OECD REVIEWS OF REGULATORY REFORM

COMPETITION POLICY IN AUSTRALIA

ORGANISATION FOR ECONOMIC CO-OPERATION

AND DEVELOPMENT

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Competition Policy in Australia* analyses the institutional set-up and use of policy instruments in Australia. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Australia* published in 2010. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 23 member countries as part of its Regulatory Reform programme. The programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses, drawing on the 2005 *Guiding Principles for Regulatory Quality and Performance,* which brings the recommendations in the 1997 *OECD Report on Regulatory Reform* up to date, and also builds on the 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation.*

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness and on specific issues, such as multi-level regulatory governance and environmental policy for Australia. These are presented in the light of the domestic macro-economic context.

This report was prepared by Michael Wise, of the OECD Directorate for Financial and Enterprise Affairs, and Caron Beaton-Wells, of the Melbourne Law School, University of Melbourne. The report was peer reviewed in the Competition Committee of the OECD, from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Australia. The report was peer reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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At the top of the institutional structure for competition regulation in Australia is the federal Minister for Competition Policy and Consumer Affairs. Principal enforcement responsibility lies with the Australian Competition and Consumer Commission (ACCC) and the courts. The Australian Competition Tribunal plays a distinctive review and adjudicatory role that complements that of the other administrative and judicial institutions. Evidence and analysis from the well-resourced, independent and respected Productivity Commission can be enlisted to illuminate policy choices.

The Trade Practices Act is Australia's competition, fair trading and consumer protection legislation, dealing not only with the usual competition enforcement topics, of restrictive agreements and practices, abuse of dominance (termed "misuse of market power" in Australia) and mergers, but also with consumer protection and sector regulation. This combination supports an integrated policy approach. The broad, complementary enforcement and regulatory powers of the ACCC ensure compliance and thus public support for pro-competitive reforms.

Recent amendments to the substantive competition law expand its prohibitions against predatory pricing and horizontal price fixing. The civil and criminal rules about cartels overlap with the prohibitions of the current law, while differing in some significant details; they may thus lead to period of uncertainty while their relationship is being worked out in practice and to greater resort to requests for authorisation. The relationship between the previous law's treatment of predatory pricing and the rule against pricing below cost that incorporates a market share test also remains to be worked out.

A principal task of reform since the 1990s has been to correct the government-business relationship. Removing "exemptions" was closely related to rationalising infrastructure regulation, because infrastructure services and regulation provided by states were not subject to Commonwealth competition law. Changing the conception of state-provided services required means to ensure competitive neutrality between the commercial operations of governments and private providers. Reform called for reviewing laws and regulations to remove impediments to competition and establishing a common, coherent scheme for assessing and regulating sectoral monopoly problems of access to essential facilities. The scope of exceptions has shrunk, as many were reformed in the course of the review. But some infrastructure reforms remain incomplete and some hardy anti-competitive perennials were not weeded out in the NCP review of legislation and regulation

1. Foundations

After an exemplary programme of pro-competitive reforms over the last three decades, market-based approaches dominate policy-making. Australia's reform programme is a model for embodying policy choices and methods in institutional structures. Co-ordinating among governments at all levels to create the National Competition Policy in the 1990s, and the National Reform Agenda since 2006, shows constitutional creativity within a federal structure and cements wide political backing for market-based approaches. Evidence and analysis from the well-resourced, independent and respected Productivity Commission can be enlisted to illuminate policy choices. The broad, complementary enforcement and regulatory powers of the ACCC ensure compliance and thus public support. Some infrastructure reforms remain incomplete and some hardy anti-competitive perennials were not weeded out in the NCP review of legislation and regulation. But Australia is well placed to take the next steps thanks to the sound competition-based institutional framework that its reform efforts have created.

1.1 Context and history

The progress of reform in Australia has tracked the evolution of the economy. Once protected, it is now comparatively liberal. Substantial productivity gains since the mid-1990s have been due to a range of pro-competitive reforms, including ones that have made infrastructure services such as telecoms, energy and transport more efficient.

The federal structure of the country complicates and enriches governance, while acknowledging geographic and economic realities. It accommodates the dispersion of people and economic activity across a continent, from the service-and-manufacturing southeast to the mining-and-agriculture west and north. The major competition reform programme was achieved by a complex re-articulation of the commonwealth-federal relationship. Another feature of Australian governing practice, which might be an inheritance from the Commonwealth traditions, is the application of policy by parsing detailed, complex statutes, through a multiplicity of institutions with complementary, clearly defined competences. This practice is particularly notable as it structures the debate about the reform and enforcement of competition law.

For most of the 20th century, competition policy in Australia was weak. It was widely held that orderly cartels and restraints would de-fuse capital-labour conflicts and maintain social peace better than cut-throat competition. Australia embraced the policy of tolerating and even supporting restrictive trade practices in the British empire's protected trading system. Protection favoured agriculture while stable domestic cartels kept inefficient firms healthy enough to support generous labour conditions. Toleration of monopoly and protection continued through the mid century (Freyer, 2006). By the 1980s, though, deteriorating economic performance showed that this policy approach would no longer support prosperity.

Reform processes since 1980s

To reverse the decline in Australia's economic standing, Australia embarked on a wide-ranging programme of fundamental reforms, beginning with financial markets and international trade and investment.

Box 2. Foundation Reforms to Reverse Poor Economic Performance

The motivation for Australia's generation-long reform project is summarised in the Productivity Commission's 2005 report on the effects of the National Competition Policy (pp. 1-3):

> Australia's economic performance during the 1970s and 1980s deteriorated markedly. Output growth slowed, inflation and unemployment rose, and living standards (in terms of per capita incomes) relative to those in many other developed countries declined. While external developments (such as the oil price shocks of the 1970s) contributed to this deterioration, recognition began to grow that domestic policy and institutional factors were constraining Australia's productivity potential and were responsible for much of its economic malaise. In particular, tariffs and quantitative import restrictions, inefficient infrastructure services, excessive regulation and inflexible labour and capital markets had collectively insulated much of the economy from competition, led to widespread and significant inefficiencies and constrained Australia's ability to adapt to changing international economic circumstances.
>
> Landmark policy decisions in the early 1980s to float the currency and remove controls on foreign capital flows signalled the first steps in reversing Australia's declining economic fortunes and establishing a more flexible and outward looking economy. Trade reforms followed – initially with the abolition of import quotas and, from the late 1980s, phased reductions in tariff assistance. In the second half of the 1980s, a number of reports highlighted the significant inefficiencies in infrastructure service provision – the overwhelming majority of which were publicly provided. Such inefficiencies not only imposed costs on domestic users, but also reduced the international competitiveness of the traded goods sector. In response, governments at all levels began to focus on improving the performance of key infrastructure sectors such as energy, transport and communications services.

Source: Productivity Commission, 2005.

In the early 1990s, a Committee chaired by Professor Fred Hilmer recommended substantial reforms to the competition policy framework. The Hilmer Committee was established to investigate the best means to provide for consistent, nationally applicable competition rules to all business activity in Australia, regardless of ownership or corporate status. The report released by the Committee in August 1993 made sweeping recommendations to implement a National Competition Policy. In February 1994 the Council of Australian Governments ("COAG") agreed to the principles of competition policy articulated in the Hilmer Report. In April 1995, all Australian governments reached agreement on a National Competition Policy. Three intergovernmental agreements underpin the National Competition Policy: the Conduct Code Agreement, the Competition Principles Agreement and the Agreement to Implement the National Competition Policy and Related Reforms. Under Australia's federal constitutional structure, the Commonwealth is limited in the extent to which it can legislate in areas reserved constitutionally for the States and Territories. Thus, the implementation of National Competition Policy rested on the political agreement of all Australian governments.

The Conduct Code Agreement obliged the signatories to apply the competition provisions of the Trade Practices Act universally, thereby creating a national Competition Code. The Competition Principles Agreement was an agreement to cooperate on the introduction of consistent competition law and policy to all businesses in Australia, including government business. The agreement set out a framework for oversight of pricing by government business enterprises, introduced a test of competitive neutrality for public sector businesses, structural reform of public monopolies, third-party access to services of essential infrastructure facilities and a wholesale review of all Commonwealth, State and Territory legislation to identify and deal appropriately with restrictions on competition. The Implementation Agreement provided for payments from the Commonwealth to the States and Territories for satisfactory progress in implementing their reform commitments. The payments were a recognition that all of the governments should share the benefits of stronger economic growth and thus higher tax revenue resulting from the reform programme to which they contributed. Total competition payments were about AUD 5.7 billion over the period 1997-98 to 2005-06. This funding level was based on the Industry Commission's estimates of the benefits of implementing the reform programme. The Implementation Agreement set specific conditions for the payments, the fulfilment of which were monitored by the newly established National Competition Council.

Box 3. Overview of the National Competition Policy Programme

General reforms

- Extension of the anti-competitive conduct provisions in the Trade Practices Act (1974) to unincorporated enterprises and government businesses.
- Reforms to public monopolies and other government businesses:
  - structural reforms — including separating regulatory from commercial functions; and reviewing the merits of separating natural monopoly from potentially contestable service elements; and/or separating contestable elements into smaller independent businesses; and
  - competitive neutrality requirements involving the adoption of corporatised governance structures for significant government enterprises; the imposition of similar commercial and regulatory obligations to those faced by competing private businesses (such as liability for taxes or tax equivalent payments, dividends and rate of return requirements); and the establishment of independent mechanisms for handling complaints that these requirements have been breached.
- The creation of independent authorities to set, administer or oversee prices for monopoly service providers.
- The introduction of a national regime to provide third-party access on reasonable terms and conditions to essential infrastructure services with natural monopoly characteristics.

- The introduction of a Legislation Review Programme to assess whether regulatory restrictions on competition are in the public interest and, if not, what changes are required. The legislation covered by the programme spanned a wide range of areas, including: the professions and occupations; statutory marketing of agricultural products; fishing and forestry; retail trading; transport; communications; insurance and superannuation; child care; gambling; and planning and development services.

Sector-specific reforms

- Electricity: Various structural, governance, regulatory and pricing reforms to introduce greater competition into electricity generation and retailing and to establish a National Electricity Market in the eastern states.
- Gas: A similar suite of reforms to facilitate more competitive supply arrangements and to promote greater competition at the retail level.
- Road transport: Implementation of heavy vehicle charges and a uniform approach to regulating heavy vehicles to improve the efficiency of the road freight sector, enhance road safety and reduce the transactions costs of regulation.
- Water: Various reforms to achieve a more efficient and sustainable water sector including institutional, pricing and investment measures, and the implementation of arrangements that allow for the permanent trading of water allocations.

Source: Productivity Commission (2005a), p. XV.

The three agreements resulted in a sustained competition reform effort by the Commonwealth and each State and Territory. Legislative reviews addressed and corrected unnecessary impediments to competition. Structural reform to government businesses made them more commercially focussed and exposed them to competitive pressure, especially in the rail, electricity and gas sectors. State-owned enterprises were subjected to a test of competitive neutrality.

Significant changes to the framework of competition legislation introduced the Competition Code, implemented a new essential facilities access regime and established the National Competition Council and the new Australian Competition and Consumer Commission and Australian Competition Tribunal exercising jurisdiction under the Code. The States and Territories introduced complementary legislation to give effect to the Competition Code under their own law.

Box 4. Institutions in the implementation of NCP

National Competition Council

The National Competition Council was established under Federal legislation, but a member of the Council cannot be appointed unless a majority of the States and Territories that are parties to the Competition Principles Agreement support the appointment. The National Competition Council's first annual report noted "Unless the National Competition Policy reforms and their benefits are understood widely in the community, there is a high risk that people will equate competition reform with job loss in particular sectors, rather than see key benefits such as increased employment opportunities overall arising from a growing economy. Accordingly, we see explaining and promoting competition reform as one of our most important tasks." (NCC 1996, p.1) The National Competition Council was a small organisation, with responsibility for both assessing compliance with the National Competition Policy agreements and issues relating to access to essential facilities.

Australian Competition and Consumer Commission and its state counterparts

The ACCC has broader responsibilities than its predecessors, as it now covers the activities of State Government businesses and the unincorporated sector, and it is involved in setting prices and access arrangements for significant monopoly activities. These new responsibilities affected the States, so the Federal legislation establishing the ACCC provided for the Federal and State Government to jointly determine the membership of the Commission. Each State established independent pricing and access regulators that dealt with natural monopoly activities within their State, such as electricity and gas distribution, intra-state rail, and ports. Some of these bodies subsequently became involved in other price setting, such as taxi and public transport fares, water prices, and premiums of government-owned workers' compensation insurers.

Productivity Commission (and its predecessors, the Industry Assistance Commission, Industry Commission, Bureau of Industry Economics, and Economic Planning Advisory Commission)

This organisation undertook several functions related to reform, including:

- public inquiries at the request of the Federal Government of areas of both State and Federal regulation which highlighted the opportunities for reform, and the size of the performance gaps;
- estimates of the economy wide benefits of individual and packages of reforms (PC, 1999a, 2005), and the associated fiscal flows to the Federal and State Governments (IC, 1995);
- reviews of some national topics under the Legislative Review programme on behalf of the States, and reviews of some areas of Federal regulation at the request of the Federal Government.

Federal and State Central agencies

Two departments played key roles in the implementation of the agreements. The first was the department that supports each Government's leader (i.e., Premier or Prime Minister). The second was the department that supports each Government's Treasurer (which combined the role of finance minister and minister for the economy in most jurisdictions). Both of these departments also worked in concert with the National Competition Council.

The NCP payments and associated assessment processes both required central coordination and provided a rationale for these central departments to take an active interest in the regulatory work of the line agencies.

The structural changes brought about by the National Competition Policy reforms have not been free from controversy. Commonwealth decisions to withhold payments have been a particular source of intergovernmental tension. There has also been public criticism of the social consequences of the reform agenda, particularly in relation to the effects on rural and regional areas. This led to Parliamentary inquiries in the late 1990s, as well as a reference to the Productivity Commission in 1998 to report on the impact of competition policy on rural and regional Australia. While each of these inquiries affirmed widespread support for the beneficial effects of National Competition Policy, they also recognised concerns about the nature and rate of change and for the need to ensure that the reform agenda was properly communicated and explained to the wider community.

The National Reform Agenda succeeded the National Competition Policy. This process, launched in 2006, is also based on agreement among governments, selecting priority areas for reform. Three streams of this programme are human capital, competition and regulatory reform. A COAG Reform Council reports to COAG annually on progress in implementing the National Reform Agenda, playing a role similar to that of the National Competition Council in the National Competition Policy reforms. The National Reform Agenda programme involves a system of payments, to recognise costs and revenue forgone by the states and to reward them for reaching reform milestones.

Table 1. Policy Reforms 1970s-2000s

	Macro-economic, monetary and taxation	Labour markets	Pro-competitive regulation	Trade and industry policy
1970s			Loosening of interest rate controls Trade Practices Act	Reductions in protection, including move from quotas to tariffs
1980s	Currency floated and capital inflow controls removed Tax reform Compulsory contributory private pensions	Government, union and business industrial relations accord	Financial market deregulation Services and product market deregulation: second phone company, lifting entry and price control in airlines, others *Corporatisation of national and state government owned utilities*	Foreign bank entry Unilateral reduction in protection Car, steel and clothing sector plans
1990s	Central bank independence *Fiscal consolidation* *Goods and services tax and removal of selected state taxes*	Dismantling of centralised wage fixing Waterfront reform Building sector specific industrial relations reforms Contracting out of labour market assistance	Foreign provision of coastal shipping *Privatisation & contracting out: banks and insurance, airlines, electricity and gas, operation of prisons, rails and trams, labour market assistance, IT and municipal services* *National Competition Policy (NCP)* *Reform of financial regulation*	On-going tariff reductions
2000s	Sovereign wealth fund	Federal takeover and deregulation of industrial relations	*Implementation of NCP* *Water trading*? Wheat export monopoly removed	On-going tariff reductions Free trade agreements (US, Thailand, others)

Items in italics were implemented by States or by both State and Commonwealth governments.

Development of competition law

Modernising competition law and enforcement to create an integrated, national system was a key element of the 1990s National Competition Policy. Australia has a common law doctrine of restraint of trade that dates back to the 1890s. However, the doctrine is limited in its application, concerned largely with preserving the freedom of individuals to work and trade. The first national legislation that sought to regulate anti-competitive conduct in the wider public interest was the Australian Industries Preservation Act 1906 (Cth). Modelled on the US Sherman Act 1890, the Australian statute made it an offence to enter into a contract or combine 'with intent to restrain trade or commerce to the detriment of the public.' It was likewise an offence to enter into a contract or combine 'with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth.' Monopolisation was prohibited in similar terms. The Act specified penalties of up to 500 pounds and, for a

second offence, imprisonment for up to one year. As the name and some of the provisions suggested, the real concern was with protecting Australian markets from the incursions of foreign business interests. Its effectiveness was undermined in any event by challenges to its constitutionality.

The 1906 Act was repealed by the Trade Practices Act 1965 (Cth), legislation sponsored by the Liberal Attorney-General, Garfield Barwick, who regarded the level of restrictive trade practices in the Australian economy as antithetical to his vision of a free enterprise society. The business sector was opposed to the legislation, the only outright prohibition in which was on collusive tendering. Sustained skilled lobbying by national business groups was successful in watering down Barwick's initial proposals for a law with outright bans on a range of practices, backed by criminal sanctions. Business found many in the Liberal government sympathetic to the view that it was not appropriate or desirable to treat restrictive trade practices as criminal behaviour (Hopkins, 1978). Thus, modelled on the United Kingdom legislation, the 1965 Act established a system for the examination of certain restrictive agreements and practices, first by a Commissioner of Trade Practices and then potentially by the Trade Practices Tribunal based on a broad test of public interest. Business was successful in arguing that the public interest should be specified to include benefits not just to consumers but also to producers, employees, distributors, importers, exporters, proprietors, investors and small businessmen. No direction was given on how to weigh these various interests, rather that unenviable task was left to the Tribunal. The remedy was a cease and desist order that could include the acceptance of undertakings, enforceable by contempt proceedings in the Commonwealth Industrial Court. Like its predecessor, the Act faced constitutional difficulties, having to be repealed and replaced by the *Restrictive Trade Practices Act 1971* (Cth). Despite their limitations, both the 1965 and 1971 Acts raised awareness about the extent of anti-competitive practices in Australian industry and their effects, thereby laying the foundations for the 1974 Act.

