, and
- decisions of the Minister to make or revoke access declarations, and decisions of the ACCC and AER in access matters.

### 2.3.2 *Structure*

39. The Tribunal consists of a President, a number of Deputy Presidents and other members as appointed by the Governor-General. A presidential member must be a judge of the Federal Court. Other members must have knowledge of or experience in industry, commerce, economics, law or public administration. For the purpose of hearing and determining proceedings, the Tribunal is constituted by a presidential member and two non-presidential members.

### 2.3.3 *National Competition Council*

40. The National Competition Council (NCC) is a research and advisory body which was established in 1995. It oversaw the NCP reforms but its remaining role is confined (to providing recommendations to the relevant Minister in relation to access to infrastructure services). The independence of the NCC was seen as an important contributor to the success of NCP. The NCC comprises the President and up to four part-time councillors from a variety of backgrounds drawn from different parts of Australia. It is supported by a secretariat with limited number of staff (who recently transferred to the ACCC but continue to provide secretariat services to the NCC).

## 3 **The Competition Policy Review Draft Report**

41. The Competition Policy Review has attracted a range of submissions, and it makes a number of recommendations, touching on issues of institutional design. These include the following:

- The need for independent competition policy advice<sup>16</sup>

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<sup>14</sup> A review by the Tribunal is a re-hearing or a re-consideration of a matter (albeit on limited material for some reviews). The Tribunal may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the original decision.

<sup>15</sup> Formal merger clearance is a first instance decision that means that neither the ACCC nor any other party may initiate legal action on the basis of an alleged contravention of CCA s.50, which prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

- Establishment of a new national competition body, the Australian Council for Competition Policy (ACCP), to:
  - lead competition policy reform
  - advise state governments and independently assess progress of agreed reforms<sup>17</sup>
- Assign a market studies function to the ACCP<sup>18</sup>
- Maintain a single competition and consumer regulator (the ACCC)<sup>19</sup>
- Amalgamate all price regulatory functions into a single body (separating the access and pricing regulatory functions from the other functions of the ACCC)<sup>20</sup>
- Strengthen ACCC governance by appointing a ‘board’, which could be either advisory or decision making in nature, and would include non-executive members who are independent of the day-to-day operations of the agency.<sup>21</sup>

42. The key section of the Draft Report, which summarises the main submissions on institutional design and provides the Review Panel’s views, is Annexed.

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<sup>16</sup> Draft Report section 22.2.  
<sup>17</sup> Draft Report sections 4.1, 4.2 and 22.3.  
<sup>18</sup> Draft Report section 22.3.  
<sup>19</sup> Draft Report sections 4.4 and 23.1.  
<sup>20</sup> Draft Report sections 4.5 and 24.2.  
<sup>21</sup> Draft Report sections 4.6 and 23.2.

## ANNEX

1. Extract from Competition Policy Review Draft Report, September 2014.
2. Relevant draft Recommendations have been inserted where relevant. Explanations of certain terms have been added in italics.

**PART 5 — Competition institutions**

3. This Part asks whether our current competition institutions are fit for purpose to operate in the long-term interests of consumers. We also examine the best institutional structure to take forward future reforms to competition policy.
4. The institutions which oversee the competition framework undertake four broad functions.



5. At the Commonwealth level, competition policy is implemented through the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC), the Australian Competition Tribunal and the Federal Court of Australia. In addition, state and territory regulators such as the NSW Independent Pricing and Regulatory Tribunal (IPART) implement aspects of competition policy.
6. Under National Competition Policy (NCP), a range of new regulatory institutions were created. For example, the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) perform functions under a legislative framework focused on the long-term interests of consumers.
7. The Panel has also considered the institutional arrangements that will be needed to implement the reform agenda coming out of this Review. We identify key factors for the success of a future competition institution, including the need for a national approach, with 'buy in' from all Australian governments, and the ability of the institution to provide independent advice on competition policy.