The current Trade Practices Act came into force on 1 October 1974. This legislation was passed at the instigation of another Attorney-General, Lionel Murphy, this time from the Labour side of politics, who like Barwick, saw a tougher approach to anti-competitive conduct as essential to reviving Australia's lagging economic performance. Acceleration in the inflation rate, in particular, was instrumental in the legislative change, as was increasing consciousness of consumer welfare and the growing recognition that competition, rather than protectionism, was the means most likely to promote economic growth and efficiency. In addition, unlike in the 1960s, there was a new lobbyist in the form of the regulator. The Commissioner for Trade Practices was pressing for stronger legislation that removed the need to examine every agreement (an inordinately slow and resource-intensive task and one that invariably found the agreement to be against the public interest). What was sought instead was a presumption that all agreements were contrary to the public interest unless proved otherwise. The Murphy proposals endorsed this approach. In preference to the British model, Murphy adopted the American system of general prohibitions supported by penalties enforceable by courts of law. Additionally, reflecting the size of the Australian economy and also the value placed on a vigorous small business sector, the 1974 Act introduced a system under which businesses could have their arrangements authorised (and thereby immunised or exempted from proceedings for breach of the prohibition) on the grounds that the public benefits flowing from the arrangements outweigh any detriment (particularly anti-competitive effects).

Since its enactment the 1974 Act has been regularly the subject of review or inquiry leading to various amendments to the definitions and prohibitions in the Act. As a result of the review carried out by the Swanson Committee in 1976, for example, a definition of 'market' was included in an attempt to guide courts towards the adoption of a more economic approach to interpretation of the statutory provisions. The definition, with its restriction to a 'market in Australia', has played a significant role in restricting the extraterritorial reach of the Act. The Committee also recommended that the prohibition on price discrimination be removed from the Act. This recommendation was repeated by the Blunt Committee in 1979, and the prohibition was removed finally in 1995. Up until the 1990s, a major preoccupation of these inquiries was with the test for the prohibition on anti-competitive mergers and acquisitions. The test vacillated between one of "dominance" and one of "substantial lessening of competition", until the latter was finally settled upon as a result of the recommendation of the Cooney Committee in 1991.

In terms of policy outcomes and implications for broader micro-economic reforms, undoubtedly the most significant review of the Act to date has been the review undertaken by the Hilmer Committee. Its report in August 1993 recommended several amendments to the conduct prohibitions of the Act, but more importantly, it also recommended the creation of the ACCC to enforce the law and proposed recommendations to widen its scope of application beyond corporations, to reach persons and unincorporated enterprises.

In October 2001 the Prime Minister announced that there would be an independent review of the competition provisions of the *Trade Practices Act,* 'in view of the significant structural and regulatory changes that are occurring in Australia that impact on the competitiveness of Australian businesses, economic development and affect consumer interests.' Reporting in January 2003, the Independent Committee of Review, chaired by former High Court Judge Sir Daryl Dawson endorsed the structural changes and increasing competitiveness of Australian markets brought about the Hilmer reforms as being responsible for the increased rate of productivity and strong growth in the economy since the late 1990s. The Dawson Committee recommended that Australian governments continue to ensure that the competition provisions of the Act are applied as broadly as possible across all sectors of the economy, including to the commercial activities of governments themselves. The Committee further recommended that the provisions be applied uniformly and that pressures to adopt special measures for particular industries be withstood. Other recommendations related to improvements in merger review processes, the refinement of the prohibitions on horizontal arrangements (including introduction of a notification procedure for collective bargaining by small business), strengthening of penalties (including introduction of criminal sanctions for serious forms of cartel conduct) and measures to make the ACCC more accountable.

Most of the specific recommendations of the Dawson Committee were accepted by government and amendments to the Act since 2007 have given effect to most of them. Key changes include the introduction of a formal merger clearance procedure and provision for merger parties to apply directly to the Australian Competition Tribunal for authorisation and amendments to the abuse of dominance prohibition in Section 46. The Dawson Committee also recommended "the introduction of criminal sanctions for serious, or hard-core, cartel behaviour", and legislation establishing cartel offences commenced on 24 July 2009. Overall, the legislative amendments to the competition provisions are regarded as significant by the government and the ACCC, signalling a further strengthening of Australian competition regulation in what is referred to as the 'third wave' of reform, after the enactment of the *Trade Practices Act* in the mid-1970s and the liberalisation of the 1980s, followed then by the introduction of the National Competition Policy in the mid-1990s.

1.2 Policy goals

The *Trade Practices Act* is Australia's competition, fair trading and consumer protection legislation. Section 2 of the Act states that "the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". The terms that appear in Section 2 are not defined further in the Act and their scope and the interaction between them could be subject to various interpretations.

On the meaning of 'welfare', there has been divergence as to whether it means 'consumer welfare' or whether a 'total welfare' standard that has regard both to producer and consumer welfare is appropriate. A recent statement on this question by the Australian Competition Tribunal favours the latter but with the caveat that benefits to producers should weigh less than benefits to end-consumers.[1] The total welfare approach would recognise the term as encompassing market actors other than those who consume goods or services in the Australian economy. That said, it is frequently emphasised that the Trade Practices Act is concerned with protection of the process of competition rather than the protection of individual

competitors. The distinction between promoting competition and protecting competitors – small business competitors particularly – has been an ongoing and divisive theme in debates about the proper role and effective functioning of Australia's prohibition on abuse of dominance (see 2.5 below). Australia takes an integrated approach to the relationship between competition and consumer policies, recognising their mutually reinforcing roles.

On the meaning of 'competition', the text of Section 2 makes clear that, rather than being seen as the ultimate goal, competition is recognised in Australia as a means to an end, namely the enhancement of welfare. Decisions applying the law have treated 'welfare' in this context principally in terms of economic efficiency. Competition and economic efficiency are treated as two separate concepts in Australian competition law. Their separation is a function of the structure of the Trade Practices Act and the dichotomy of the roles assigned to the courts in assessing contraventions of the core prohibitions on anti-competitive conduct, and to the administrative agencies in assessing applications for authorisation. Under this framework, the courts are charged with determining the competitive effects of conduct and, by and large, it is thought that efficiencies are excluded from this exercise. The ACCC and Australian Competition Tribunal, on the other hand, are entrusted with what is regarded as the economically more complex as well as more resource-intensive task of evaluating all of the effects of a transaction and weighing claimed efficiencies against competition effects. While there have been some commentators who have argued against retention of this separation and for explicit incorporation of efficiencies into judicial analysis (Williams & Woodbridge, 2002), the argument appears to have little traction in wider circles.

2. Substantive issues: content of the competition law

The prohibitions on anti-competitive conduct in Australia's *Trade Practices Act* cover each of the familiar areas: restrictive agreements (horizontal and vertical), abuse of dominance and mergers. The prohibitions employ a combination of a substantial lessening of competition (rule of reason) and strict liability or *per se* tests, with exemptions and defences in order to balance policy interests. There is a considerable body of case law in which the provisions have been interpreted and applied. However, with recent amendments to several of the prohibitions there may be some uncertainty in the future about certain areas of application.

2.1 Foundation and framework

The *Trade Practices Act* is a federal Act, which means it must be linked to heads of power in the Commonwealth Constitution. The principal head of power for this purpose is the corporations power. Hence, the Act applies to corporations (defined as financial and trading corporations). The prohibitions on anti-competitive conduct by corporations are in Part IV of the Act. Extending the law to entities other than corporations was a principal objective and accomplishment of the Hilmer reforms. Each State and Territory government enacted a schedule version of Part IV in a *Competition Policy Reform Act.* These enactments, together with the schedule version of Part IV of the *Trade Practices Act*, are generally referred to as the *Competition Code*. The schedule version is identical to Part IV except that it applies to persons rather than corporations. Persons include natural persons as well as unincorporated entities, such as partnerships and business associations, and government enterprises. As a result, the same law applies throughout Australia in each of its jurisdictions: federal, State and Territory. Also in implementation of the Hilmer reforms, the States and Territories agreed that the ACCC, the Australian Competition Tribunal and the Federal Court would be given powers to enforce the *Competition Code* (see Part XIA of the *Trade Practices Act*).

Application of competition provisions of the *Trade Practices Act* follows a two-tier framework: (1) court-enforced prohibitions on anti-competitive conduct in Part IV with significant penalties and remedies for breach in Part VI; and (2) administratively-adjudicated procedures of authorisation and notification that enable firms to obtain exemption or immunity from the prohibitions on public benefit grounds under Part VII. The concept of 'public benefit' is construed broadly for this purpose as 'anything of value to the community generally'. There is no exhaustive list of factors, although primacy is given to 'the achievement of economic goals of efficiency and progress.'[2] Other public benefits that have been recognised include environmental benefits, improved public safety, promotion of industrial harmony, and expansion of employment opportunities. Authorisation is granted by the ACCC, with provision for review on the merits by the Australian Competition Tribunal (except in the case of mergers, for which applications are made directly to the Tribunal). It is available for all anti-competitive conduct prohibited under the Act except misuse of market power under Section 46. Notification differs from the authorisation process in that parties do not have to await a decision of the Commission. Rather, the immunity operates from the date of lodgement and remains unless revoked by the Commission. Notification is available for all exclusive dealing (the term used in Australia for non-price vertical restraints) and was recently made available also for collective bargaining by small business. In the case of third line forcing and collective bargaining, the immunity takes effect after a 14-day period, which gives the Commission an opportunity to review the conduct to determine whether or not it has concerns sufficient to refuse the benefit of the exemption.

Separate Parts of the Act deal with regulation of access to declared essential facilities (Part IIIA) and with regulation of telecommunications (Parts XIB-XIC), among other things. There are also separate Parts that deal with unfair trading and consumer protection. Notwithstanding the fact that the statutory provisions relating to competition and consumer protection are contained in separate Parts of the Act, the government and the ACCC repeatedly emphasise the integrated and mutually reinforcing nature of competition and consumer policy in Australia. To some extent this may be seen as reflected in the approach taken to enforcement. Functions involving access regulation are separated, but otherwise the Commission does not separate the staff working on enforcement in competition and consumer matters and does not distinguish between the two areas in statements on enforcement policy. On the other hand, there has been debate about whether the Commission gives greater emphasis, in terms of resource allocation and prioritisation, to competition at the expense of its consumer protection mandate. The ACCC submission about consumer policy to the Productivity Commission has acknowledged that there may be a perception that the broad scope of its functions has led to an "imbalance" in focus, with anti-competitive conduct matters thought to be getting more attention than fair trading and consumer protection issues. However, the ACCC's submission also indicated that such a perception was inaccurate and did not reflect statistics on enforcement outcomes relating to consumer protection. Combining the competition, access regime, fair trading and consumer functions at the ACCC enables enforcement to be flexible, varying according to the economic, social and market situations.

2.2 General rules about restrictive agreements

The prohibitions on restrictive agreements under Part IV of the *Trade Practices Act* employ both *per se* (strict liability) and competition tests. There are provisions that attempt to deal with the overlap between the various prohibitions, aiming in particular to ensure that conduct that falls potentially within both the *per se* and substantial lessening of competition tests is dealt with under the latter. These 'anti-overlap' exemptions are seen as critical in giving business the assurance that vertical arrangements will not fall foul of the broad-ranging *per se* prohibitions intended primarily to catch horizontal restraints. There are also specific exceptions, exemptions and defences, including for arrangements between related bodies corporate, agreements for the purposes of collective acquisition or marketing and joint ventures. The general authorisation and notification processes are available to protect agreements considered to have public benefits that outweigh any anti-competitive or other detrimental effects.

2.3 Horizontal agreements

Section 45 is the *Trade Practices Act's* general prohibition on restrictive agreements. Its coverage is determined by several technical terms and definitions. It applies only to corporations; however, other entities such as persons and unincorporated bodies are subject to its prohibitions by virtue of the Competition Code. It covers not only "contracts" but also "arrangements" and "understandings". At least two of the parties must be competitors (or potential competitors). These contracts, arrangements or understandings are prohibited if they contain a price fixing provision or an "exclusionary provision", or if they have the purpose, effect or likely effect of substantially lessening competition in a market within Australia.

The prohibition on exclusionary provisions was intended to catch primary boycott behaviour in which two or more competitors conspire to exclude another competitor from a market. However, the definition of "exclusionary provision" is sufficiently broad to catch also agreements that have the purpose of restricting output or dividing markets without necessarily having the purpose or effect of being anti-competitive. In response, the Dawson Committee recommended that the scope of prohibition be narrowed, by the introduction of a defence that the provision does not substantially lessen competition. However, that recommendation has not been acted on.

Section 45DA of the Act prohibits secondary boycotts where the purpose, effect or likely effect is to cause substantial lessening of competition in a market. This prohibition is directed at the conduct of trade unions and the effect that their conduct might have on third parties, but that is not its only possible application.

The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act* was passed in June 2009. This Act made extensive amendments to the provisions governing restrictive agreements under the *Trade Practices Act*. The amendments implement reforms announced by the former government as giving effect to the recommendation of the Dawson Committee that 'serious' cartel conduct be criminalised. The amendments establish a new Division in the Act dedicated to cartels. It contains both cartel offences and a new set of parallel civil per se prohibitions. The general provisions of Section 45 about restrictive agreements will remain, although the *per se* prohibition on price fixing will be removed.

The new offences and civil per se prohibitions reflect the 1998 OECD *Recommendation of the Council concerning Effective Action against Hard-Core Cartels* [C(98) FINAL] in that they are addressed to four types of conduct or provision, broadly categorised as price fixing, output restriction, market allocation and bid rigging. These types of provisions are classified as "cartel provisions." The new cartel provisions make it an offence (subject to proof of fault elements referred to below) or a civil violation to make a contract, arrangement or understanding that contains a cartel provision or to give effect to a cartel provision. Despite the fact that the provisions will not be retrospective, there is no temporal limitation on the idea of giving effect in this context. Conceivably therefore it could catch conduct that gives effect to an agreement reached in the past, if the conduct put into effect by the agreement occurred after the provisions became effective (that is, after 24 July 2009).

A difference in the elements of the offences and the civil prohibitions (in addition to proof beyond reasonable doubt) is that the former require the proof of certain mental (fault) elements generally associated with criminal provisions, namely the intention to make a contract or arrangement or arrive at an understanding and the knowledge or belief that it contains a cartel provision. An earlier proposal would have distinguished an offence from a civil contravention by the element of an 'intention to dishonestly obtain a benefit' (similar to the element of dishonesty in the cartel offence under the UK *Enterprise Act 2002*). This element is not a part of the new criminal cartel provisions. It was subject to criticism on the grounds that dishonesty was not an appropriate touchstone of seriousness and was likely to confuse juries.

The scheme of prohibitions in relation to cartel conduct appears complex and duplicative. The existing prohibition on "exclusionary provisions" overlaps substantially with the new output restriction and market allocation prohibitions. The new prohibitions are wide ranging in scope and so may catch legitimate or pro-competitive or efficiency-enhancing activity. To some extent this risk is offset by provision for exceptions and defences, referred to below. Nevertheless, as a result of the breadth of the new prohibitions, the *ex ante* protection of the authorisation procedure may be sought to a greater extent than has previously been the case.

Having a dual criminal-civil regime with wide ranging offences and prohibitions and substantial overlap between them means that policy and enforcement outcomes will depend on the exercise of prosecutorial discretion by enforcement agencies. Those agencies are the ACCC and the general centralised prosecutions agency, the Commonwealth Director of Public Prosecutions (DPP) that has responsibility for prosecutions of all indictable federal offences in Australia. The roles and relationship between these agencies in the context of the new cartel regime have been outlined in a Memorandum of Understanding (ACCC/DPP MOU). As set out in the ACCC/DPP MOU, the Commission is responsible for investigating cartel conduct and gathering evidence, managing the immunity process in consultation with the DPP, and referral of serious cartel conduct to the DPP for consideration for prosecution, while the DPP is responsible for prosecuting the cartel offences in accordance with the DPP's *Prosecution Policy of the Commonwealth*, and seeking associated remedies, including under "proceeds of crime" legislation.

The general Commonwealth Government policy of bifurcated enforcement reflects the value attributed to independence of the prosecution from the investigative process and from the political process as well as consistency in prosecutorial decision-making across the full spectrum of federal offences. In the regulatory context, separation of the investigatory and prosecutorial functions has the benefit of utilising the domain-specific expertise and experience of a regulator in investigating potential offences, while retaining independence and consistency in the ultimate decision to prosecute by assigning this responsibility to the independent prosecutions agency. There is a potential for inefficiency and conflict when agencies with traditionally different cultures, priorities and perspectives are involved in enforcement. There have been disagreements about enforcement for corporate offences between the Australian Securities and Investment Commission and the DPP. Thus the effectiveness of the bifurcated system will depend in large part on the extent to which there is "shared philosophy about the seriousness of cartel conduct, shared priorities in prosecuting cartel activity and open and constant communication between the two agencies."[3]

Under the ACCC/DPP MOU factors guiding the choice between civil and criminal enforcement include the duration and effect of the conduct, the extent of its harm to the public or to particular parties, the magnitude of the market affected and recidivism. For criminal enforcement a harm threshold of more than AUD 1 million of the value of commerce affected by the cartel has been set. The criteria in the ACCC/DPP MOU for distinguishing between criminal and civil treatment leave much to the discretion of the agencies. Concern about the lack of clarity of these criteria would be ameliorated if the conduct subject to the cartel offences was only a narrow sub-set of the conduct that is the subject of the civil prohibitions. Concerns about how concurrent criminal and civil proceedings will be handled may be addressed by guidelines that the ACCC has undertaken to issue. Ultimately, however, it will be the experience with enforcement that will determine whether these concerns are allayed.

There is a range of exceptions, exemptions and defences that apply to horizontal agreements that otherwise would be subject to the offences and prohibitions contained in the *Trade Practices Act.* These include exemptions regarding authorisation and notification, exemptions to prevent overlaps, exemptions for joint ventures and exemptions from the *per se* prohibition on price fixing for collective bargaining and acquisitions. Each of these is described further in detail below. Exemption or immunity may be obtained on a case-by-case basis for provisions in contracts, arrangements or understandings through the authorisation or notification processes in Part VII of the Act. Notification in this context is available only

for collective bargaining and then only for contracts where it is expected that the total value of the transactions under the contract over a 12-month period will not exceed AUD 3 million (or higher amounts as set by regulations). For contracts that are expected to exceed the threshold, authorisation is available.