## 22 Institutional structures for future competition policy

### 22.1 Lessons from NCP

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

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

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

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

- the agreement to a set of competition elements, with each jurisdiction determining its own priorities and undertaking its own legislation review program;
- the establishment of the NCC that prepared public assessments of the performance of all governments in meeting their NCP commitments and provided advice to the Commonwealth Treasurer on competition payments to the States and Territories. The NCC also provides recommendations to Commonwealth and state and territory ministers in relation to third-party access to infrastructure; and
- competition payments from the Commonwealth to the States and Territories in recognition that the Commonwealth would gain more revenue than the States and Territories from the reforms.<sup>22</sup>

11. As the PC noted in its 2005 Review of National Competition Policy Reforms:

Distinguishing features of NCP were its national focus, extensive agenda, agreed framework of reform principles, commitments to timeframes, with contingent financial payments from the Australian Government to the States and Territories.<sup>23</sup>

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

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<sup>22</sup> The last competition payments to the States and Territories were made in 2005-06. Since then, the role of the NCC has been limited to making recommendations on third-party access to infrastructure.

<sup>23</sup> Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 127.

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

## 22.2 *A National Approach to Competition Policy*

### *A national approach*

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

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

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

17. But the ‘starting point’ for reform varies across jurisdictions. Reflecting the different structural features of the state and territory economies and different cultural and social priorities, progress under NCP varied across the jurisdictions. This is reflected both in the issues that the jurisdictions sought to prioritise and their level of success in achieving outcomes. These differences will also affect the priorities that the jurisdictions seek to pursue going forward.

18. Successful competition policy reform will require commitment and effort from all three levels of government. While there may be a leadership role for the Commonwealth in addition to taking action in its own sphere, leadership will also be required from the States and Territories and local government.

### *Independent competition policy advice*

19. The independence of the NCC was seen as an important contributor to the success of NCP and identified as an equally important component of any institutional arrangements put in place to drive future competition policy.

20. There are arguments put in submissions for a broad role to be performed by such a body. The NSW Government sets out a number of roles for an independent body:

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

21. All submissions made on this issue stress the need for independence — that the functions which could also be performed by existing bodies or by a specially created one be separate from the policy and/or regulatory bodies that would be carrying out or regulating the specific reforms.

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

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

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

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

25. The NCC, as a national body, played a vital role as part of NCP. However, as noted in [Chapter 8](#), the review and reform of legislation which may impede competition has stalled following the conclusion of the NCC's role in reviewing legislation. The NCC now retains only a limited role in relation to advising ministers on infrastructure and gas access matters. It has not maintained the capacity to readily step into a broader role again.

#### *Competition payments*

26. A significant feature of NCP was competition payments made by the Commonwealth to the state and territory governments to recognise that the Commonwealth received a disproportionate share of increased revenue from the larger national income resulting from NCP. This was highlighted in an analysis of NCP undertaken by the PC (then the Industries Commission) that estimated the potential gains from NCP and how it would be reflected in revenue at the Commonwealth, state and territory levels.<sup>24</sup> The payments were made, or withheld, by the Commonwealth Treasurer following advice from the NCC.

27. The NSW Government comments that:

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

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

29. The Panel met with representatives of the States and Territories which all argued that competition payments contributed positively to their ability to implement reform. While the quantum of the payments was not large compared to total state and territory revenues, it was consistently argued that the payments provided an additional argument that could be used to support reform. In particular, it was put to the Panel that the possibility of payments being withheld was important to maintain support in the face of opposition to reform.

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<sup>24</sup> Industry Commission 1995, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*.

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

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

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

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

33. There have been a number of calls for competition payments to be a feature of any institutional framework going forward in order to recognise the potentially uneven distribution of reform effort and reward.

34. The NSW Government recommends that:

The provision of financial incentives from the Commonwealth to the States would help lock in reforms and share the economic growth and revenue benefits (which would largely be captured by the Commonwealth tax bases) in a way that is proportionate with reform effort and outcomes. (page 17)

35. The BCA [Business Council of Australia] also argues that:

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

36. It is the focus on sharing the benefits which is a crucial feature of the NCP payments and that should be reinstated in any future arrangements. The payments should not be represented as an 'incentive' or a 'bribe' for the states and territories to undertake reform. Such an approach has the potential to direct the focus away from the benefits of reform.

37. However, as with the NCP reforms, there is a likelihood that the benefits of reform will not necessarily flow in proportion to the effort put into pursuing and implementing reform. It is therefore reasonable to facilitate a process to re-balance any such revenue effects.

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

*Market studies*

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

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

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

As well as taking a look at particular markets, market studies can relate to practices across a range of goods and services, for example, doorstep selling.<sup>25</sup>

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

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

...

As government regulation and policy are not typically susceptible to enforcement action, market studies can be the best response to concerns regarding markets where public restrictions may be distorting a market or chilling competition.<sup>26</sup>

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

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

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<sup>25</sup> Office of Fair Trading 2010, *Market Studies: Guidance on the OFT Approach*, page 2

<sup>26</sup> *Ibid*, pages 2-4.

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

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

44. While international experience favours embedding a market studies function within the competition regulator, this approach may lead to conflicts between policy and regulation/enforcement functions. As the Monash Business Policy Forum states, 'separation of policy design and implementation is key to effective regulatory agencies ... regulators should be explicitly excluded from policy development'. (pages 13 and 17)

45. Typically, a market study will seek to understand the workings of a market with a view to identifying any factors that prevent or distort competition, efficiency, or consumer welfare.

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

47. A market study should consider the framework, structure and rules which govern a market. Recommendations could be made to implement changes in any of these areas, either through changes to regulation that directly determine the shape of the market, or to regulation that has the unintended consequence of reducing competition in the market, for example, by affecting entry into or exit from the market.

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

49. In Australia, there is no dedicated market studies body to examine the competitive dynamics of particular markets in a systematic way. Currently, inquiries into these issues are conducted on an ad hoc basis by, for example, the ACCC, the PC or state and territory regulators.

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

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

51. While the ACCC, the PC and state and territory regulators have each conducted studies into particular markets, none of these bodies is specifically designed to conduct market studies. Having the ACCC conduct market studies could encourage the perception that they are a precursor to enforcement action.

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

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

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

55. On balance, the use of mandatory information-gathering powers in market studies may create an adversarial environment, where participants show reluctance to cooperate and share information with the body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research, while having the power to compel production of information — appears to achieve desired outcomes without the need to invoke mandatory legal powers.

#### *Outcomes of studies*

56. The former UK Office of Fair Trading paper notes that options available at the conclusion of their market studies include:

- improving the quality and accessibility of information for consumers
- encouraging businesses in the market to self-regulate
- making recommendations to the Government to change regulations or public policy
- taking competition or consumer enforcement action, or
- making a market investigation reference to the [relevant authority].<sup>27</sup>

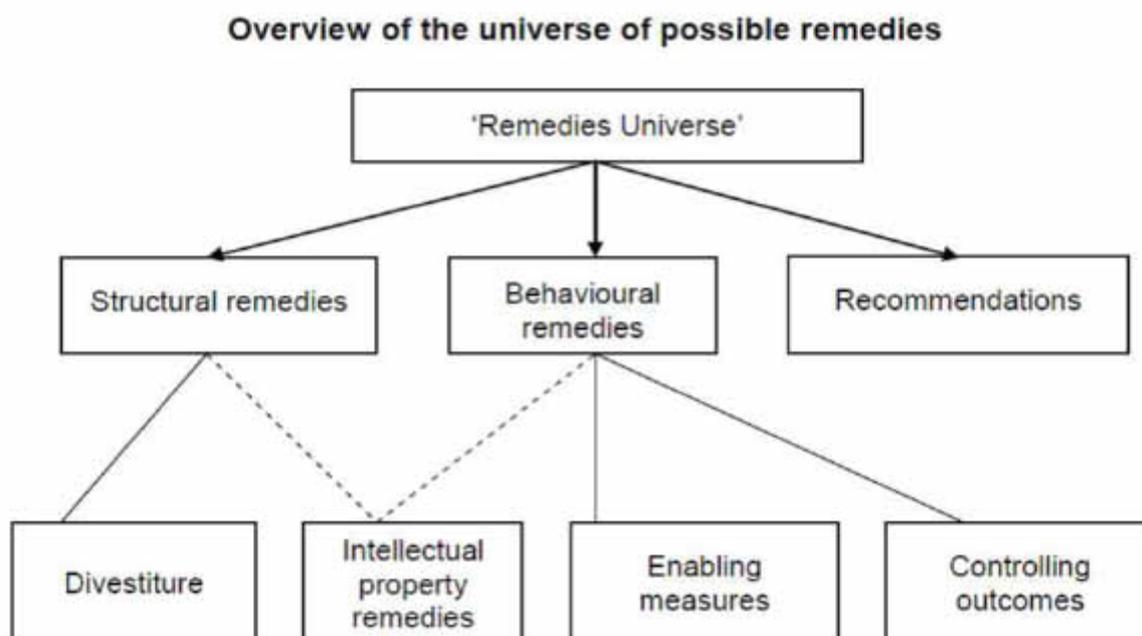
57. Importantly, findings and recommendations presented to government allow the market studies body to dispel myths about the market and determine the effects on consumers without limiting the reform options for government. Ultimately, this provides government with valuable information about the nature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