Exemptions also aim to prevent overlap between the various prohibitions under Part IV of the *Trade Practices Act.* For example, if there is an agreement that involves an exclusive dealing or resale price maintenance provision, then there are exemptions that remove it from the general compass of Section 45 and allow it to be dealt with under the prohibitions specific to such restraints. The same applies to provisions for the purchase of shares or assets. These are exempted from Section 45, so as to be dealt with under the general merger and acquisition prohibition under Section 50. These anti-overlap exemptions do not make perfect distinctions. For example, supply agreements between competitors that may be pro-competitive might nonetheless be caught by Section 45, and a vertical restraint is exempted from Section 45 only if it fits one of the prescribed practices of exclusive dealing in Section 47.

Exceptions and defences to the cartel offences and civil prohibitions deal with acquisition of shares and assets, collective acquisition of goods or services and joint ventures. The joint venture exception covers a contract containing a cartel provision if the cartel provision is for the purposes of a joint venture and the joint venture is for the production or supply of goods or services (among other criteria). The restriction of this exception to joint production and supply arguably would expose joint buying, marketing and research and development collaborations to criminal liability (where those collaborations do not have an element of joint production or supply). The exception is also limited to provisions in contracts, and does not capture arrangements or understandings (except where the parties intended that they have contractual effect); by contrast, the existing civil defence captures arrangements and understandings without any such proviso. The government considers that this limitation is necessary to prevent sham joint ventures from escaping liability. Some concern had been expressed that prospective joint venture parties would need to put their preliminary negotiations into contractual form or even seek prior authorisation simply to negotiate. These concerns were substantially addressed by amendments and explanations during the final Parliamentary consideration of the legislation. Joint venture parties may be able to rely on other exceptions, notwithstanding that they are not expressed to apply to joint ventures.

In terms of the broader experience, consistent with the history in Europe, Australian attitudes about cooperation between competitors have undergone a dramatic shift, from an approach that was tolerant in the 1950s to one today that is suspicious and, in the case of so-called 'hard core' cartels, condemnatory and punitive. Despite per se prohibitions having existed in the Act since its enactment, the start of the shift is probably best traced to the mid to late 1990s when the ACCC secured victories with sizeable (by Australian standards) penalties against cartels in the express freight, fire protection, concrete, and electrical transformer industries. Some of these related to the Australian operations of international cartels, as for example, in the animal vitamins cartel case. As early as 1994, the Trade Practices Commission, the predecessor of the ACCC, called for criminal sanctions for cartels. Conscious of international developments, he raised the issue again publicly in 2001 and a formal proposal for criminalisation of all 'hard-core' cartel conduct in line with the OECD Recommendation was made by the Commission in its submission to the Dawson Committee in 2002.

At least since the mid-1990s, cartels have been a high priority in the agency's enforcement agenda. In 2005 the ACCC substantially amended its Immunity Policy for Cartel Conduct to align it with international best practice (based predominantly on the United States' model). Since then, the Immunity Policy has been credited with a substantial increase in cartel detection rates. The most significant case to date involved a price fixing and market sharing cartel between Australia's two largest cardboard manufacturing companies, Visy Ltd and Amcor Ltd. Amcor secured immunity, while Visy settled the case based on admissions of liability and agreement to submit to record-level penalties. The corporate penalty of AUD 36 million was more than double the previous penalty levied for anti-competitive conduct in Australia, and the individual penalties were equally unprecedented.

The ACCC has sought changes to the law to facilitate its anti-cartel enforcement, specifically, against collusive practices where the communication between competitors is tacit and it is difficult to prove that the parties have committed to parallel action. The call for amendment was made in a general inquiry that the ACCC held in relation to petrol pricing in Australia in 2007, following a narrow judicial interpretation of "understanding" that resulted in findings of no liability. The ACCC's proposal is to remove the requirement to find commitment on the part of parties to an 'understanding' for the purposes of the prohibition of Section 45. The ACCC further recommended that the statute provide courts with a list of factual matters from which an 'understanding' may be inferred. On 8 January 2009, the government released a discussion paper calling for submissions on the issue by 31 March 2009. The government is currently reviewing these submissions in detail.

2.4 Vertical agreements

The *Trade Practices Act* also contains prohibitions relating to vertical restraints. Except in the case of arrangements between related bodies corporate, Section 47 prohibits vertical practices that impose non-price related restraints (referred to generally in Australian practice as "exclusive dealing"). Such practices include the supply of goods or services on various conditions that include that the purchaser not acquire goods or services from a competitor or only re-supply to particular customers or in particular areas. Similarly, the prohibition catches refusals to supply for the reason that the purchaser/re-supplier has not agreed to or complied with the relevant condition. With the exception of third line forcing referred to below, exclusive dealing practices only breach Section 47 if they have the purpose or effect or likely effect of substantially lessening competition. This is most likely to be the case if there is insufficient interbrand competition, that is, there is some degree of market power at the level of the supplier or buyer or at both levels. In addition, where a corporation with substantial market power enters into exclusive or selective distribution arrangements its conduct may also contravene the prohibition on misuse of market power (which is the term used in Australian law for abuse of dominance).

Practices involving third line forcing, that is where supply is on the condition that the purchaser acquire goods or services from a third party, are illegal per se. There is no competition test involved. Third line forcing was made per se illegal in 1976 following concerns about lending institutions insisting on borrowers using a nominated insurer which tended to charge high premiums. However, competitive pressures in financial markets have increased significantly since then and, as a consequence, in 1995, it was recommended by the Hilmer Committee that a competition test be adopted for third line forcing. This recommendation was reiterated by the Dawson Committee in 2003, pointing out that there are instances in which third line forcing may be beneficial and pro-competitive where efficiencies in production make it cheaper to produce and sell two or more products in combination. The then Liberal government accepted the recommendation in principle, but the Act has not been amended.

Section 48 of the *Trade Practices Act* prohibits resale price maintenance per se, that is regardless of its effect on competition. The ban relates only to the sale or advertising of goods or services *below* a specified price. In other words, it does not relate to the specification or enforcement of maximum prices. This prohibition was inserted in 1971 in response to concerns about rising inflation and has had bipartisan political support since then. The object of the prohibition is to ensure that competition is unfettered by price restraints imposed by suppliers on re-suppliers of goods or services. The conduct that is subject to the prohibition in Section 48 is set out in detail in Part VIII of the Act (sections 96-100). In essence Part VIII provides that it is illegal to supply goods or services on the condition that the supplied party will not resupply those goods or services at a price below that specified by the supplier. The condition may arise or be manifested in various ways. Refusals to supply are also caught. A price may be 'recommended'. However, only genuine non-obligatory recommendations will escape Section 48. There is also a loss-leader defence, which has been little used.

Whether resale price maintenance should be subject to a competition test has not been the subject of much debate in Australia. It was not considered by the Dawson Committee in its 2002 review of the competition provisions. There is no indication that consumer groups support a liberalisation of the resale price maintenance laws. The economic case for relaxing the prohibition is not strong, given the concentrated structure of Australian industry, in which resale price maintenance could more easily be used to support horizontal co-ordination.

All forms of exclusive dealing may be authorised by the ACCC if they confer sufficient public benefits to outweigh the anti-competitive effects. The streamlined 'notification' procedure for obtaining exemption is available for all forms of exclusive dealing. For third line forcing, parties must wait 14 days after notification. The notification (and exemption) may be revoked if the ACCC finds that the conduct would substantially lessen competition and the harm is not outweighed by public benefits. (For third-line forcing, which is a per se issue, only the public benefit element is relevant). Very few notifications involving exclusive dealing conduct other than third line forcing are received by the Commission each year. It receives hundreds of third line forcing notifications, of which it opposes only a very small proportion. Although resale price maintenance is prohibited per se, the conduct also may be authorised by the ACCC if there is a sufficient public benefit associated with it. However, there is yet to be an application for authorisation for resale price maintenance.

The prohibition on exclusive dealing under the Act has not been the subject of much public enforcement activity, perhaps because of the provision for notification. However, there have been several major cases brought by private litigants, some of which were important in establishing foundational principles for the application of the 'substantial lessening of competition' test in the late 1970s. One such principle is that the test should be forward-looking and involve an assessment of competition in the relevant market(s) with the conduct in the future as compared with competition in the relevant market(s) without the conduct in the future. In recent years, there has been a series of cases brought under Section 47 (on occasion in combination with the abuse of dominance prohibition in Section 46) in which the competition test has been applied to the sale of exclusive rights to a scarce resource. One such case, involving the acquisition of exclusive rights to broadcast on free-to-air and subscription television games of the Australian Football League and National Rugby League, has been the most expensive and longest running case in Australian trade practices history and has led to calls for re-appraisal of the approach taken to the conduct of such litigation in Australia (see 3.2 below).

The third line forcing prohibition has also been the subject of considerable private litigation in which competitors have challenged bundling practices or arrangements. Generally speaking, the position taken by the courts in these cases has been that, provided a supplier structures the transaction to provide a single package of goods or services, it will not constitute third line forcing even if different unrelated corporations produce or supply components of the package. Other issues with which courts have grappled have included the degree of compulsion required in the 'forced' purchase and the degree of specificity required in identification of the third party supplier. The law on these issues is yet to be finally settled. These issues would become less important if the prohibition was made subject to a competition test.

2.5 Abuse of dominance (misuse of market power)

In Australian terms, abuse of dominance is described as "misuse of market power". The prohibition is found in Section 46 of the *Trade Practices Act*. The section prohibits a corporation with a substantial degree of market power from taking advantage of that power for various specified purposes (namely, substantially damaging or eliminating a competitor; substantially damaging or eliminating competitors generally, a class of competitors or any particular competitor; or preventing or deterring anyone from engaging in competitive conduct in any market). Authorisation and notification are not available for conduct that may constitute a misuse of substantial market power (and is not conduct that falls within another prohibition and is authorised or notified on that basis).

The scope and application of Section 46 has been the subject of significant controversy over many years in Australia. In its original form, the prohibition, headed 'Monopolisation', reflected corresponding provisions in the United States' *Sherman Act* and the European Community Treaty. The conduct proscribed by the section was that of a corporation in a position substantially to control a market (a reference to monopoly power in a broad sense). However, in 1986, based on a concern that the section would apply only to a very small proportion of corporations, the prohibition was amended to lower the threshold, requiring a corporation to have only a 'substantial degree' of power in a market. The heading was also changed to 'Misuse of market power.' At the same time, provisions were added to indicate that, in determining whether or not a corporation has the requisite degree of power, a court may have regard to the power of related corporations and the extent to which the corporation's conduct is constrained by competitors, potential competitors, customers and suppliers.

However, the 1986 amendments did little to quell the controversy, a substantial proportion of which involved debate as to whether Section 46 should incorporate an 'effects' test that would replace the purpose element of the prohibition. Proposals for such a test, led largely by the ACCC and its predecessor, were considered on at least 10 occasions between 1976 and 2003. On all except one occasion (in 1984), the proposal was rejected on account of concern that it would unduly broaden the scope of the prohibition and would not distinguish adequately between pro-competitive and anti-competitive behaviour. Moreover, as was observed by the Dawson Committee in 2003, the cases to that point in the history of Section 46 did not substantiate the view that the purpose element was an unnecessarily onerous hurdle to overcome. Nor was the introduction of an effects test supported by overseas experience.

High Court decisions have shown that the real challenges associated with proving a breach lie in establishing the requisite degree of power and that the respondent had taken advantage of that power. These (and other) issues were examined by a Parliamentary inquiry, which reported in 2004 on the extent to which the *Trade Practices Act* offered sufficient protection for small business. The report made several recommendations aimed at clarifying aspects of the prohibition, most of which have now been implemented.

With respect to the power element, amendments were made in 2007 in an attempt to ameliorate concerns that the standard being applied by the courts may be reverting to one of substantial control. For example, the amendments direct the courts that more than one corporation may have substantial power in a market and that freedom from constraint does not have to be absolute in order for substantial power to be established. The section was amended further to ensure that it extends to situations in which a corporation with substantial power in one market engages in conduct in another market for a proscribed purpose (which itself may relate to a competitor or competitive conduct in any other market). This followed an ACCC case involving a large regional newspaper publisher in which the allegation had been that the publisher, having power in one territorial market, had used it to threaten a smaller competitor in another territorial market. The amendments also recognised that power may arise not just from the relatedness of corporations but also as a result of contracts or arrangements between them.

Because the concern of Section 46 is with market behaviour, rather than structure, the critical element of the prohibition is that of 'taking advantage' of power. Thus, as is evident on the face of the statutory provisions and has been emphasised by the courts, there is nothing unlawful in the possession of substantial power per se. Instead, it is with the use of that power for an illegitimate purpose that the prohibition is concerned. This test of 'use' does not involve a moral judgment. Rather, as has been emphasised by the Australian High Court, it requires a causal connection between the power and the conduct. An amendment in 2008 codified the various ways in which this nexus may be established, including having regard to whether the firm would have acted in the same way in a competitive market or whether its conduct was materially facilitated by the firm's power.

Few Section 46 cases are brought to court. Whether the recent amendments to the 'power' and 'taking advantage' elements of the prohibition will generate a greater degree of enforcement activity remains to be seen. Particular uncertainty surrounds the effect of an additional amendment in 2007 which introduced a new prohibition that is intended to be specific to predatory pricing. This amendment can be traced to debate that followed an unsuccessful case brought by the ACCC against the concrete masonry manufacturer, Boral, in the late 1990s. The case failed ultimately because the Commission was unable to establish that Boral had substantial power in what was found to be a highly competitive market, characterised by vigorous price cutting by Boral and its large competitors in tendering for major construction projects. The Court regarded Boral's pricing strategy as synonymous with competition rather than power and, based on United States antitrust jurisprudence, was particularly influenced by the evidence that Boral had little prospect of recoupment (recovery of its losses through supra-competitive pricing).

Following this case, at the behest of Parliamentary advocates for the small business sector, the former government introduced a new provision that prohibits a corporation that has a substantial share of a market supplying goods or services for a sustained period for less than the relevant cost to the corporation of supplying such goods or services for an impugned purpose. This 'Birdsville amendment' (named after the remote pub in which it was supposedly penned) deviates from orthodox economic theory by adopting a threshold based on market share rather than market power, and removing the element of taking advantage (and thereby the requirement of showing a connection between the market share/power and the offending conduct). There is also uncertainty associated with the new elements of 'relevant cost' and 'sustained period', although courts have to grapple with such concepts in the context of a predatory pricing claim regardless of whether or not they appear in the statute. The intended relationship between the new predatory pricing prohibition and the general misuse of market power prohibition is also not clear. Aggravating the uncertainty is a further recent amendment which provides that a corporation may contravene the general prohibition 'even if the corporation cannot and might not ever be able to recoup losses incurred by supplying the goods or services.' It will still be open to courts to have regard to recoupment as an evidentiary consideration in weighing whether or not a firm has substantial power and whether it has used that power in the relevant sense.

The current government sought to add to the Birdsville amendment a reference to a substantial degree of power but lost on the numbers in the Parliamentary upper house. It since has been suggested that the amendment will now remain on the statute books until a firm is found liable for below cost pricing in circumstances where it is unlikely that the firm would be found to have substantial market power and there is no or minimal prospect of recoupment. The ACCC is ready to take action if an appropriate case arises, and private litigation is also possible which will test the extent of the provision. Making such an action (in which the Commission would have the opportunity to intervene) more likely, the government has conferred jurisdiction on the Federal Magistrates Court to hear such cases. In March 2009, the Attorney General announced a proposal to merge the Federal Magistrates Court into a lower division of the Federal Court. This lower division is expected to retain the existing jurisdiction, rules, procedures and fees of the Federal Magistrates Court.

In the handful of cases in which a breach of Section 46 has been established, declaratory and injunctive orders have been made and penalties imposed, albeit the latter generally have been of a low order. The ACCC has campaigned previously for power to make cease and desist orders in relation to Section 46 conduct. However, since the proposal was rejected by the Dawson Committee in 2003 it no longer appears to be on the Commission's agenda. A remedy of divestiture for Section 46 cases has also been considered in the past, but it has not been accepted.

Problems of access to or abuse by a network monopoly or infrastructure provider are addressed in Australia by a separate section of the TPA, which prescribes a regulatory system for defining and regulating an "access regime". That system is set out below in the section dealing with sectoral issues and exemptions.

2.6 Mergers

Section 50 provides the ACCC with the legislative framework to consider and address potential competition concerns posed by mergers and acquisitions in Australia. It prohibits mergers or acquisitions that would have the effect, or likely effect of substantially lessening competition in a substantial market in Australia or in a State or Territory or region. This law applies regardless of the industry or sector in which the acquiring or target firm operates.

Section 50(3) provides a non-exhaustive list of matters (or merger 'factors') that must be taken into account when assessing whether a merger would be likely to substantially lessen competition. They are:

- actual and potential level of import competition in the market;
- height of barriers to entry to the market;
- level of concentration in the market;
- degree of countervailing power in the market;
- likelihood that the acquisition would result in the acquirer being able to significantly and sustainable increase prices or profit margins;
- extent to which substitutes are available in the market or are likely to be available;
- dynamic characteristics of the market, including growth, innovation and product differentiation;
- likelihood that acquisition would result in the removal from the market of a vigorous and effective competitor; and
- nature and extent of vertical integration in the market.

This list does not include reference to efficiencies. As previously explained, the structure of the legislative and institutional framework for competition regulation in Australia attempts to maintain a theoretical separation between competition issues and efficiency considerations. That said, the list is not exhaustive and the ACCC does recognise the relevance of efficiency effects in examining a merger proposal for potential breach of Section 50. Where a merger is likely to achieve significant efficiencies but the efficiencies do not prevent a substantial lessening of competition, the merger may only proceed if authorised by the Australian Competition Tribunal applying a net public benefits test. In that context, efficiencies are given primacy in assessing claimed public benefits. In addition, the Tribunal is directed to regard a significant increase in the real value of exports or a significant substitution of domestic product for imported goods as public benefits. It is also required to take account of all relevant matters that relate to the international competitiveness of Australian industry.

Section 50A is a separate provision that is intended to deal with acquisitions occurring outside of Australia but which have an effect on a market in Australia. Where an international merger results in a party obtaining, directly or indirectly, a controlling interest in a body corporate that carries on business in

Australia, the section can apply. It was inserted because of doubt about whether such an acquisition would be regarded as an 'indirect' acquisition for the purposes of Section 50. In respect of such acquisitions, the Treasurer, ACCC or any other person may apply to the Australian Competition Tribunal which may declare that the acquisition would have or be likely to have the effect of substantially lessening competition in a market and would not result in any sufficiently counterbalancing benefit to the public. If such a declaration is made, the parties to the merger have six months, or such further time as the Tribunal permits, to remedy the situation (for example, through divestiture). If it is not remedied, the parties are not permitted to continue to carry on business in Australia. This sanction has not been invoked.