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<sup>27</sup> Office of Fair Trading 2010, *Market Studies: Guidance on the OFT Approach*, page 3.

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

59. The former UK Competition Commission guidelines provide an overview of the possible outcomes from a market investigation:<sup>28</sup>



60. While CHOICE's submission supports an additional market investigations function (page 56), the ACCC disagrees, noting that it does not support the ability of a market investigations body to impose legally enforceable remedies (ACCC Submission 1, page 139). The ACCC view is preferable as it is consistent with Australia's legal landscape which gives Parliament the power to make laws and the judiciary the power to impose remedies.

### 22.3 A New Competition Policy Institution

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

62. The NCC, which oversaw the NCP, now has a considerably diminished role. It has been put to the Panel that the NCC no longer has the capacity to provide leadership in this domain. **Draft Recommendation 46** proposes that the remaining functions of the NCC, associated with the National Access Regime, be transferred to a new national access and pricing regulator. The NCC could then be dissolved.

63. The PC is the only existing body with the necessary credibility and expertise to undertake this function, given its role as an independent research and advisory body on a range of economic, social and

<sup>28</sup> Competition Commission 2013, Guidelines for market investigations: Their role, procedures, assessment and remedies, page 79.

environmental issues affecting the welfare of Australians. But the PC's work is driven by the Commonwealth and, if it were to have the competition policy function as well, its legislation and governance would need significant change.

64. The AEMC is an example of an independent, national organisation, operating in an area of state government responsibility that has a governance structure supported by both the Commonwealth and the States and Territories.

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

66. The establishment of governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure. Many of the competition policy reforms outlined in this Draft Report are overseen by state and territory governments. All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed.

67. The ACCP cannot be accountable to just one jurisdiction but must be accountable to them all. This suggests an intergovernmental agreement and oversight by a specific Ministerial council. Given the economy-wide nature of competition issues, this responsibility should be assigned to Treasurers.

68. An intergovernmental agreement would set out the functions of the ACCP and the process of appointing its members. While there should be scope for members to be nominated and appointed by state and territory governments, their role would not be to represent jurisdictional interests, but rather to view competition policy from a national perspective.

69. The secretariat should be independent of any one government and there may be merit in rotating the right to nominate the Chair.

### ***Functions of the ACCP***

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

71. There needs to be a clear advocate for competition policy in Australia's institutional structure. Too often this has fallen by default to the ACCC, which can be an uneasy role for a regulator to fulfil. The Panel sees advocacy for competition as a central function of the ACCP.

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

### ***ACCP — market studies***

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

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

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

76. The use of mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market but, on the other hand, may create an adversarial environment where participants show reluctance to cooperate and share information with the market studies body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research — appears to achieve desired outcomes without the need to invoke mandatory legal powers.

77. A principle recognised in the NCP was that there were different circumstances in different jurisdictions that could lead to different approaches to either the scope or timing of reform. The Panel, in agreeing with this principle, considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

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

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

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

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

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

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

#### *ACCP — competition payments*

84. There is widespread support for competition payments that were made by the Commonwealth to state and territory governments to recognise that the Commonwealth received a disproportionate share of the increased revenue flowing from the NCP reforms.

85. While the quantum of the payments was not large compared to total state and territory revenues, the Panel consistently heard that their existence provided an additional argument that could be used to support reform. The Panel was also told, however, that their effectiveness was limited by not being applied to the Commonwealth and not consistently being applied to local government.

86. On the other hand, as noted by the PC, a focus on payments and penalties ‘has from time to time almost certainly misled the community as to the main rationale for the reform ...’.<sup>29</sup> This appears to underlie the observation made by many stakeholders that progress with competition policy reform waned once competition payments ceased.

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

88. The PC 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. The ACCP could then assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

#### **The Panel's view**

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

The Panel sees advocacy for competition as a central function of the ACCP, and that it should act as an independent assessor of progress on reform.

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

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

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

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

#### **Relevant Draft Recommendations (from Section 4 of the Draft Report)**

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

The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda. The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

<sup>29</sup> Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 152.

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.<sup>30</sup>

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

**Draft Recommendation 40 — Role of the Australian Council for Competition Policy**

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

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

**Draft Recommendation 41 — Market studies power**

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

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

**Draft Recommendation 42 — Market studies requests**

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

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

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

**Draft Recommendation 43 — Annual competition analysis**

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

**Draft Recommendation 44 — Competition payments**

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

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

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

<sup>30</sup>

*[The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. The [members of COAG](#) are the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association (ALGA). The Prime Minister chairs COAG. The role of COAG is to promote policy reforms that are of national significance, or which need co-ordinated action by all Australian governments. COAG is supported by inter-jurisdictional, ministerial-level Councils that facilitate consultation and cooperation between the Commonwealth and the States and Territories in specific policy areas.]*

## 23 Enforcement of Competition Law

89. Enforcement of competition law is crucial to consumers, and therefore to the performance of the economy.

90. The primary enforcement body is the ACCC, which was created in 1995 by merging the Prices Surveillance Authority and the Trade Practices Commission, with some functions from the telecommunications regulator Austel. The ACCC retained the Trade Practice Commissions' Commonwealth consumer protection enforcement functions. It has also added the AER as a constituent component.

91. Many submissions comment on the role, structure and effectiveness of the ACCC as the central regulatory body for competition law. The issues that submissions raise include:

- whether the ACCC should be responsible for enforcement of both competition law and consumer protection law or whether those responsibilities should be separated;
- whether the ACCC decision making would be improved by changes to its governance structure; and
- whether the ACCC uses the media responsibly.

92. Submissions also address whether access and pricing regulatory functions should be undertaken by a body separate to the ACCC.

### 23.1 Competition and consumer protection functions

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

94. The link between competition and consumer functions has been described as competition law keeping the options open, while consumer protection laws protect the ability of consumers to make informed choices among those options.<sup>31</sup>

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

[C]ombining competition and consumer protection in a single regulatory agency is inconsistent with best practice design of regulatory institutions. (page 33)

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

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<sup>31</sup> Netherlands Competition Authority 2010, *Competition Enforcement and Consumer Welfare: Setting the Agenda* Preamble, page 3.

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

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

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

98. The OECD identifies three major advantages of retaining the competition and consumer functions in one institution:

- gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments;
- gains from developing and sharing expertise across these two areas; and
- gains in terms of the wider visibility to the community, and understanding in the community, of competition and consumer issues.<sup>32</sup>

99. Retaining a combined competition and consumer body is supported by a range of consumer groups that focus on the ACCC's record of being an active competition and consumer regulator.

100. The Australian Communications Consumer Action Network submits that it sees the competition and consumer protection roles of the ACCC as complementary and those roles 'as inextricably linked and important to maintain within the same organisation.' (page 9) CHOICE notes one of the benefits of having a combined competition and consumer regulator is avoiding regulatory over-capture. (page 55)

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

102. For example, currently the ACCC can assess a complaint of anti-competitive behaviour against the misuse of market power provisions, the business unconscionable conduct provisions, or the operation of a relevant code. Having these considerations split across different agencies could lead to additional administrative complexity or, far worse, to duplicate prosecutions of the same conduct under separate parts of the CCA by separate agencies.

#### **The Panel's view**

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

<sup>32</sup> OECD Policy Roundtables 2008, *The Interface between Competition and Consumer Policies*.

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

We recognise that with these synergies come tensions, and note that the ACCC should continue to carefully balance its competition-related regulatory tasks with its consumer protection role.

## Relevant Draft Recommendations (from Section 4 of the Draft Report)

### Draft Recommendation 45 — ACCC functions

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

## 23.2 ACCC accountability and governance

103. The ACCC is established under the CCA as a statutory corporation. It is governed by a chairperson and other persons appointed as members of the Commission (usually called commissioners). Decisions are made by the chairperson and commissioners meeting together (or as a division of the Commission), save where a power has been delegated to a member of the Commission. The Commission is assisted by its staff. In practice, the chairperson and commissioners are appointed on a full-time basis; in other words, they perform an executive role.