2.6.1 Substantive analysis

Most merger proposals are dealt with by way of the informal clearance process of the Commission, outlined below, rather than by Court decisions. In order to provide greater clarity about the ACCC's application of Section 50, it releases the reasons for its findings on its website. This provides a body of precedent for the consideration of practitioners regarding the way the ACCC approaches merger matters. In determining whether to clear a merger, the Commission applies the substantial lessening of competition standard and has detailed guidelines articulating the approach that it takes in applying this test. The most recent version of the Merger Guidelines was published in November 2008 incorporating amendments to its 1999 Guidelines based on international best practice, contemporary economic theories and the Commission's experience over the last decade. The Commission consulted with the business and trade practices advisory community on a draft of the Guidelines and they are generally supported by stakeholders.

A lessening of competition is substantial, in the view of the ACCC's Merger Guidelines, if it confers an increase in market power on the merged firm that is significant and sustainable. In assessing whether a merger is likely to have such an effect, the Commission considers each of the 'merger factors' set out in Section 50(3) as well as any other relevant factors. These merger factors provide insight as to the likely competitive pressure the merged firm will face following the merger and the possible competitive effects of the merger. The assessment of the competitive effects is based on the two widely accepted economic theories of competitive harm—namely, unilateral and coordinated effects. The Commission focuses on the foreseeable future when considering market definition and each of the merger factors to determine whether a substantial lessening of competition is likely to occur. It considers and compares two likely future states - the future with the merger and the future without the merger and asks whether there is a real chance that the difference between them in competition terms will be substantial. The 'without' (or counterfactual) position is not simply the continuation of the status quo, but is the expected position the market will be in absent the acquisition in the foreseeable future (generally 1-2 years).

Under the 1999 Guidelines there were safe harbours (based on market shares and concentration ratios) that were used as a filtering mechanism by which the Commission identified those transactions that necessitated further investigation. The safe harbours have been removed from the 2008 Guidelines which express a preference for measuring concentration based on the Hirschman-Herfindahl index (HHI). Under these Guidelines the Commission has indicated that it is likely to have competition concerns warranting investigation in the case of any merger generating a HHI greater than 2000. Beyond concentration (which is taken as a starting point for analysis), it is clear from the Guidelines and the case law that the most important merger factor is the height of barriers to entry. The Commission has regard to regulatory, structural and strategic barriers and considers the timeliness, likelihood and sufficiency of entry. By its rule of thumb, entry is considered "effective" if it is likely to have a market impact within a 1 to 2 year period by deterring or defeating an attempted exercise of market power by the merged firm. The Commission also has a rule of thumb for assessing the competitive influence of imports, namely that it will regard imports as likely to provide an effective and direct constraint where they have represented 10% of total sales in each of the previous three years.

Where a firm is likely to exit a market, or fail, the test that is applied is whether the future state of competition with the merger would be substantially less than the future state of competition without the merger (where the firm fails). To demonstrate that a merger will not substantially lessen competition due to the prospective failure of one of the merger parties, the Commission takes the view that it is generally necessary to show that:

- the relevant firm is in imminent danger of failure and is unlikely to be successfully restructured without the merger;
- in the absence of the merger, the assets associated with the relevant firm, including its brands, will leave the industry; and
- the likely state of competition with the merger would not be substantially less than the likely state of competition after the target has exited and the target's customers have moved their business to alternative sources of supply.

Where the ACCC is considering a proposed acquisition of a failing firm, the counterfactual to the acquisition that it uses may not always be that the firm fails. Where there are several companies interested in acquiring the failing firm, the prospective exit of the firm from the market may not be the relevant counterfactual for the competition assessment. If a firm is seeking to acquire a failing firm, and considers that there are broader implications for market stability that may outweigh the detriments of a substantial lessening of competition that the acquisition may cause, it can seek authorisation from the Australian Competition Tribunal, referred to below. In applying a net public benefits test, the Tribunal may have regard to broader stability concerns and other issues relevant to the acquisition that the ACCC may not when applying the substantial lessening of competition test. However, as this process may take up to six months, its appropriateness for such transactions where timing is crucial may be limited.

There has been long-standing debate in Australia about whether Section 50 adequately deals with 'creeping acquisitions', a concept which generally refers to the acquisition of a number of individual assets or businesses over time which, individually, are unlikely to contravene the prohibition in the Act but which, when taken together, may have such an effect. Proponents of change to Section 50 argue that it is a 'static' legislative instrument which does not adequately address these circumstances. The most recent call for reform in this regard has been made by the ACCC following completion of an inquiry into competition in the grocery industry and its finding that creeping acquisitions in this industry may be a potential concern in the future. In September 2008 the Australian government responded by issuing a discussion paper and calling for submissions. In June 2009 the government issued a second discussion paper with proposing options to address creeping acquisitions concerns, such as a new prohibition on an acquisition by a firm with substantial market power that would have the effect of enhancing its market power. Further comment has been solicited, about potential unintended consequences of the proposed rule and about the costs and benefits of alternative ways to deal with the concerns about creeping acquisitions.

2.6.2 Process of review and decision

There is no compulsory pre-notification requirement for mergers in Australia. Nevertheless, in its 2008 Merger Guidelines the ACCC has set a notification threshold as a means of indicating to parties when a transaction should be brought to the attention of the Commission. The relatively low threshold is crossed where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share of greater than 20% in the relevant market(s). In practice, this threshold is not all that meaningful. With the exception of minor acquisitions that clearly raise no competition issues, the entrenched practice in Australia is for parties voluntarily to notify the ACCC of a proposed transaction.

There are three avenues for merger review in Australia. The first is to seek informal clearance. This is a non-statutory procedure pursuant to which the ACCC assesses the competitive effects of the merger proposal and either 'clears' it (which means in effect undertaking not to oppose the transaction) or refuses to clear it (which leaves open the possibility of proceedings being brought to oppose the transaction if the parties decide to proceed nevertheless). A clearance by the ACCC does not prevent third parties from challenging the merger for breach of Section 50 in the Federal Court. The informal clearance process is governed by detailed guidelines that set indicative time frames and guide parties in relation to the type of information required. The Commission will typically reach a decision on non-confidential clearance proposals in six to eight weeks. In 2007-2008, 89% of these reviews were completed in less than eight weeks. The Commission also reviews proposals on a confidential basis and these reviews are generally completed in four weeks. The view that the Commission provides on a confidential basis is generally subject to the qualification that the Commission may undertake market inquiries and consider the matter further once it becomes public. If a non-confidential proposal raises significant issues necessitating extended market inquiries the Guidelines provide for the Commission to publish a statement of issues and establish a secondary timeline. Upon finalisation of the review, the Commission will issue reasons for its decision, known as a public competition assessment, in any of the following situations: (1) the merger is rejected; (2) the merger is cleared subject to enforceable undertakings; (3) the merger parties seek such disclosure; and (4) a merger is cleared but raises important issues that the Commission considers should be made public. In 2007-08, the ACCC conducted 397 informal merger reviews. In these reviews, 5 mergers were publicly opposed by the Commission outright, and 6 were resolved with enforceable undertakings. Of the 212 matters considered by the ACCC on a confidential basis, 6 were opposed or had concerns expressed confidentially.

The second option, introduced from 2007, is for merger parties to apply to the ACCC for a formal clearance, that is for a determination that the merger would not be likely to substantially lessen competition. Unlike its informal counterpart, this decision is binding on the ACCC, is subject to timeframes defined by statute (requiring a decision by the Commission within 40 days with some allowance for extension) and confers the merger parties with statutory immunity from proceedings relating to the merger by any third party. The Commission's decision not to formally clear a merger is subject to a limited review on the merits by the Tribunal, essentially on the papers, and the Tribunal is required to decide the matter within 30 days (60 days if it is complex).

The third option is for merger parties to seek authorisation from the Australian Competition Tribunal. Unlike for other conduct, these applications may be made directly to the Tribunal, rather than having to apply first to the ACCC with the option of review by the Tribunal in the face of an adverse determination by the Commission. The Tribunal may only grant authorisation if it is satisfied that the proposed acquisition is likely to result in such a public benefit that it should be allowed to occur. The Tribunal must make its decision within three months or it will be taken to have rejected the application, although there is provision for extensions of time in particularly complex matters. If the Tribunal authorises a merger, then it can proceed without risk of action by any party under Section 50.

To date there is yet to be an application for a formal clearance by the ACCC or for authorisation by the Tribunal. In large part this is because substantial improvements were made to the informal clearance process responsive to the criticisms about the timeliness and transparency of the process made in the course of the Dawson review.

In addition there are aspects of the formal clearance process that make it less attractive to parties than the informal process. Formal Merger Review Process Guidelines issued by the Commission impose strict requirements to produce comprehensive documentary and market information when making a formal application, including any economic expert's report to a standard required of experts testifying in the Federal Court. The Guidelines state clearly that the Commission will strictly enforce the legislated validity

requirements, and an incomplete application will be declared invalid and rejected. Moreover, the Guidelines state that applicants will not have the opportunity to change an application once submitted except to correct minor errors. By contrast, the informal system is more flexible. In addition, there is much less scope for preserving confidentiality under the formal process. These features raise doubts about the extent to which the formal process in fact will be used in Australia.

As parties are not required to notify the ACCC of a proposed merger, they also have the option of proceeding with the transaction without seeking any regulatory consideration. However, this would not prevent the ACCC from subsequently investigating the merger, including making market inquiries using its formal information-gathering powers and taking enforcement action. In practice, only those transactions that clearly do not affect a substantial market or raise competition concerns are not first run past the Commission and in many cases parties nevertheless opt to inform the Commission of the transaction anyway.

Where an acquisition would, or would be likely, to lead to a substantial lessening of competition in an Australian market, the ACCC can seek to enforce its assessment by applying for a permanent injunction to restrain an anti-competitive acquisition; or pursuing pecuniary penalties against those involved in the acquisition. If the ACCC is of the view that a completed acquisition has substantially lessened competition, it may also apply to the Federal Court for a divestiture order within three years of the contravention. A divestiture order can require a person to dispose of the shares or assets acquired in contravention of Section 50, or it can take the form of a declaration that the acquisition is void (resulting in the vendor refunding the consideration for the acquisition).

Certain merger and acquisition proposals are also subject to scrutiny by the Australian Government under the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and Australia's foreign investment policy. The Australian Government has the power under the FATA to block those proposals which would result in a foreign person acquiring control of an Australian business where this is determined to be contrary to the national interest. The FATA and the Foreign Acquisitions and Takeovers Regulations 1989 provide monetary thresholds below which the relevant FATA provisions do not apply and separate thresholds for acquisitions by US investors. The Australian Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Key considerations include national security, economic development and the impact on competition. It is important to note that a decision by the Australian Government under the FATA does not prevent the ACCC considering the merger or acquisition. Nor does a decision by the ACCC preclude the Australian Government from deciding whether the merger or acquisition is contrary to the national interest.

2.7 Unfair competition and consumer protection

In addition to its competition provisions, the *Trade Practices Act* has provisions dealing with fair trading and consumer protection. The long-standing policy in Australia has been to recognise these provisions as inter-related and mutually reinforcing, as reflected in their incorporation in a single Act, the statement of its object being 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' and investment of responsibility for its administration in a single regulator, the ACCC.

The provisions relating to fair trading and consumer protection in the *Trade Practices Act* are found in Part IVA which prohibits unconscionable conduct in business transactions, Part IVB which prohibits a business from contravening an applicable industry code of conduct (of which there are currently four mandatory codes of conduct dealing with franchising, oil, horticulture and unit pricing), and Part V which prohibits businesses from engaging in misleading or deceptive conduct (and some other particular practices). Part V also contains a range of basic protections for consumers in their dealings with

businesses, including laws against pyramid selling, a range of implied warranties in consumer transactions and provisions dealing with product information and safety standards. These fair trading and consumer protection provisions apply to any business that trades across domestic and/or international borders, except financial services providers. There are equivalent statutory provisions in State and Territory fair trading and consumer legislation. In addition, Australia's consumer policy framework includes a range of industry-specific legislation administered by federal or state and territory fair trading agencies, as well as ombudsmen, co- and self-regulatory arrangements and consumer education initiatives.

Following a broad-ranging review in 2007-2008, the Australian Productivity Commission identified significant weaknesses in the consumer policy framework, including regulatory complexity, costly jurisdictional variations in regulation, perverse outcomes for consumers, lack of policy responsiveness to emerging needs, problems relating to contract terms and information disclosure and complex redress arrangements resulting from the plethora of bodies that handle consumer complaints. Based on the Productivity Commission's recommendations, in October 2008 all Australian governments agreed to a new consumer policy framework, comprising a new national consumer law – the Australian Consumer Law - based on the relevant provisions of the *Trade Practices Act.* The Australian Consumer Law will be implemented by a scheme of State and Territory legislation that adopts the provisions of the *Trade Practices Act* (as was done with the schedule version of Part IV for the purposes of the Competition Code), with streamlined enforcement arrangements based on formal communication and coordination agreements between the enforcement agencies in each jurisdiction. In addition to the existing provisions of the *Trade Practices Act*, it was agreed that the national consumer law would also include provisions regulating unfair terms in consumer contracts and a new regime for product safety and new enforcement powers and redress options, as well as additional changes based on best practice in state and territory laws.

On 17 February 2009 the Minister for Competition Policy and Consumer Affairs released a Discussion paper explaining the nature and scope of the reforms and inviting submissions on specific aspects of the reform proposals. On the same date the Minister announced that the introduction of legislation governing unfair contract terms and increasing the powers of the ACCC to deal with breaches of the consumer laws (including civil pecuniary penalties, disqualification orders, infringement and substantiation notices) would be fast-tracked. Legislation including the new unfair contract provisions and enhanced enforcement powers was introduced into Parliament on 24 June 2009. The rest of the Australian Consumer Law is expected to be implemented in 2010, and the States and Territories are expected to apply it by the end of 2010. The Australian Consumer Law is intended to be fully implemented by 1 January 2011. A review is proposed after seven years with particular consideration to be given to whether a move to a single national regulator is warranted.

3. Institutional issues: enforcement structure and practices

Principal enforcement responsibility lies with the ACCC and the courts. The Australian Competition Tribunal plays a distinctive review and adjudicatory role that complements that of the other administrative and judicial institutions. At the top of the institutional structure for competition regulation in Australia is the federal Minister for Competition Policy and Consumer Affairs. As an initiative of the Labor government elected in 2007, the specific designation of a Minister is seen as reflecting a renewed commitment to competition and consumer policy in Australia. The Minister also chairs a working group on business regulation and competition as one of seven working groups established by the Council of Australian Governments. The working group is seen as important in continuing to implement the commitment to removing restrictions on competition across the economy. Policy-making in the area of competition is seen as the domain predominantly of Treasury with the support of other research and review bodies such as the Productivity Commission.

3.1 Competition law and policy institutions

3.1.1 The Treasury

The Treasury advises Treasury ministers (including the Minister for Competition Policy and Consumer Affairs) on competition policy, including responsibility for the Trade Practices Act, advice on the economic regulation of infrastructure and broader product markets. The primary focus of the Treasury is on economic policy, including the key policy outcomes of processes and reforms that promote a secure financial system and sound corporate practices, the removal of impediments to competition in product and services markets and safeguarding the public interest in matters such as consumer protection and foreign investment.

The Competition and Consumer Policy Division is located in the Treasury's Markets Group (which is also responsible for corporate law, financial services regulation policy and foreign investment policy) and focuses its policy role on three streams: competition policy; economic regulation of infrastructure; and consumer policy. The ACCC, the Productivity Commission, the National Competition Council and the Australian Competition Tribunal are Treasury portfolio agencies.

3.1.2 The Australian Competition and Consumer Commission

Organisation

The ACCC was established in November 1995 by the merger of the former Trade Practices Commission and the Prices Surveillance Authority upon the recommendation of the Hilmer Committee. It is an independent, national statutory authority. There is a process for consultation with the states and territories about the membership of the ACCC. The Minister with portfolio responsibility for the *Trade Practices Act*, the Minister for Competition Policy and Consumer Affairs, cannot give the Commission directions regarding its functions under the competition provisions of the Act. The ACCC is generally regarded as an effective and efficient regulator by stakeholders in Australia, as well as internationally. While criticisms of the level of transparency and accountability in some of its processes, as well as criticisms about its use of publicity, were aired in the Dawson review, those concerns appear largely since to have dissipated. There appears to be a strong consciousness on the part of the Commission of the public interest nature of its role and accordingly its public statements regularly emphasise values such as transparency, timeliness, consistency and fairness in its decision-making.

The ACCC has a wide range of roles and responsibilities. It is the only national agency responsible for enforcing the competition provisions in Part IV of the Act and for making decisions about clearances, notifications and, at first instance, authorisations (except for mergers) under Part VII of the Act. The ACCC also has a role in relation to the regime governing access to essential facilities under Part IIIA of the Act. As a result of the Hilmer reforms referred to in Section 2.1 above, the ACCC also administers associated State/Territory competition policy application legislation (the Competition Code). This means that the ACCC can bring actions to enforce the provisions of the Competition Code and it is also able to deal with authorisation applications and notifications that arise under the Code.

In fair trading and consumer protection the ACCC's role complements the consumer protection role of State and Territory consumer affairs agencies, which administer mirror legislation (fair trading acts) in their jurisdictions (soon to be harmonised into a single national consumer law – see Section 2.7 above). The ACCC also has responsibilities for prices oversight under Part VIIA of the *Trade Practices Act*. This Part allows for public inquiries conducted by the ACCC, prices notification where specified companies are to notify the ACCC of a proposed price increase and monitoring and reporting by the ACCC of prices, costs and profits of companies. In 2007-8 there was a significant increase in prices surveillance activity by the ACCC, particularly in relation to prices in the unleaded petrol and grocery industries. These inquiries resemble the market studies that are done regularly by some OECD Member competition enforcers.

In terms of structure and governance, the Commission has a Chairperson, two Deputy Chairpersons, other full-time Commissioners and part-time Associate Commissioners. Commissioners are appointed for up to five years by the Governor-General if the Minister is satisfied that the person has the requisite knowledge or experience in industry, commerce, economics, law, public administration, consumer protection or small business matters. Appointments must be supported by a majority of the State and Territory governments. Individual Commissioners are independent and do not report to the Chairperson. The Commission meets each week to discuss matters and to make decisions on specific issues. Decisions are by majority vote. The Commission also has internal subject-matter committees on mergers, enforcement, communications, regulated access and price monitoring, and adjudication.