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

105. Other bodies reviewing the activities of the ACCC include tribunals and courts and the Commonwealth Ombudsman. The ACCC and its staff must also comply with a range of other general rules and guidance such as the *Public Governance, Performance and Accountability Act 2013*, Legal Services Directions,<sup>33</sup> Commonwealth freedom of information framework<sup>34</sup> and general obligations on public service employees.<sup>35</sup>

106. The ACCC, like other executive institutions, is issued with a statement of expectations from the Government, most recently in 2014.<sup>36</sup> This sets out the Government's expectations about the role and responsibilities of the ACCC, its relationship with the Government, issues of transparency and accountability and operational matters. The ACCC has responded with its statement of intent.<sup>37</sup>

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

108. The Review's remit includes considering the governance structure of the ACCC and whether improvements may be made to strengthen decision making. Given the fundamental role that 'checks and

<sup>33</sup> Legal Services Directions 2005.

<sup>34</sup> *Freedom of Information Act 1982*.

<sup>35</sup> *Public Service Act 1999*.

<sup>36</sup> See [www.accc.gov.au/system/files/ACCC\\_Statement\\_of\\_expectations.pdf](http://www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf).

<sup>37</sup> See [www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%202026%20June%202014.pdf](http://www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%202026%20June%202014.pdf).

balances' play in good governance structures it is appropriate to consider whether the current checks and balances are sufficient.

109. Mr John Dahlsen notes:

Governance arrangements could clearly be improved to establish a chain of accountability superior to what currently exists. It is possible that the strong, independent and non-conflicting influence of directors with clearly mandated powers could improve the situation.<sup>38</sup> (page 131)

110. The Panel notes there are other governance structures available for government bodies. The Panel has had particular regard to the Reserve Bank of Australia (RBA) given that it is a body that is independent and has a reputation for using its independence. It is trusted in the way that it undertakes its responsibilities and its decisions are seen to be taken in the interests of Australia, even though any individual decision will have 'winners and losers'.

111. The RBA has its own source of revenue that can bolster its independence. That cannot be replicated for the ACCC. But there are other features that could be applied to the ACCC. The Governor of the RBA is generally appointed from within the agency, which provides cultural continuity. The Governor is also asked to appear before a House of Representatives Committee twice each year for a broad-ranging discussion of the RBA's approach to implementing its responsibilities.

112. The RBA also has a Board with independent, non-executive directors. The Board brings business and academic experience to the governance of the RBA. It also provides an alternative source of advice and oversight from that generated within the RBA, and so can provide a check against 'group think'.

113. Adding a Board to the ACCC could strengthen the checks and balances on the ACCC's internal decision-making by bringing external perspectives to bear, and could also strengthen the accountability of the ACCC executive to the broader community as represented by external members of the Board.

114. The Panel has contemplated two options to introduce this diversity of views into the decision-making of the ACCC.

115. The first is to replace the current Commission with a Board, comprising a number of members akin to the current commissioners, who would work full-time in the operations of the ACCC, and a number of independent non-executive members with business, consumer and academic expertise, who would not be involved in the day-to-day functions of the ACCC. This option would strengthen accountability of the ACCC to the broader community as represented by the non-executive members of the Board.

116. The Panel has no strong view on whether the Board should be chaired by an executive or non-executive member.

117. An alternative means of adding to the diversity of views may be through retaining the current Commission structure but adding an Advisory Board without decision-making powers. The Advisory Board would comprise independent non-executive directors with business, consumer and academic expertise and would advise the Commission on operational and administrative policies. The Advisory Board would be chaired by the Chair of the Commission, with other commissioners also potentially serving as members.

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<sup>38</sup> Mr John Dahlsen provided a confidential submission to the Review, but gave his permission for his submission to be quoted in this Draft Report.

118. The Panel considers that, whichever option may be adopted, a fundamental requirement is the appointment of non-executive members who would not have other roles in the ACCC or its committees and who would be independent of the day-to-day operations of the agency.

119. The ACCC could also report regularly to a broadly-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics, to build profile and credibility for the agency as well as to subject it to additional accountability to the Parliament.