In terms of accessibility and transparency, many of the ACCC's decisions are published in public registers which are accessible from the ACCC's website. The ACCC also issues guidelines on a range of its activities and media releases to report on enforcement actions and outcomes. ACCC Commissioners and staff undertake speaking engagements and briefings, public and private, to explain the work of the Commission and its approach to particular issues.

In terms of external scrutiny, ACCC assessments about whether or not there has been a potential breach of the *Trade Practices Act* are subject to judicial scrutiny given that only a court can determine whether a contravention of the *Trade Practices Act* has occurred and make orders against offenders. In addition, ACCC decisions about authorisations and notifications are subject to review on the merits by the Australian Competition Tribunal. The ACCC is also required to appear before a number of Parliamentary Committees to report on its activities and use of funds. It is also subject to freedom of information and judicial review laws as well as laws governing actions for defamation and contempt of court. Other administrative avenues for external review of ACCC activities and operations include the Commonwealth Ombudsman; Privacy Commissioner; Administrative Appeals Tribunal; and Human Rights and Equal Opportunity Commissioner.

Enforcement powers, policies and processes

The ACCC's current priorities for competition enforcement action are serious cartel conduct, unconscionable conduct and misuse of market power with a view particularly to clarifying the law in these areas. In deciding whether, as well as what kind of, enforcement action to take in any given matter, the ACCC takes account of both the harmfulness of the conduct and the culpability of the businesses and individuals involved, as well as the likely educative or deterrent impact of enforcement action so as to justify the use of the resources. The ACCC applies a range of criteria to determine what level of education, administrative resolution and litigation is appropriate to achieve compliance.

The Commission determines how to respond to potential breaches by way of a 'compliance pyramid', set out in a Compliance and Enforcement Policy statement issued in April 2009, citing education, information and liaison at its base, progressing to voluntary compliance and self-regulation through the engendering of compliance culture and adherence to industry codes, and from there to the extraction of enforceable undertakings and follow up monitoring, with court proceedings at the tip. The Commission uses a range of detection and investigative tools and methods in enforcing the *Trade Practices Act.* Determining the most appropriate enforcement tool or method will often depend on factors such as the investigation stage, nature of the alleged conduct, level of information at hand and the like.

The ACCC obtains information about potential breaches from a wide range of sources. As a part of a move away from a complaints-driven enforcement model, it has a branch that performs research, intelligence and analytical tasks in relation to the information that it receives from external sources, including data provided by other agencies, feedback from stakeholders obtained through liaison work, and international trends. The ACCC also employs specific tools to detect anti-competitive behaviour through its cooperation and immunity policies.

The ACCC's general Cooperation Policy for enforcement matters applies to potential civil contraventions by corporations or individuals of the competition, fair trading and consumer protection provisions of the *Trade Practices Act.* Discretion regarding immunity for criminal conduct lies with the DPP, not the ACCC. The ACCC incentivises cooperation under the policy through, for example, joint submissions to the court for a reduction in penalty; administrative settlement instead of litigation or complete or partial immunity from action by the Commission. The nature and extent of the reward on offer in any given case is assessed having regard to the requirements set out in the policy. Those requirements include the provision of valuable and important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings, fully cooperating with the investigation and making full and frank disclosure. Rewards are not available if the applicant was a ringleader in or originator of the activity or if there is a prior record of similar activity. Corporations must also be prepared to make restitution where appropriate. In practice, many negotiated settlements and joint submissions to the court on penalties flow from the operation of the Cooperation Policy. In deciding the amount of the penalty that will be the subject of a joint submission the ACCC takes account of the value and level of cooperation, as well as the nature and seriousness of the contravening conduct. However, the Cooperation Policy provides no specific guidance on how a penalty discount is to be calculated under the Policy. In particular, as compared with the approach in relation to other jurisdictions, it gives no indication as to how the extent of any harm caused by the conduct is likely to be assessed (for example, through a volume of affected commerce proxy). Notwithstanding any agreement reached between the ACCC and an applicant under the Cooperation Policy, it remains the role and responsibility of the court to decide independently on appropriate penalties for breaches of the Act.

The ACCC's current Immunity Policy for Cartel Conduct is modelled substantially on the corresponding policy in the United States. Under the Policy the ACCC will confer full amnesty from prosecution and penalty to the first eligible cartel participant to report its involvement in a cartel and cooperate fully with the Commission's investigation and prosecution of other cartel participants, provided certain conditions are met. Specific conditions include that the immunity applicant not have been involved in the coercion of other persons to participate in the cartel and not have been the clear individual leader in the cartel. There is no requirement of restitution. The Policy provides for corporate immunity, derivative immunity (to cover employees and officers of a corporation with corporate immunity) and individual immunity. It also has provisions relating to the placement of markers; affirmative amnesty; oral applications; confidentiality and limitations on the use of information provided in the application process; revocation and other related matters. If an applicant is ineligible for immunity but wishes to cooperate, their cooperation may be considered under the Commission's general Cooperation Policy. There is no indication in either the Immunity Policy or the Cooperation Policy of the percentage by which penalties may be discounted for the second-in or third-in applicants, behind the immunity recipient. Under the Immunity Policy, immunity may be available even if the Commission has commenced an investigation into the alleged cartel, provided it has not yet received advice that it has sufficient evidence to commence proceedings. Since its introduction in 2005, the ACCC credits the Immunity Policy with a substantial increase in its detection of cartel activity, exposing potential cases at the rate of about one a month.

The ACCC/DPP MOU regarding Serious Cartel Conduct (see Section 2.3 above) provides for the Commission to receive and manage requests for immunity from both criminal and civil proceedings, and make recommendations to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the Commission's immunity policy in relation to cartel conduct. The Commission will decide whether to grant immunity from civil proceedings in accordance with its policy. However, the DPP will decide whether to grant immunity from criminal proceedings in accordance with the Prosecution Policy of the Commonwealth and upon the recommendation of the ACCC. The Annexure was added to the DPP's Prosecution Policy in recognition of the fact that the approach to immunity in cartel cases is likely to be different than in other criminal cases. Thus the ACCC/DPP MOU further provides that ACCC will consult with the DPP in relation to the Commission's decision as to whether or not to grant immunity and the management of requests for immunity from civil proceedings where the matter also concerns criminal investigation or prosecution.

The ACCC predominantly requests persons who might have relevant information about a possible contravention to provide such information voluntarily. However, it also can issue statutory demands for information under Section 155 of the *Trade Practices Act* where the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of providing information, documents or evidence about a matter that constitutes or may constitute a contravention of the Act. The power under Section 155 was extended in 2008 to enable it to be exercised by the Commission even after commencement of proceedings, up until the close of pleadings. This extension was prompted by the Commission's concern that it had to delay bringing proceedings (including for interim injunctive relief to immediately restrain conduct) so as to preserve its ability to use its powers under Section 155.

Failure to comply with a Section 155 notice is an offence. In the case of a person not being a body corporate, the maximum penalty is a fine of AUD 2,200 or imprisonment for 12 months. In the case of a body corporate, the maximum penalty is a fine not exceeding AUD 11,000. The Commission has recently brought several proceedings for non-compliance with Section 155.

The ACCC may also enter premises and search for and seize evidence pursuant to a search warrant issued by a magistrate. The powers available under a search warrant include the power to enter the premises; search the premises; seize evidence; make copies of evidential material; and operate electronic equipment at the premises. With the criminalisation of serious cartel conduct will come additional surveillance and telecommunications interceptions powers to apply in the investigation of such conduct.

While the ACCC does not have the power to impose penalties, it may accept formal administrative settlements or enforceable undertakings from businesses to resolve possible contraventions of the *Trade Practices Act*. The acceptance of such undertakings under Section 87B of the Act may be in addition to or in lieu of taking legal proceedings. Parties who give undertakings may subsequently withdraw or vary them only with the consent of the Commission. Section 87B undertakings are an important compliance tool for use in situations where there is evidence of a breach or potential breach of the Act that might otherwise justify litigation. The Commission does not accept offers of such undertakings unless the undertakings are to be made public and do not contain denial of contravention. The Commission may enforce such undertakings in court if they are not honoured. Failure to comply with a court order can result in criminal sanctions.

Part VI of the *Trade Practices Act* provides for a range of penalties and remedies to address contraventions. The orders that may be sought by the ACCC include declarations, injunctions, pecuniary penalties, adverse publicity orders, community service, compliance programme and probation orders, compensation and other orders. Private parties may also institute legal proceedings in respect of alleged contraventions of the *Trade Practices Act* and may claim compensation for loss or damage suffered as a result of a contravention (see 3.2 below).

As the *Trade Practices Act* is a Commonwealth law that regulates corporations in accordance with the Commonwealth's constitutional powers, primary liability for contraventions of the Act rests with corporations. For the purposes of this liability, the conduct and mental state of directors, employees or agents is imputed to the corporation provided they were acting within actual or ostensible authority. Individuals or non-corporate entities such as unincorporated associations or partnerships may attract primary liability under the application legislation of the States and Territories (the Competition Code) if they breach any of the prohibitions in that legislation. However, individuals may also attract ancillary (accessorial) liability in relation to the conduct of the corporation of which they are a director, employee or agent. Ancillary liability arises, for example, where an individual aids, abets, induces or is knowingly concerned in contravening conduct. The standard for such liability is knowledge of the essential facts.

Contravention of the competition provisions (aside from the secondary boycott provisions) by corporations may result in penalties of up to: AUD 10 million; or when the value of illegal benefit can be ascertained, three times the value of the illegal benefit; or when the value of the illegal benefit cannot be ascertained, 10% of the turnover in the preceding 12 months, whichever is the greater. A civil penalty of up to AUD 500 000 can be imposed on an individual. Breaches of the boycott provisions may attract penalties of up to AUD 750,000. The highest civil penalty imposed on a corporation for breach of the competition provisions to date is AUD 36 million, and on an individual, AUD 1.5 million. Penalties are yet to be imposed applying the maxima involving three times the gain or 10% of turnover. These provisions were introduced in 2007 and are expected to generate an upward trend in the quantum of penalties imposed for breaches of the competition provisions of the Act.

Criminal penalties have been available only for contravention of the criminal fair trading and consumer protection provisions of the Act. Prosecutions are rare. Penalties of up to AUD 1.1 million for companies, and AUD 220 000 for individuals, per offence may be imposed. For the cartel offences, individuals may be subject to imprisonment for up to ten years and fines of AUD 220,000 per offence, while corporations may be liable for a maximum fine that mirrors existing maximum fines for breaches of the civil penalty provisions. However, the maximum fine for the cartel offence for individuals (of only AUD 220,000) is low, both in comparison with provisions in other jurisdictions and in comparison with the individual penalty for civil contraventions of the competition provisions (AUD 500,000), but it is consistent with the maximum fines for a breach of the criminal consumer offences already in the Trade Practices Act. The object of deterrence (particularly general deterrence) is a key factor in determining appropriate penalty levels in Australia. The recent introduction of criminal sanctions for serious cartel conduct is seen as crucial in strengthening deterrence for this particular type of behaviour.

The ACCC has a very high success rate in litigation. A significant proportion of penalty proceedings that it brings, particularly in cases involving *per se* breaches, are settled with admissions as to liability and joint submissions as to penalty and associated orders.

3.1.3 The Australian Competition Tribunal

The Australian Competition Tribunal is a review body. 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. The Tribunal hears applications for review of determinations of the ACCC granting or revoking authorisations. In relation to mergers and acquisitions the Tribunal has a two-fold role. It has the power to hear applications for review of determinations of the Commission granting or refusing formal clearances for company mergers and acquisitions. It also has power to deal with applications for authorisation of mergers and acquisitions which would otherwise be prohibited under the Act. The Tribunal also hears applications for review of certain decisions of the Minister or the ACCC in access matters under Part IIIA of the Act, as well as applications for review of certain determinations of

the Commission in relation to notices given by the Commission regarding exclusive dealing. The Tribunal also has power to inquire into and report to the Minister on whether a non-conference ocean carrier has a substantial degree of market power on a trade route.

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 of Australia. 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. The Tribunal has no resources of its own. The funds appropriated by Parliament for the purposes of the Tribunal are managed by the Federal Court. Registry services and administrative support for the Tribunal are provided by staff of the Tribunal and the Federal Court.

The Tribunal has inquisitorial powers and thus is not dependent upon the parties to identify and collect all of the evidence relevant to a matter before it. That said, proceedings before the Tribunal have been court-like in the level of formality and procedures involved, as well as general observance of rules of evidence. The current President of the Tribunal is examining ways in which to make proceedings less formal, and to streamline procedures and impose limits on evidence including reducing the volume of documents and limiting the number of experts who are called and the time taken in witness examination.

3.1.4 The Federal Court

In Australia, as a consequence of the constitutional separation of judicial and administrative powers, only a court can determine whether a contravention of the *Trade Practices Act* has occurred and make orders against offenders. The relevant court is the Federal Court of Australia (although State and Territory Supreme Courts can hear cases under the Competition Code). Decisions of the Federal Court can be appealed to the Full Court of the Federal Court, and then to the High Court of Australia.

In the early days of the *Trade Practices Act* Federal Court judges lacked the economic expertise necessary to deal with competition cases. There were also impediments to the reception of economic evidence, by virtue of traditionally restrictive rules of procedure and evidence. However, more than 35 years on from enactment of the *Trade Practices Act*, these limitations have been ameliorated largely by experience. There is now a fairly well established pool of judges on the Federal Court who have particular experience or expertise in competition law. In addition, there has been a concerted effort on the part of judges, practitioners and experts to develop innovative ways to make the most effective use of economic evidence.

One of these, known as the 'hot tub', is a method for presentation of the evidence of expert witnesses that was pioneered by the Trade Practices Tribunal (as it was then known). Using this method, at the conclusion of all the evidence (other than the evidence of the experts) and before the commencement of addresses, each expert is sworn immediately after the other and in turn gives an oral exposition of his or her expert opinion with respect to the relevant issues arising from the evidence. Each expert then in turn expresses his or her opinion about the opinions expressed by the other experts. Counsel then cross-examine the experts, either one after the other or by putting questions in respect of a particular subject to each. Re-examination is conducted on the same basis. The procedure has significant advantages for the efficient disposition of litigation involving expert evidence. The procedure also overcomes the disadvantage that is often experienced in cases where expert evidence is given at a time when the issues and the evidence that ultimately are required to be addressed are not fully appreciated by the parties. The procedure obviates that difficulty by ensuring that the experts called have an opportunity to deal with the case on the basis of the evidence adduced and the issues raised by both parties.

In addition to the 'hot tub', there has been relaxation of the rule against experts giving evidence of the issues that are ultimately for the court to determine, and there has been provision made for experts to give evidence by way of submission. The Federal Court has also developed guidelines to direct experts and practitioners in preparing expert reports in such a way as to maximise their value and minimise the time and cost involved in presenting expert evidence, as well as in heeding the principle that expert witnesses are required to be independent rather than advocates for a party. The rules also allow for the court to appoint its own expert. However, this procedure rarely has been used.

3.2 Other means of applying competition law - private actions

In Australia, the *Trade Practices Act* provides private litigants with a right of action to recover damages for loss suffered by conduct in contravention of the competition or consumer protection provisions of the Act. In addition, private litigants may obtain injunctions (but not for mergers); divestiture (in the case of mergers); and other orders (for example, a declaration that a contract is void or for specific performance of a contract). Some aspects of the law might help private plaintiffs. For example, a plaintiff can submit a court's finding of fact in an enforcement action brought by the ACCC as *prima facie* evidence (Section 83). And the law enables a party (or prospective party) to certain proceedings at the ACCC, the Tribunal or the court to ask the Attorney-General for a grant of financial or legal assistance (Sec. 170). The ACCC also has the power to bring representative actions seeking compensation on behalf of 'victims' but to date has only done so in a small number of cases involving breach of the consumer protection provisions. One reason the number is small is the hurdle, imposed by the legislation, of having to obtain prior written consent of all represented persons in the proceeding. The Australian Competition Law contains provisions to facilitate more representative actions. In appropriate cases, which are describe in ACCC guidelines, the Commission may also seek leave of the court to intervene in private proceedings.

Aside from general statements on its enforcement policy, there is no published guidance regarding the circumstances in which the Commission is likely to bring action in respect of a private party complaint as opposed to leaving it to the private party to exercise its own rights. However, where the Commission decides not to take action in respect of a private party complaint, the reasons for the decision will be outlined in a letter to the complainant. Such decisions may be subject to limited external scrutiny through review by the Commonwealth Ombudsman. When the ACCC concludes a matter with a settlement, the agreed set of facts may give private party plaintiffs a foundation on which to build a case.

While there have been numerous private actions brought in relation to the consumer protection provisions of the Act (the misleading and deceptive conduct prohibition especially), only a handful have been pursued in relation to contraventions of the competition law provisions, particularly the cartel provisions. Some of these private cases have been significant, though, in terms of developing the jurisprudence on the prohibitions. Reasons for the small number of competition cases could include: (1) the expense and uncertainty associated with private litigation; (2) the lack of financial incentives comparable to those available in the United States (single line damages only are available, there are costs rules under which the loser pays and the indemnity available to a successful plaintiff is partial only); (3) the relative ease of obtaining injunctive relief and its effectiveness in dealing with the cause of the harm; (4) the difficulties of proving damage; and (5) the fact that many victims may not be aware that they have been affected by illegal anti-competitive conduct.

Concerned that private litigation could jeopardise ongoing investigations or undermine the efficacy of its immunity policy for cartel conduct, the ACCC has not voluntarily provided witness statements and transcripts of interviews conducted relating to an immunity applicant. The ACCC has also sought to protect the confidentiality of information provided by cartel participants who came forward under the ACCC's cooperation policy, despite criticism of non-disclosure from the Federal Court and complaints from lawyers for plaintiffs. Legislation was recently introduced to strengthen further the ACCC's capacity

to protect information provided by immunity applicants, by limiting substantially the circumstances in which the ACCC can be compelled to produce or disclose immunity information. This legislation gave effect to Recommendation B.2.b of the OECD's 1998 *Recommendation of the Council concerning Effective Action Against Hard Core Cartels* (to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process). The ACCC need not give reasons for a refusal to disclose, and the role of the courts in reviewing such decisions is curtailed.