#### **The Panel's view**

ACCC decision-making is sound, but the Panel considers there are benefits from considering options to further strengthen governance and accountability.

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.

The Panel is also of the view that the ACCC should not undertake competition policy advocacy and education, as this may compromise stakeholder perceptions of impartiality.

#### **Relevant Draft Recommendations (from Section 4 of the Draft Report)**

##### **Draft Recommendation 47 — ACCC governance**

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

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

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

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

### **23.3 ACCC and the media**

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

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

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

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

123. The Dawson Inquiry recommended that the ACCC develop a media code of conduct and the Panel notes a reference in the Dawson report that '[t]he ACCC was conscious of the concerns expressed and supported the introduction of such a code in order to address them'.<sup>39</sup> The Panel understands that this recommendation has not been adopted.

124. The Panel believes that the ACCC should establish, publish and report against a Media Code of Conduct. This should counter the perception of partiality on the part of the ACCC, especially in enforcement actions.

#### **The Panel's view**

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

#### **Relevant Draft Recommendations (from Section 4 of the Draft Report)**

##### **Draft Recommendation 48 — Media Code of Conduct**

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

## **24 Access and Pricing Regulation**

125. Economic regulation of monopoly or other infrastructure where there is limited competition among providers seeks to protect, strengthen and supplement competitive market processes to improve the efficiency of the economy and increase the welfare of Australians.<sup>40</sup>

126. Economic regulatory functions are currently undertaken by the ACCC and by state and territory regulators.

127. The ACCC regulates access to and pricing of national infrastructure services such as telecommunications, energy (through the AER which is a separate but constituent part of the ACCC) and bulk water, and monitors pricing in other infrastructure markets where there is limited competition.

### **24.1 State and Territory Regulators**

128. Each State and Territory has an access and pricing regulator. These regulators perform various functions, such as determining regulated prices for retail energy, water and transport services and access to essential services or infrastructure, that are not undertaken by the ACCC or AER. Some of these regulators

<sup>39</sup> Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, Recommendations 12.1 and 12.2, page 182. [In 2002–03, the Review was undertaken by a committee chaired by Sir Daryl Dawson. The Report of the Committee (the Dawson Report) was released in April 2003 and recommended some significant changes to existing provisions of the Trade Practices Act, now the CCA.]

<sup>40</sup> See [www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure](http://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure).

also provide economic policy advice to governments. For example, the Western Australian Economic Regulation Authority recently completed its Microeconomic Reform Inquiry.<sup>41</sup>

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

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

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

- IPART regulates 3 valleys for State Water. The Murray-Darling basin is regulated by the ACCC.
- IPART regulates around 21km of the Hunter Valley Coal rail network. The ACCC regulates the remaining 650km of track. (IPART, page 30)

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

132. The Panel notes these concerns but believes that States and Territories should continue to have responsibility for those sectors with which they are, by geography and institutional arrangements, better placed to deal. For example, regulation of public transport fares is better dealt with at a State and Territory level.

133. That said, some of the gaps and overlaps arise because activities that can be regulated nationally are still undertaken at a State and Territory level. The Panel's view is that a national approach to regulation should be adopted in these cases. For example, as discussed in Section 9.1, the Panel recommends a national approach to water regulation.

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<sup>41</sup> Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final Report*.

## 24.2 A separate national access and pricing regulator

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

135. The ACCC argues that there are benefits in having access and pricing regulation undertaken by the competition and consumer regulator. The Panel's view, however, is that, while there are synergies between the competition and consumer functions, there are fewer synergies between the functions of competition enforcement and access and pricing regulation.

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

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

138. The Monash Business Policy Forum proposes the creation of an 'Australian Essential Services Commission' to bring all pricing and access regulation into one agency. The body would 'bring together the current regulatory functions of the ACCC, ACMA, the regulatory functions of the Murray-Darling Basin Authority, and groups such as the Australian Energy Regulator (AER)'. (page 36)

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

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

140. States and Territories have called for the AER to be separated out of the ACCC. The 1 May 2014 COAG Energy Council meeting communique notes that 'state and territory Ministers reiterated their support for separation of the AER from the Australian Competition and Consumer Commission. The Chair agreed to communicate these views to the Australian Government'.