Other issues pose difficulties for private litigants. One of these, the requirement for Ministerial consent where the contravening conduct took place outside of Australia, is referred to below. Another is the doubt surrounding the status of admissions made by defendants and whether they can be used as evidence in follow-on proceedings. Further, there are impediments to early settlement of proceedings arising out of the exposure of a settling defendant to potential claims for contribution by the other defendants to the sums that they are ultimately ordered to pay to the plaintiff.

3.3 International issues

3.3.1 Extraterritorial effects

The *Trade Practices Act* has an express provision to deal with anti-competitive conduct taking place outside of Australia that nevertheless affects competition in Australian markets. Section 5(1) extends the application of certain parts of the Act, including the competition and consumer protection provisions, to conduct that is engaged in outside of Australia if the party engaging in the conduct is: an Australian incorporated entity; or a body corporate carrying on business in Australia; or an Australian citizen; or a person ordinarily resident within Australia.

In actions for damages Section 5(3) requires the consent of the Minister to be obtained before conduct occurring outside of Australia can be relied upon at a hearing. For other remedial orders, Section 5(4) requires the consent of the Minister to be given before proceedings are instituted. Under Section 5(5) the Minister must give such consent unless, in the Minister's opinion, the conduct in question was required or specifically authorised by the law of the country in which it was engaged and the giving of consent is not in the national interest. The provisions were introduced in 1986 to ensure that the extraterritorial application of the Trade Practices Act does not impinge on laws or policies existing in another country. They require an extra step for claims made by or on behalf of Australian consumers affected by cartel conduct taking place outside of Australia. Ministerial consent is obtained in most cases. Nevertheless, Australian plaintiff lawyers have called for the Ministerial consent requirement to be abolished or otherwise that it at least not be made a prerequisite to the institution of proceedings and that the onus to obtain consent be removed from the applicant such that it falls to the respondent to show that the conduct was required or authorised by the foreign country and, if so, that the matter then be referred to the Minister to determine whether the proceedings are not in the national interest.

3.3.2 Market openness and trade law issues

In assessing the competitive impact of mergers and acquisitions, the ACCC will take into account market openness by considering the actual and potential level of import competition. The Commission considers that imports are most likely to provide an effective and direct competitive constraint in circumstances where all of the conditions set out below are met:

- independent imports (that is, imports distributed by parties that are independent of the merger parties) represent at least 10% of total sales in each of the previous three years;
- there are no barriers to the quantity of independent imports rapidly increasing that would prevent suppliers of the imported product from competing effectively against the merged firm within a period of one to two years (for example, government regulations, the likelihood and impact of anti-dumping applications on imports, customer-switching costs or the need to establish or expand distribution networks);
- the (actual or potential) imported product is a strong substitute in all respects (that is, quality, range, price, etc.) for the relevant product of the merged firm, taking into account factors including the need to meet any relevant Australian or industry standards, any increase in the complexity of customers' logistical arrangements, increased transport times and costs, and the risk of adverse currency exchange rate fluctuations;
- the price of actual or potential landed imports, including any tariffs or other import-specific taxes and charges, (that is, the import parity price) is close to the domestic price of the relevant product that would prevail in the absence of the merger;
- importers are able to readily increase the supply volume of the product they import with minimal or no increase in the price paid; and
- the merged firm and other major domestic suppliers do not have a direct interest in, are not controlled by, and do not otherwise interact with, actual or potential import suppliers.

The ACCC assists Treasury in participating in the negotiation of the competition chapters of Free Trade Agreements, fulfilling an advisory role. Each of Australia's bilateral Free Trade Agreements confirms the parties' commitment to taking action to address anti-competitive conduct within their economy. This recognises the importance of ensuring that the dynamic benefits for businesses and consumers that flow from reducing trade and investment barriers between countries are not reduced by anti-competitive behaviour in local markets.

3.3.3 Enforcement processes and cooperation

The ACCC engages in dialogue with its international counterpart agencies to enhance information sharing and facilitate investigative and enforcement cooperation. Cooperation between agencies is often undertaken on an informal basis via emails and phone calls and can range from general inquiries, for example on the development of competition law and institutions, to discussion on specific topics including cooperation between authorities on multi-lateral mergers or cartel investigations. There is a provision in the *Trade Practices Act* that specifically authorises the ACCC to exchange confidential information with domestic and foreign regulators (although the ACCC can impose conditions on disclosure so as to protect the confidentiality of the information provided). The ACCC has a central International section that disseminates information on developments in competition and consumer protection law and enforcement, to the whole organisation on a weekly basis.

In addition to such mechanisms, the ACCC also has in place formal cooperation agreements with numerous counterpart agencies, including two treaty-level agreements with the United States, an agreement covering consumer protection with the European Community, and agreements with New Zealand, Taiwan, Korea and Fiji. These agreements generally contain notification obligations with respect to enforcement activities that may affect the other party's interests in the application of its competition and consumer laws. Cooperation agreements may also contain an 'avoidance of conflict' provision setting out obligations on parties to endeavour to minimise any potentially adverse effects of one party's enforcement activities on the other party's interests in the application of their competition and consumer laws.

Each of Australia's cooperation agreements has been implemented differently, reflecting the nature of the relationship and the development of the counterpart agency. In some instances a key purpose of the agreement is for capacity building and as such the implementation of the agreement has involved various training programmes being run by the ACCC for the counterpart agency. In addition to the training programmes these agreements have also facilitated staff exchanges between the authorities. A further example of the implementation of an agreement relates to the development of internal documents, such as a cooperation matrix which is used by investigative staff to determine whether notification is required as well as what level of cooperation and assistance may be available under the cooperation agreement.

The Australian Productivity Commission in 2005 issued a research report on Australia and New Zealand's Competition and Consumer Protection Regimes. The Commission recommended a package of measures to enhance cooperation between Australia and New Zealand in relation to the competition and consumer protection regimes. The recommended package, while retaining national sovereignty for Australia and New Zealand in relation to competition and consumer protection matters, involved further harmonising the Australian and New Zealand laws and enhancing the policy dialogue and cooperation between the two Governments (Section 46A already prohibits the misuse of market power in a trans-Tasman market – that is, any market in Australia, New Zealand or Australia and New Zealand).

3.4 Resources and priorities

3.4.1 Resource levels and trends

In staff terms, the ACCC is one of the largest competition agencies in the world, reflecting the breadth of the ACCC's portfolio and its range of the sectoral responsibilities that it carries in addition to its 'core' competition and consumer protection work. It is continuing to grow, with 727 staff budgeted in 2008-9, up from 617 in 2007-8 and 576 in 2006-7. . About half – 320 – of the ACCC's staff work in the areas of traditional competition and consumer protection (including mergers, adjudication, enforcement, compliance, regional offices and the legal branch). Of these 320 staff the split between those with legal qualifications (146) and those with economic qualifications (130) is pretty even, with the remainder having a range of other credentials. With a head office in the national capital, Canberra, the agency has regional offices in each of the other seven States and Territories.

Reflecting the strength of its focus on enforcement, approximately one-third of the ACCC's expenditure on staff is spent in connection with enforcement and compliance activity in relation to competition and consumer protection matters. A significant proportion of these staff are located in the regional offices. After enforcement and compliance, the next largest allocation of the staff budget, 10%, is for the work of the Australian Energy Regulator which was established in 2005 as a constituent part of the ACCC but operates as a separate legal entity. After that, merger activity takes up 6% of the staff budget. In 2007-8 Information, Research and Analysis, including the work of the International group, represented only 3% of staff expenditure, up from 2% the previous year. This is no doubt a reflection of the fact that the ACCC is predominantly an enforcement agency and policy and research functions are seen as the domain of other agencies, principally Treasury and Productivity Commission (see Section 5 below).

The ACCC has a fairly even gender ratio for its staff, with 334 female and 317 male staff in 2008. Most of its staff are full-time employed (only 68 held part-time positions as at 30 June 2008). The agency also has certain equal opportunity target groups, including people from a non-English speaking background, people with disabilities and Aboriginal and Torres Strait Islander people.

The ACCC has focussed in recent years on its learning and development strategy for its staff. Recent initiatives have included a significant revision of the agency's professional development journal, the introduction of a regulatory affairs course for graduates, an introductory micro-economics course, and an IT forensics course, the development of negotiation skills training and refinements to the agency's applied investigations and litigation skills workshop. Employees are eligible for study assistance in the form of study leave and full or partial reimbursement of tuition fees for approved courses of study. The study leave policy and guideline was revised in 2008 to place greater emphasis on post-graduate studies and, in conjunction with the University of Melbourne Law School, a scholarship programme was introduced for selected staff to undertake a Graduate Diploma in Competition Law. The ACCC recruits between 30 and 40 graduates each year and arranges international reciprocal exchanges for its staff. In 2008 these exchanges were undertaken with New Zealand and Canada.

The main source of revenue for the ACCC is government appropriation with a small proportion of departmental revenue. In 2007-8 the ACCC had total revenue of AUD 118.9 million being appropriation funding and the remaining AUD0 .5 million being external funds. As a knowledge-based organisation, the ACCC spends approximately 48% of its budget on employee costs. Legal expenditure is more volatile depending on the timing and outcome of legal proceedings. In 2007-8 legal expenditure represented 24% of the ACCC's total expenditure, up from 20% in 2006-7. The ACCC operating result for 2007-8 was a AUD 5.2 million deficit as a result of the ACCC's loss of a significant petrol price fixing case in which it was ordered to pay the respondents' legal costs. Had it not been for this expense, the ACCC would have recorded a modest surplus of AUD 1.2 million.

3.4.2 Priorities by sector and substantive provision

In terms of enforcement priorities, as shown by the figures in Table 2 below show, the majority of investigations opened by the ACCC in recent years relate to conduct involving horizontal agreements. This is consistent with the enforcer's prioritisation of anti-cartel enforcement efforts in this period. The figures in relation to mergers can be differentiated for this purpose on the basis that they relate to matters in which clearances have been sought, as opposed to matters that have been investigated with a view to potential enforcement action. Except for 2006 in which unusually large penalties were secured for abuse of dominance, cartel cases are also the cases in which the highest levels of penalties have been attained across the various categories of case in which penalties are available. The quantum of penalties achieved in 2007 is substantially above the quantum of previous years as a result of the record AUD 38 million returned from the Visy/Amcor case. By and large, however, Australian cartel penalties are much lower than the penalties levied in jurisdictions such as the United States and European Community. The record Australian fine is about the same as the record fine issued in the UK, but much lower than the record in some other mid- to small-sized jurisdictions such as the Netherlands. That said, the penalties reflected in Table 2 were all calculated based on the former corporate maximum of AUD 10 million. There is yet to be a penalty based on the 2007 formula of treble the gain or 10% of annual turnover. This formula may well see a significant upward trend in Australia's penalties.

In terms of other observations available from the figures, it is evident that the conversion rate from investigation to the commencement of legal proceedings is particularly low in abuse of dominance matters. In 2004 and 2005, 8 and 9 investigations into such conduct were opened respectively but none were converted to litigation. This ratio probably reflects the legal and economic complexity of such matters, illustrated by several High Court decisions in this period.

Table 2. Trends in Competition Policy Actions

	horizontal agreements	vertical agreements	abuse of dominance	mergers	unfair competition*
2008: investigations opened	38	20	13	410	113
matters in which proceedings instituted	4	3	1	0	18
matters in which litigation concluded/withdrawn	5	2	0	0	29
matters in which enforceable undertakings sought	2	0	0	4	65
quantum of pecuniary penalties (AUD)	27 620 000	302 000	0	n/a	220 000
2007: investigations opened	23	13	5	432	14
matters in which proceedings instituted	5	5	1	0	18
matters in which litigation concluded/withdrawn	9	4	1	0	15
matters in which enforceable undertakings sought	4	4	0	8	28
quantum of pecuniary penalties (AUD)	46 282 500	3 846 250	0	n/a	470 000
2006: investigations opened	23	8	2	343	93
matters in which proceedings instituted	5	3	0	1	9
matters in which litigation concluded/withdrawn	6	4	2	1	20
matters in which enforceable undertakings sought	3	2	0	11	40
quantum of pecuniary penalties	9 525 000	899 500	8 000 000	n/a	860 000
2005: investigations opened	44	14	9	260	100
matters in which proceedings instituted	7	1	0	1	12
matters in which litigation concluded/withdrawn	5	7	1	1	19
matters in which enforceable undertakings sought	2	1	0	6	65
quantum of pecuniary penalties	28 560 000	2 236 000	900 000	n/a	n/a
2004: investigations opened	35	15	8	171	124
matters in which proceedings instituted	2	2	0	0	20
matters in which litigation concluded/withdrawn	8	2	0	1	30
matters in which enforceable undertakings sought	5	4	1	7	33
quantum of pecuniary penalties	39 500 625	3 095 000	0	n/a	1 051 000

2003: investigations opened	6	3	1	166	22
matters in which proceedings instituted	5	0	0	1	19
matters in which litigation concluded/withdrawn	6	2	4	0	23
matters in which enforceable undertakings sought	2	0	0	4	23
quantum of pecuniary penalties	4 200 000	2 000 000	0	n/a	n/a

* Covers the unfair conduct provisions in Part IVA and consumer protection / fair trading provisions in Part V of the *Trade Practices Act.* Pecuniary (civil) penalties are not available for breach of these provisions, although criminal fines are available under Part VC of the Act for the offences relating to consumer protection.

Source: Australian Competition and Consumer Commission.

4. Limits of competition policy: exclusions and sectoral regimes

A principal task of reform since the 1990s has been to correct the government-business relationship, in several dimensions. Removing "exemptions" was closely related to rationalising infrastructure regulation, because infrastructure services and regulation provided by states were, by virtue of the state involvement, not subject to Commonwealth competition law. Changing the conception of state-provided services required means to ensure competitive neutrality between the commercial operations of governments and private providers. Reform about exemptions and special treatment involving non-government activities called for reviewing laws and regulations to remove impediments to competition and establishing a common, coherent scheme for assessing and regulating sectoral monopoly problems of access to essential facilities. Removing and discouraging exceptions from competition law was an important element of the Competition Principles Agreement among the Australian governments in the 1990s. The scope of exceptions has shrunk since then, as many were reformed in the course of the review. But many remain.

General principles of exclusion or special treatment

General provisions define how other legislation can create an exemption from the TPA (Section 51, TPA). The Commonwealth and any state or territory can authorise or approve conduct that would otherwise violate the TPA. The procedure for exemption requires transparency and presumes sunset. The legislation must be explicit and specific about the conduct that is to be exempted and about the creation of an exemption. Regulations that implement legislation creating an exemption are subject to a two year sunset. The TPA does not otherwise define or limit the substantive criteria or scope of such exemptions. The statute does not purport to confine exemptions to particular areas nor to announce a rule of construction in the event of purported conflict between other legislation and the TPA. Under the National Competition Policy plan, legislation must be subject to regular review under the Competition Principles Agreement framework (at least once every 10 years), and it is not to be retained unless benefits of the restriction to the community as a whole outweigh the costs. The government enacting it must notify the ACCC (but not necessarily in advance; within 30 days after adoption).

The list of enactments and regulations that confer exemption is long. The ACCC publishes the list on its website and in its annual report. Many of these exemptions are narrow and technical. Some are commonly encountered in other jurisdictions, where they are also difficult to reform. Most arise at state and territorial levels of government. Several deal with marketing arrangements for agricultural products, either by establishing protected monopolies (such as the sugar monopoly in Queensland) or by authorising joint action ostensibly to equalise bargaining power between producers and processors.

Box 5. Laws and regulations creating exemptions from competition law

Commonwealth

Trade Practices Act 1974; s. 173 (merger law treatment of agricultural products)
Australian Postal Corporation Act 1989
Payment Systems (Regulation) Act 1998
Payment Systems (Regulation) Regulations 2006

New South Wales

Registered Clubs Act 1976
Liquor Act 1982
Rice Marketing Act 1983
Poultry Meat Industry Act 1986
Grain Marketing Act 1991
Hunter Water Act 1991
Competition Policy Reform (New South Wales) Act 1995
Competition Policy Reform (New South Wales) Savings and Transitional Regulation 1996
Farm Produce (Repeal) Act 1996
Industrial Relations Act 1996
Health Services Act 1997
Protection of the Environment Operations Act 1997
Totalizer Act 1997
Casino Control Regulation 2001
Coal Industry Act 2001
Gaming Machines Act 2001
Industrial Relations (Ethical Clothing Trades) Act 2001
Wine Grapes Marketing Board (Reconstitution) Act 2003
James Hardie Former Subsidiaries (Winding up and Administration) Act 2005
Racing Legislation Amendment Act 2006
World Youth Day Act 2006

Queensland

Forestry Act 1959
Chicken Meat Industry Committee Act 1976
Gladstone Power Station Agreement Act 1993
Transport Operations (Passenger Transport) Act 1994
Competition Policy Reform (Queensland) Act 1996
Sugar Industry Act 1999

Victoria

State Owned Enterprises Act 1992
Electricity Industry (Residual Provisions) Act 1993
Gas Industry (Residual Provisions) Act 1994
Water Industry Act 1994
Competition Policy Reform (Victoria) Act 1995
Health Services Act 1998
Gas Industry Act 2001
Gambling Regulation Act (GRA) 2003
Outworkers (Improved Protection) Act 2003
Legal Profession Act 2004
Owner Drivers and Forestry Contractors Act 2005

Tasmania

Electricity Supply Industry Act 1995
Electricity Supply Industry Restructuring (Savings and Transitional Provisions) Act 1995
Competition Policy Reform (Tasmania) Act 1996

Western Australia

North West Gas Development (Woodside) Agreement Act 1979
Energy Coordination Act 1994
Competition Policy Reform (Western Australia) Act 1996
Grain Marketing Act 2002
Electricity Industry (Wholesale Electricity Market) Regulations 2004
Electricity Industry Act 2004
Electricity Corporations Act 2005

South Australia

Industries Development Act 1941
Cooper Basin (Ratification) Act 1975
Roxby Downs (Indenture Ratification) Act 1982
Competition Policy Reform (South Australia) Act 1996
Authorised Betting Operations Act 2000
Authorised Betting Operations Regulations 2001
Chicken Meat Industry Act 2003

Northern Territory

Consumer Affairs and Fair Trading Act 1990
Competition Policy Reform (Northern Territory) Act 1996
Consumer Affairs and Fair Trading (Tow Truck Operators Code of Practice) Regulations
Electricity Reform Act 2000
Water Supply and Sewerage Act 2000

Australian Capital Territory

Health Act 1993
Competition Policy Reform Act 1996
Financial Management Act 1996
Government Procurement Act 2001
Road Transport (Public Passenger Services) Act 2001
Territory Records Act 2002
Cemeteries and Crematoria Act 2003
Insurance Authority Act 2005

Source: ACCC.

Government entities and operations

Exemptions for state-related enterprises have been eliminated. One element of the NCP deal was to extend the TPA to government businesses and unincorporated enterprises (notably partnerships). Constitutional allocation of powers limits what the national government can do about restraints on competition that are not imposed by corporations. Conduct by individuals (such as professionals), non-corporate bodies such as marketing boards operating within a state and state government entities has been subject instead to state-level authority. This amounted to de jure exemption from national competition law. The distinction was overcome, and the exemption eliminated, by the agreement among the governments to harmonise their competition legislation and assign enforcement of all of it to the same institutional system. Under the Competition Principles Agreement and the Competition Code, the same substantive rules are applied to entities other than the "corporations" that are subject directly to the TPA.

Competitive neutrality of government-related commercial operations was also implemented in the mid-1990s. Governments at all levels adopted generally similar frameworks of principles and institutions. The policy goal is to eliminate inefficient distortion of resource allocation, by eliminating any commercial advantage that public ownership might confer on entities engaged in significant business activities. The principles only apply to the business activities of publicly owned entities, not to their non-business, non-profit activities. (NCC 1998, p.17) Governments agreed to use a corporatisation model for significant business enterprises, so the prices they charge are calculated on the same basis as their private sector competitors, including all direct and indirect costs, with adjustments, such as debt guarantee fees, tax equivalent payments and commercial rates of return, to offset any cost advantages. Formal arrangements were set up to investigate complaints from private sector businesses about how government businesses implemented the reforms. The competitive neutrality framework is flexible: that is, if the costs would outweigh the benefits for a particular entity and product or service, a government need not apply it. Each government produced a policy statement and a timetable for implementing the reform and setting up a complaints handling process.

The Australian Government Competitive Neutrality Complaints Office, a unit within the Productivity Commission, operates as the Australian Government's competitive neutrality complaints mechanism. It provides independent advice to Government following private sector complaints about unfair competition from the public sector. The Office receives and assesses complaints, proceeds with complaints which require investigation and provides independent advice to the Treasurer on each matter. The Government is not obliged to accept this advice. Most investigations are intended to be finalised and a report sent to the Treasurer within 90 days of accepting a complaint. The Government has undertaken to respond to recommendations within 90 days and for complex complaints a public inquiry may result. The Office received 2 written complaints in 2007-8 and one on 2006-7. The Office also regularly provides informal advice on and assists agencies in implementing competitive neutrality requirements.

Box 2. Box 6. Competitive Neutrality in Practice

The Australian Government applies competitive neutrality to businesses that meet the following criteria:

1. there must be charging for goods or services (not necessarily to the final consumer);
2. there must be an actual or potential competitor (either in the private or public sector) *i.e.* purchasers are not restricted by law or policy from choosing alternative sources of supply; and
3. managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.

De minimis and other small-business exclusion

Authorisation for small businesses to engage in collective bargaining is facilitated, in order to equalise their bargaining positions with larger firms. This is not a blanket exemption, but a simplification of the procedure for obtaining an authorisation from the ACCC, that is, a decision that a practice which is formally prohibited is nonetheless permissible. The Dawson report recommended making this a negative option process of notification to the ACCC. This puts the burden on the ACCC to take action if it objects to collective action. A separate notification is required for each target of the collective bargaining. The regime was introduced in 2007 and thus is still in an early stage. In the 2007-08 financial year, the ACCC received seven collective bargaining notifications. The process may still appear burdensome compared to the benefit of avoiding enforcement action. In circumstances where applicants do not qualify for collective bargaining or where collective bargaining is inappropriate, authorisation is available.

Common general exclusions

Agreements about wages, hours and terms of employment are not covered by the basic prohibition of restrictive agreements in Section 45, but several other prohibitions are applicable to them (51(2)). Notably, the TPA applies to some other labour issues. The TPA was amended in 1996 to authorise the ACCC to take action against labour secondary boycotts. The power was used against the Maritime Union of Australia in a protracted dispute in 1997-98 about corporate restructurings that were allegedly aimed at breaking the union. Its action against MUA and its officials, for using secondary boycotts and other tactics to prevent vessels from sailing unless they used MUA labour, led to an order to implement a compliance programme and pay penalties and costs, along with undertakings by the union and the firms that included a payment (from a firm) to the ACCC to be used to compensate small businesses that were harmed in the dispute. (Freyer, 2006)

Conditions in agreements licensing patents, design copyrights and trademarks are exempted from the TPA, so long as they are limited to permitted topics (Section 51(3)). Terms in patent and copyright licenses must relate to the invention or design or items made with it. Terms in trademark contracts must relate to the kinds, qualities or standards of goods bearing the mark.

Access regime and structural reforms

The TPA's novel system for defining and regulating "access regimes" applies the notion of essential facilities across sectors. The purpose is to promote economically efficient infrastructure use and investment, including promoting competition in markets upstream and downstream from the service. Use of common principles and procedural frameworks is intended to encourage consistent regulation of access in each industry and across industries (TPA, Part IIIA, Section 44AA). The supply of goods, use of intellectual property or use of a production process cannot be a "service" subject to a requirement of access under this system.

The first step, when a user applies to subject a service to the access regime, is a recommendation by the National Competition Council about whether the statutory criteria are met. The basic criteria for "declaring" a service are that access would promote a material increase in competition in some other market and that it would be uneconomical for anyone else to develop another facility to provide it. Other criteria are that service be of "national significance", in terms of size or importance to commerce or the national economy, that access would not unduly risk health or safety, that the service is not already subject to another regime and access would not "be contrary to the public interest." (TPA Section 44G).

The decision to declare the service is made by a minister. The criteria for the ministerial decision are the same as the NCC uses for its recommendation. Those criteria are necessary conditions, but they do not limit the minister's discretion. That is, even if those criteria are met, the minister could decide not to declare.

Terms and prices for access are then to be negotiated commercially with the provider, in principle. But if the parties cannot agree, their disputes are resolved by an "arbitration" proceeding at the ACCC. The outcome of that proceeding can be an order of access or interconnection and specification of terms and charges for it. Prices that the ACCC sets for mandated access must be set to generate revenue at least sufficient to meet the "efficient costs" of providing access, and must include a return on investment commensurate with the regulatory and commercial risks. Price structures must allow multi-part pricing and price discrimination if those would be more efficient, but a vertically integrated provider may not discriminate in favour of its own downstream operation (unless, of course, the costs of serving that operation are lower). Access pricing regimes should give parties an incentive to reduce costs or improve productivity. (TPA, Section 44ZZCA). The ACCC access determinations must take into account the

legitimate business interests of providers, may not deny a provider sufficient capacity to meet its own existing and reasonably foreseeable needs and cannot cause a third party to become an owner of a facility. A service provider may make voluntary undertakings about access terms, which may be accepted by the ACCC.

A state or territory may set up an access regime. If it is certified by the NCC as in compliance with the statutory principles, services covered by that state regime are not subject to the declaration-arbitration process.

Box 7. Proposals to streamline the access regime system

The principal elements of the plan that the government has issued for consultation include:

Council of Australian Governments Competition and Infrastructure Reform Agreement commitments

Binding time limits on regulatory processes: Introduce binding time limits (of generally six months) on decision-makers for regulatory decisions, in place of current target time limits. Would allow 'clock-stopping' for consultation and information gathering and where all parties agree to a suspension. Deemed decisions to apply in certain circumstances.

Limited merits review: Limit merits review to information submitted to the regulator (with few exceptions).

Streamlining Part IIIA decision-making criteria and processes

Binding 'no-coverage' ruling: Allow potential infrastructure investors to seek a binding minimum 20 year exemption from declaration of new infrastructure where that infrastructure would not meet the declaration criteria.

Allow 'fixed principles' in access undertakings: Allow access undertakings to include 'fixed principles' which will apply to subsequent undertakings covering that infrastructure service.

Remove the 'health and safety' criterion: Limit consideration of health and safety issues to the public interest criterion and the arbitration process, rather than under a separate declaration criterion.

Streamline the 'effective access regime' criterion: Services covered by a state/territory access regime would only be exempt from declaration where the regime has been certified as effective under Part IIIA.

Deeming of ministerial decisions: Amend the deeming provision so that in the event of a non-decision the Minister is taken to have agreed with the National Competition Council's recommendation.

National Competition Council (NCC) and Australian Competition and Consumer Commission (ACCC) administrative processes

Declaration applications: Allow the NCC to accept alterations to declaration applications, addressing a current legal uncertainty.

Access undertakings: Allow the ACCC to approve undertakings subject to the infrastructure provider agreeing to amendments to the terms and conditions of the undertaking.

Increase flexibility for regulators: Allow the NCC and the ACCC to make decisions by circulation of papers.

Australian Competition Tribunal processes

Awarding of costs in review processes: Allow costs to be paid or awarded for review of declaration decisions before the Australian Competition Tribunal in certain circumstances.

Remove automatic stay of decisions: When a decision is appealed, the Tribunal to determine whether a stay on decision to declare a service is appropriate.

Decisions relating to the declaration of a service and the certification of state access regimes and the arbitration and access undertaking decisions of the ACCC are subject to review on the merits by the Australian Competition Tribunal. Further appeals to court are possible concerning errors of law. Parties can introduce new evidence at each stage.

Since 1995, there have been over 40 applications for declaration to the NCC. Services at issue include rail, airports, water and sewer, natural gas transportation, electricity transmission and data processing. About a third of these have been declared, in rail, airports and water and sewer services. Despite the general rule, in practice special regimes have been set up for gas, water, electricity and telecoms. Contested actions under the general procedure are mostly about access to railway lines.

Some of these disputes have been time-consuming and costly. There is no binding deadline for the NCC to act, but only an exhortation to use its best efforts to make a recommendation within four months for a declaration and six months for a certification. Those targets are not always met. Litigation at the Australian Competition Tribunal and the courts can continue for years. One matter has been in litigation since 2004. The constant resort to litigation looks to some like "gaming" the system, leading to calls for reform. Suggestions have included eliminating the recommendation stage at the NCC or the declaration decision by the minister, or simplifying the process of appeal about the merits of the declaration decision.

In April 2009, the government announced an intention to revise aspects of the access regime procedures. Key features include binding time limits for decisions and some limits on the merits review by the Australian Competition Tribunal. These proposed reforms follow some of the points of the Competition and Infrastructure Reform Agreement of 10 February 2006, in which governments committed by 2010 to incorporating consistent regulatory principles in access regimes for significant infrastructure facilities. The principles include limiting merits reviews to the information before the original decision maker and binding time limits of six months for regulatory decisions.

Sectoral issues and special regimes

Telecommunications and media

Telecoms is one of the sectors subject to special competition rules. In 1997, the sector was opened up to full competition and regulated access to telecoms infrastructure was enabled via an amendment to the TPA (TPA, Part XIC). This allowed many new providers to enter the market, which over time has lowered prices and increased the range of services available. Regulated access to telecoms infrastructure may be ordered if it is necessary to enable effective competition and in the long-term interests of end users (TPA, Part XIC). The ACCC has generally adopted a total-service long-run incremental cost (TSLRIC) pricing methodology when setting access prices. Anti-competitive conduct in the sector is regulated under Part XIB of the TPA (also added in 1997), which enables the ACCC to issue notices to carriers and service providers that take advantage of substantial market power to engage in conduct that has the effect of substantially lessening competition (TPA, Part XIB). The notices are a predicate for actions in court seeking penalties and damages.

The ACCC is the regulator that applies these sector-specific competition rules. It has the authority to require regulated firms to file their charges (either public tariffs or terms of access agreements) and to maintain their records in a prescribed form to facilitate oversight and enforcement. Another body, the Australian Communications and Media Authority (ACMA), has responsibilities for numbering, industry codes and standards, frequency management and licensing and about some consumer topics such as controlling internet spam and universal service obligations.

The sector-specific competition regime regulates a historic monopoly that delayed the usual reform steps, of privatisation and vertical separation, in part because there was resistance to complete privatisation. The principal services remain highly concentrated. The sector-specific competition regime was designed to aid the transition from a historic monopoly to an openly competitive market where the privatised incumbent, Telstra, would be one of many carriers. But Telstra has been able to retain considerable market power in the new environment, despite measures such as the unbundling of the local loop and the imposition of accounting and operational separation on its functions. It remains one of the most vertically integrated providers in the world, with dominant positions in the fixed-line, mobile, broadband and pay TV segments. Much of the ACCC's enforcement has been about access to Telstra's wires by other providers of DSL data service. Cable TV is a less competitive alternative to DSL in Australia, because Telstra has a controlling share (50%) in the largest cable TV provider.

The Government has recently announced the establishment of a company to build a national broadband network, to operate on a wholesale-only basis. The Government will be the majority shareholder of this company, but significant private sector investment in the company is anticipated. The company will invest up to $43 billion over eight years to fund the rollout and ongoing operations of the network. The Government aims to achieve 90% coverage of all residences with the fibre network, with the remaining 10% to be delivered through wireless and satellite technologies, within the AUD 43 billion. This will effectively supersede Telstra's copper network. The Government has also commenced a wide-scale review of the regulatory regime, examining ways of promoting greater competition across the industry, including measures to better address Telstra's vertical integration, such as functional separation. It is also considering addressing competition and investment issues arising from horizontal integration of fixed-line and cable networks, and telecommunications and media assets.

The Broadcasting Services Act 1992 deals with media ownership and control. It regulates concentration of ownership in broadcasting sectors and ownership across different media. The rules apply to licences for commercial television, commercial radio broadcasting, subscription (pay) television broadcasting, international broadcasting, data-casting transmitters and "associated newspapers" (those that exceed specified circulation levels in a given broadcasting licence area). The primary objectives of the Act relating to the ownership and control rules are to encourage diversity in the control of the more influential broadcasting services.

The rules regulate ownership of the more influential broadcasting services in order to promote diversity of views and to prevent market dominance. The concentration and cross-media rules aim for diversity of owners both within individual markets and across different media platforms. The provisions are based on the concept of control. A person who has company interests exceeding 15% is regarded as being in a position to control the company, although other circumstances are prescribed whereby control of a licence or newspaper may also be achieved. The media ownership diversity rules involve the calculation of the number of "points" (or media groups) in a radio licence area. Transactions are prohibited where they result in an "unacceptable media diversity situation", that is, a metropolitan licence area where the number of points is less than five or a regional licence area where the number of points is less than four. The rules also prevent one person controlling: (a) commercial television licences whose combined reach exceeds 75% of the Australian population; (b) two commercial television licences in the same licence area; (c) more than two commercial radio licences in the same licence area; or (d) more than two of the regulated forms of media (that is a commercial television licence, a commercial radio licence and an associated newspaper) in the one commercial radio licence area.

The ACMA administers the ownership and control rules that apply to broadcasting. This agency represents the merger, in July 2005, of the Australian Communications Authority and the Australian Broadcasting Authority. ACMA maintains a register of media groups and a change of control of a media entity requires notification to ACMA to enable it to enforce these provisions. ACMA may, in certain

circumstances, give prior approval to transactions that will result in a temporary breach of the ownership and control rules. Entry into commercial radio is controlled by the regulator, ACMA, which must take a range of technical and other factors into account when considering whether to make new services available with any licence area. These factors include the requirements of the community within the licence area and any implications for incumbent broadcasters. The Government has reserved the right to determine whether additional commercial television licences may be issued anywhere in Australia by ACMA.

Despite the goal of viewpoint diversity, the number of providers is small and stable. There are three significant free over-the-air television broadcasters. Broadcasting is subject to the access regime. The pay-TV market is also concentrated. Foxtel, with a substantial majority of metropolitan area subscribers, is owned 50% by Telstra. The outcome of measures to promote viewpoint diversity has been to limit the number of providers and protect the incumbents against entry.

Energy: electric power and natural gas

Sector-specific access regimes are applied in a structure that ensures co-ordination with the ACCC's administration of analogous principles of competition law. Restructuring these industries and rationalising the dispersed federal regulatory structures to create coherent national markets and policies is a major accomplishment of the long-term reform process. The move toward integrated national regulation was a COAG priority, which required establishing several new regulators. Some steps remain, and one of the key institutions is being set up in 2009.

The Australian Energy Regulator (AER) is a constituent part of the ACCC, which operates as a separate legal entity. The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks. The AER establishes revenue caps, regulates the revenues and prices of distribution network service providers, establishes service standards for electricity network service providers and establishes ring-fencing guidelines for business operations with respect to regulated transmission and distribution services. The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules in all jurisdictions except Western Australia. In gas, the AER is responsible for approval of certain access arrangements required to be submitted by service providers under the National Gas Law and National Gas Rules, review of annual reference tariff variations in accordance with relevant access arrangements, hearing disputes in relation to the terms and conditions of access for relevant pipelines and approval of competitive tendering processes and terms and conditions of access for competitive tender pipelines as required under the National Gas Law and National Gas Rules. State governments are seeking to introduce legislation to enable the AER to assume responsibility for electricity and gas retail markets (other than retail pricing).

The Australian Energy Market Commission (AEMC) is responsible for rule making and market development. A constitutional curiosity, the AEMC is not a Commonwealth body, although it develops rules for a national market. It is established under the law of South Australia, and the jurisdictions had to enact enabling legislation to recognise its authority. Ministers cannot direct the AEMC about the content of rules that it makes to promote its objectives. The AEMC cannot initiate rule proposals, but it can initiate a review that would lead to a recommendation. The rules AEMC develops deal with the operation of the systems, not with prices.

The Australia Energy Market Operator commenced operations on 1 July 2009, as a single national electricity and gas market operator, taking over functions now performed at the state level for the gas market and functions now conducted by the National Electricity Market Management Company. Its responsibilities will include a new national transmission planning function.

Structural separation of transmission, distribution, production and retail and third-party access to power lines and pipelines were achieved long ago in most areas. Retail contestability is also in place in most areas. Prices for power are comparatively low. Some power companies are still publicly owned (New South Wales). Some once-separated ones are reassembling (South Australia, Victoria). Retail prices are capped in all jurisdictions except Victoria, where the caps were removed after an AEMC study concluded that competition there was sufficient.