141. The Energy Networks Association argues that:

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

142. The ACCC, on the other hand, advocates that the AER should be retained within the current structure of the Commission, arguing that there are efficiencies in locating the AER within the ACCC, particularly in relation to the sharing of corporate functions such as legal resources.

143. The Consumer Action Law Centre supports this view, submitting that:

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

144. Other submissions, without speaking directly to the issue of separating the AER, note the need for greater clarity in respect of the AER's role within the ACCC.

145. The Panel considers that access and pricing regulatory functions would be best performed by a single national independent agency. The benefits of a single national independent agency include:

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

146. The Panel's proposal would see regulatory functions currently undertaken by the ACCC in energy (through the AER), water and telecommunications, and functions currently undertaken by the NCC in relation to the National Access Regime and the National Gas Law, transferred to the national access and pricing regulator. Consumer protection and competition functions associated with regulatory functions would remain with the ACCC, however.

147. Including the NCC's functions under the National Access Regime and the National Gas Law within the access and pricing regulator would allow the NCC to be dissolved. This would result in the access and pricing regulator undertaking both the declaration functions under the National Access Regime and the National Gas Law and the current ACCC role in arbitrating the terms and conditions where a facility is declared, but where terms and conditions are not able to be commercially negotiated. The Panel notes concerns<sup>42</sup> expressed by the PC about a single body undertaking these functions but does not foresee any conflict in a single regulator performing both functions and anticipates there may be benefits. Under the current telecommunications access regime (in Part XIC of the CCA), the ACCC performs both the declaration and arbitration functions.

148. The national access and pricing regulator could, over time, assume responsibility for other functions if and when they were elevated into a national framework. One function that could be transferred from States and Territories is national regulation of urban and rural water should a national framework be agreed.

149. Australia's telecommunications industry is subject to specific access and pricing regulation administered by the ACCC. The Panel proposes that these functions would transfer to the new access and pricing regulator.

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<sup>42</sup> Productivity Commission 2013, *National Access Regime*, page 291

**The Panel's view**

The Panel supports a continuing role for state and territory economic regulators. However, a move to national regulation as circumstances permit should be encouraged, including, for example, in the case of water.

The Panel proposes the creation of a separate access and pricing regulator to oversee all industries currently regulated by the Commonwealth.

The following regulatory functions would be transferred from the ACCC and the NCC and be undertaken within the 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; and
- price regulation and related advisory roles under the *Water Act 2007* (Cth).

Consumer protection and competition functions would remain with the ACCC.

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

**Relevant Draft Recommendations (from Section 4 of the Draft Report)****Draft Recommendation 46 — Access and pricing regulator functions**

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

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

Consumer protection and competition functions should remain with the ACCC.

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

**25 Review of Competition and Regulatory Decisions****Federal Court of Australia**

150. Australia's competition law is enforced through proceedings in the Federal Court of Australia. Proceedings may be brought by the ACCC or by a person harmed by contraventions of the law.

151. The Federal Court has exclusive jurisdiction to determine whether a contravention of the competition law has occurred, save in respect of section 46. The Federal Circuit Court also has jurisdiction to determine matters arising under section 46. [*Section 46 of the CCA prohibits corporations that have a substantial degree of power in a market from taking advantage of that power for 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*]

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

over time, can develop expertise in the types of issues that must be resolved. This supports the conferral of exclusive jurisdiction on the Federal Court.

153. The Panel notes that in some countries, notably New Zealand, the court is able to draw on the assistance of an economist who presides over the proceeding with the trial judge. **The Panel invites submissions about that practice, and whether there are procedural practices that might be implemented in Australia that would be beneficial in resolving competition law proceedings in a just and cost-effective manner.**

### **The Australian Competition Tribunal**

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

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

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

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

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

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

158. The Tribunal currently has a role as a first-instance decision maker in authorising mergers, in addition to its review functions. The first-instance decision making requires an investigative role that the Tribunal, with its predominant review function, is not well placed to deliver. The Panel considers that the Tribunal would be more effective if it were constituted solely as a review body. This is discussed further in Chapter 15.

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

Tribunal's powers are often confined to considering the materials before the original decision-maker, and the Tribunal is unable to hear from the business people and expert economists who authored those materials. While these restrictions enable reviews to be conducted more quickly, they also reduce the depth of the review able to be undertaken by the Tribunal.

**The Panel's View**

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