Postal services

Part IIIA of the TPA (access to services) does not apply in relation to services provided by Australia Post. These exempted services include bulk interconnection services and incoming overseas mail services. (Australian Postal Corporation Act 1989 (Cth), Section 32D). The ACCC has several regulatory responsibilities in the postal sector. These include assessing notifications about prices for Australia Post's reserved services, dealing with disputes about the terms and conditions for its bulk mail services, and monitoring Australia Post for cross-subsidies between reserved and non-reserved services. Australia Post is subject to the competition provisions under Part IV of the Trade Practices Act.

Liner shipping

Ocean shipping conferences are regulated by a separate section of the TPA. Part X of the TPA permits shipping lines to collectively discuss freight rates, capacity levels and liner scheduling, by exempting agreements on these topics that conform to the sector regulation from the prohibitions of Sections 45 and 47 of the TPA. A review by the Productivity Commission released in 2005 recommended repealing this exemption and relying instead on the general provisions of the TPA for authorising joint actions that would in fact be beneficial to the Australian economy. As an alternative, if repeal was not possible, the Productivity Commission suggested several ways to narrow the scope of Part X. Following this review, the Australian Government decided to retain Part X but to amend it to clarify its objectives, remove discussion agreements from its scope, protect individual confidential service contracts between carriers and shippers and introduce a range of penalties for breaches of its procedural provisions. A further review of Part X is scheduled to be held in 2010-11. The legislative amendments have not yet been implemented.

Railways

Reforms over the last 15 years have addressed the long-standing problem of co-ordinating among states and territories to create an efficient national system. The principal regulatory tool for access to key infrastructure is Part IIIA of the TPA. The ACCC's roles in this sector include assessing codes and undertakings about rail infrastructure access, arbitrating disputes between operators and infrastructure providers and analysing mergers and authorisations.

Financial services

Merger or acquisition proposals involving banks are subject to a process in addition to the ACCC's competition assessment. A national interest test is applicable only to mergers and acquisitions involving financial institutions. This is administered by the Treasurer of the Australian Government under Section 63 of the Banking Act 1959 and Section 14 of the Financial Sector (Shareholdings) Act 1998. Mergers of insurance companies are also subject to additional regulatory reviews.

Disposals of distressed banking assets can be done quickly, without merger-control review by the ACCC, where the stability of the financial system or the interests of depositors could be jeopardised by delay. This exclusion from the TPA was enacted in response to the financial sector crisis of 2008. The amendment enables the Australian Prudential Regulation Authority to intervene quickly. The ACCC is consulted about these transfers, but it does not have power to take action about them under Section 50 of the TPA.

Agriculture

Until recently, there has been an exclusive monopoly over bulk wheat exports. On 1 July 2008 the Wheat Export Marketing Act 2008 came into operation, establishing a system for accrediting exporters of bulk wheat. The new regulatory framework aims to promote the development of an efficient and competitive bulk wheat export marketing industry that advances the needs of wheat growers. To gain accreditation, wheat exporters that own or operate port terminal facilities must provide fair and transparent access to their facilities to other accredited wheat exporters. After October 2009, accreditation will require formal access undertakings under Part IIIA of the TPA, assessed by the ACCC, or a state or territory access regime that is certified as effective after recommendation by the National Competition Council.

Some monopolies involving agriculture are authorised at the level of states and territories. De facto, there had been a monopoly in sugar. All raw sugar produced in Queensland, which produces about 95% of Australia's raw sugar, had been vested in Queensland Sugar Limited. On 1 January 2006 new marketing arrangements for sugar were introduced, removing the statutory vesting of the Queensland sugar crop. The majority of growers retain group marketing arrangements with Queensland Sugar Limited. Exports of rice grown in New South Wales are subject to a protected monopoly. Parties wanting to participate in the domestic rice market must make an application to the NSW Rice Marketing Board to become an Authorised Buyer. Western Australia has supply and marketing boards that regulate potatoes, but its egg market was deregulated in 2005.

Professional, service licensing (state)

A number of professions and services are subject to licensing requirements under state laws and regulations. Licensing requirements that are more stringent than necessary to protect consumers impair competition by deterring or preventing entry. Some states that recognise the qualifications of providers licensed in other states nonetheless require them to pay separate licensing fees to practice. The fee requirement itself impedes entry and dampens competition. Reform may require compensation payments, because states use the funds for other, sometimes related purposes, such as insurance to protect consumers against defaults. The COAG National Reform Agenda programme recognises disparities in state regulation of licensed services as one of the problems it seeks to correct, in order to establish a seamless national economy. A step in that direction was COAG's April, 2009 announcement of a project to establish uniform national regulation of the legal profession.

Pharmacies (state)

Entry into the retail pharmacy business is limited. A national review was undertaken in 2000, which produced recommendations to COAG to remove the restrictions on the number of pharmacies that pharmacists could own while supporting regulations prohibiting non-pharmacists' ownership or control. COAG noted that the ownership restrictions were unnecessary but agreed to only limited recommendations for change on the grounds that more radical reform might create excessive adjustment pressures. Yet no jurisdiction implemented the recommendations, which were abandoned as a result of organised opposition to a major chain's proposal to enter. There is evidently no current plan to renew the reform effort. The restraints are probably raising consumer prices or limiting services. *Ex post* studies have found that removal of similar restraints on retail competition in other jurisdictions, such as Italy, has led to significantly lower prices.

Taxis (state, local)

States still impose numerical limits on the number of taxis allowed, despite the National Competition Policy review process. Queensland, for example, did a National Competition Policy review of its rules in 2000 and determined to retain them and even to extend the controls so that "limousines" could not compete with taxis. In 2004, the Queensland Government stated that it would release new licences in response to performance criteria related to waiting time. As the number of taxis in many markets has declined or held steady despite increasing demand, the cost of a license has increased. That cost represents the value of preventing competition, and hence it is a measure of the cost that the monopoly imposes on the consumer and the economy. Reform in this sector in other countries has often involved compensating license holders for the loss of some of that value.

5. Competition advocacy and policy studies

A key role in policy analysis and recommendations for improvement is performed by the Productivity Commission, the Australian government's principal policy review, research and advisory body on microeconomic policy and regulation, including competition. The National Competition Council also played a role in policy formulation and monitoring in the early years following the implementation of the Hilmer reforms, but its role is now more limited, concerned with declarations of facilities for the purposes of the Part IIIA access regime.

Productivity Commission

The Productivity Commission was created in 1998 by combining three previously existing bodies, the Bureau of Industry Economics, the Economic Planning Advisory Commission and the Industry Commission. The Industry Commission had itself been created in 1990 by combining the Industries Assistance Commission and the Tariff Board. The evolution of roles and titles for these bodies parallels the evolution of Australian policy goals about markets, from industry protection to economic productivity. Its work has been key to the "political economy" of promoting reform, providing evidence and measures to counter the claims of special interests and explain to the community what is at stake and quantify likely gains from reform.

The statutory functions of the Productivity Commission are to:

- hold public inquiries and report on matters related to industry and productivity, including safeguard procedures in international trade,
- provide secretariat services and research services to government bodies such as the Council of Australian Governments,
- investigate and report on complaints about the implementation of the Australian Government's competitive neutrality arrangements,
- advise the Assistant Treasurer on matters related to industry and productivity as requested,
- initiate research on industry and productivity issues, and
- promote public understanding of matters related to industry and productivity.

Consistent with the objective of raising national productivity and living standards, the Productivity Commission's remit covers all sectors of the economy, including the private and public sectors and all levels of government. It is located within the Treasury portfolio. It does not administer government programmes or exercise executive power but rather is seen as and operates as an independent advisory and educative body. Inquiries with recommendations for policy action must be done in response to a request from government. The government responds in detail to recommendations from the Productivity Commission.

The Productivity Commission consists of a chairman and up to eleven other Commissioners. They are supported by 80 professional and support staff. Its budget allocation was AUD 31 million in 2008-09. The Commission publishes about 40 reports and studies per year.

The Productivity Commission's reviews and reports often include recommendations to amend, repeal or adopt laws and regulations. Some of the Commission's recent projects that are directly relevant to competition policy include:

- Review of the Copyright Act 1968: Parallel importation of books (2009; ongoing);
- Review of Price Regulation of Airport Services (2008);
- Inquiry Report into Road and Rail Freight Infrastructure Pricing (2007)
- Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping (2005); and
- Research Report on the Australian and New Zealand Competition and Consumer Protection Regimes (2005).

The Productivity Commission is viewed as an authoritative non-partisan well-resourced body. Its recommendations carry weight with all Australian governments and all sides of politics. While governments do not always accept the Commission's advice, most of its recommendations are typically accepted and its findings are generally endorsed. Commission reports materially contribute to policy debates in Federal, State and Territory Parliaments, as well as generally within the media and broader community.

The ACCC does not have a competition advocacy role. It acts to achieve compliance through a range of mechanisms, including enforcement, education and the administration of the TPA. The ACCC participates, principally by making submissions, in reviews by the Productivity Commission or in consultations on potential amendments conducted by Treasury. It also frequently comments on competition-related issues in the media. The ACCC itself is occasionally called on to do particular studies, sometimes related to enforcement matters or to complaints alleging need for enforcement. Thus, concerns about rising food prices led the Federal Government to commission an inquiry from the ACCC, in 2008, which focused on ways to remove any remaining restrictions on competition in the grocery sector, including planning (zoning) barriers that affect new entrants.

National Competition Policy

Review of legislation was an important, and controversial, element of the National Competition Policy programme. About 1800 laws were reviewed. Nearly half were in the priority areas of water, primary industries, communications, fair trading and consumer protection, insurance and superannuation, health, legal and other professions, planning and construction, retailing, social regulation and transport. That programme effectively ended when the last payments were made to the States in 2005.

The National Competition Council's final assessment report in 2005 indicated that 22% of the priority legislation review and reform task remained incomplete. Had the programme continued, with on-going assessments by the Council and associated payments, some of the difficult areas (such as taxis) may have been dealt with in the second round of reviews.

Table 3. Overall outcomes with the review and reform of legislation

	Proportion of priority legislation complying (%)			Proportion of non-priority legislation complying (%)			Proportion of total legislation complying (%)[0]		
Government	*2003*	*2004*	*2005*	*2003*	*2004*	*2005*	*2003*	*2004*	*2005*
Federal	33	60	64	66	77	89	51	70	78
New South Wales	69	83	88	79	84	94	73	83	91
Victoria	78	84	84	83	86	91	81	85	88
Queensland	61	83	85	92	92	92	71	86	87
Western Australia	31	46	55	54	73	77	44	62	68
South Australia	37	60	69	82	90	94	63	77	83
Tasmania	77	82	84	90	95	96	84	89	91
ACT	59	81	82	97	98	98	85	93	93
Northern Territory	47	79	82	83	90	90	62	83	85
Total	**56**	**74**	**78**	**81**	**87**	**91**	**69**	**81**	**85**

Including areas of State regulation that were being subjected to national reviews and implementation processes.

Source: NCC 2004a & 2005

The National Competition Council advised against drawing conclusions from small differences in the proportion of complying legislation. It noted that the estimates can reflect the differential treatment across jurisdictions—for example, a 'Chiropractors and Osteopaths Act' would be counted once, whereas separate legislation for each profession would be counted twice. On the other hand, in some cases, a jurisdiction's review and reform activity for one issue might encompass several pieces of legislation—for example, reform of the Federal Government's private pensions legislation involved 10 pieces of legislation (NCC 2005, p. 9.5)

The legislative review component of the NCP programme was contentious, in part because it was the aspect where the National Competition Council recommended the majority of the deductions from competition payments. Nonetheless, most legislation was reviewed and many important reforms were implemented.

Box 8. Outcomes of the reform of anti-competitive regulation

In addition to the removal of several statutory monopoly agricultural marketing schemes, there were a wide range of other reforms to regulation that had been assessed as unnecessarily hindering competition. While each of these reforms often only affected comparatively small sectors, or affected larger sectors at the margin, the cumulative impact was significant. In several cases these reforms were based on actions that had been taken by one State, but had not replicated elsewhere. An example was Victoria's 1988 deregulation of alcohol sales which reduced the barriers to entry faced by small bars and restaurants, allowing a much greater diversity of outlets.

Drinking milk prices fell following national reform of the dairy industry, despite the imposition of a 11¢ levy until 2009 on drinking milk to fund an industry adjustment levy.

Shop trading hours were deregulated by the Tasmanian Government in 2002, and while some commentators had predicted a net loss of employment, analysis by the Government had suggested employment would increase by 345 full time equivalent jobs. Since the legislation came into effect, employment in Tasmania's retail sector has increased by 9.1% or 2 900 jobs. As the Government acknowledged, it is not possible to estimate how many jobs were created as a direct result of the removal of restrictions, rather than as a result of other favourable factors such as population growth, increased consumption from higher aggregate employment and the sharp increase in visitor numbers. However, there were also the less measurable gains to consumers in convenience.

Bakeries were de-regulated. The NCP Review of New South Wales *Bread Act 1969* concluded that there was no net public benefit to restricting times for the baking and delivery of bread. The Act was repealed.

Choice of foot treatment increased following the NCP Review of the New South Wales *Podiatrists Act 1989.* Certain foot treatments can now be obtained from nurses and medical practitioners, instead of exclusively from podiatrists.

Veterinary services monopoly was removed in New South Wales and replaced with a specific list of veterinary practices that, on health, welfare and trade grounds need to be restricted to licensed practitioners, enabling a wider range of animal health care services to be provided by both vets and non-vets.

Taxi services. This was an area where the National Competition Council found many jurisdictions non-compliant, although there was some progress compared to the recent past. For example, the Western Australian Government released new taxi licenses following the NCP review, and while the numbers were modest (48 in 2003, 28 in 2004, and a further 40 between 2005 and 2008), these were the first licenses released in 14 years.

Liquor licensing controls relaxed. As a result of an NCP review, the Tasmanian Government removed a requirement that a minimum of 9 litres of wine be purchased in a single sale from specialist wine retailers, which had previously protected hotel bottle shops. New South Wales removed an anti-competitive 'needs test' that hindered the opening of new outlets, and replaced it in 2004 with a 'social impact test'. The Council expressed concerns the complexity and associated compliance costs of this new mechanism (2004, p. x), and this seems to have been borne out by experience. Further reforms in New South Wales flagged in 2008, as concerns were raised about the lack of variety of small outlets that serve alcohol with or without food in Sydney compared to Melbourne.

Sources: NCC (2004), New South Wales (2004), Nieuwenhuysen (2007), Tasmanian Government (2004), Western Australian Government (2004)

COAG National Reform Agenda

The COAG National Reform Agenda builds on some aspects of the NCP process. A part of this agenda is a National Partnership Agreement to Deliver a Seamless National Economy, aimed at reducing unnecessary and inconsistent regulation across jurisdictions and improving process for making and reviewing regulations. Of the 27 identified priority areas, only a few are principally competition problems. Rather, a main theme of creating a seamless national market is reducing inconsistency and cost burdens of regulation. The programme retains the link between meeting targets and a budget incentive. The national partnership payments model involves "facilitation" payments that recognise the net set-up costs and

revenues forgone by States and Territories as a result of implementing reforms, as well as a "reward" component, with payment contingent on independent assessment that milestones have been achieved. The basis for payments differs from the NCP: now, it will be a payment for completion, not a withholding of payment for non-performance.

Table 4. Timeline for national competition Policy

Date	Event
30 October 1990	Special Premiers' Conference establishes joint Commonwealth-State committee on micro-economic reform
12 March 1991	Prime Minister Bob Hawke observed that expanding the scope of the Trade Practices Act would provide significant benefit (in *Building a Competitive Australia* statement to Parliament).
30 July 1991	Special Premier's Conference agrees that competitive markets would benefit Australia, and that a national approach to competition policy would be important.
4 October 1992	Independent Committee of Inquiry into a National Competition Policy for Australia established, chaired by Professor Fred Hilmer
7 December 1992	First meeting of the Council of Australian Governments (COAG)
25 August 1993	Report of Independent Committee of Inquiry into a National Competition Policy for Australia released (Hilmer Report)
25 February 1994	Council of Australian Governments agrees to accelerate microeconomic reform, endorsing the Hilmer Report principles
19 August 1994	COAG agrees in principle to competition policy reform process and releases draft agreements
11 April 1995	COAG signs the agreements to implement national competition policy
11 April 1995	Industry Commission assessment of growth and revenue implications of Hilmer and related reforms published
6 November 1995	National Competition Council (NCC), Australian Competition and Consumer Commission and Australian Competition Tribunal created
30 June 1997	NCC finalises its first independent Assessment of State and Territory Progress with Implementing National Competition Policy and Related Reforms
14 October 1999	PC report on *Impact of Competition Policy Reforms on Rural and Regional Australia* released
26 July 1999	NCC assessment report (second tranche) is released, and Treasurer accepts a recommendation to defer a $15 million payment (25%) to Queensland
3 November 2000	COAG agrees to further guidance to the National Competition Council on how to interpret compliance with the legislative review requirements, that the timeframe for completing the National Competition Policy programme should be extend to 2005, and that the National Competition Council should undertake annual assessments of implementation progress
14 December 2001	NCC's 2001 assessment report (third tranche) released
6 December 2002	NCC's 2002 assessment report (third tranche) released
8 December 2003	NCC's 2003 assessment report (third tranche) released
25 June 2004	COAG's Agreement on a National Water Initiative transferred the 2005 National Competition Policy assessment of progress with water reform to the new National Water Commission
21 December 2004	NCC's 2004 assessment report (third tranche) is released
14 April 2005	Productivity Commission *Review of National Competition Policy Reforms* is released
3 June 2005	COAG agrees to a new reform agenda
15 December 2005	Commonwealth Treasurer, announces the final National Competition Payments to States and releases the NCC's final National Competition Policy assessment. This assessment contained a snapshot of outcomes from the National Competition Policy programme over the period 1995-2005 and final payments recommendations.
10 February 2006	COAG agrees to the National Reform Agenda with the objective of enhancing Australia's human capital and to continue competition reform and regulatory. COAG agrees in principle to establish a COAG Reform Council (CRC) to replace the NCC in reporting to COAG annually on progress in implementing the National Reform Agenda.
20 April 2006	The National Water Commission provided the 2005 National Competition Policy assessment of progress with water reform.
13 April 2007	COAG agrees that the CRC's role is to monitor progress in implementing National Reform Agenda reforms and to assess the costs and benefits of reforms referred to it unanimously by COAG. COAG also amends the Competition Principles Agreement.
20 December 2007	COAG establishes the Business Regulation and Competition Working Group to hasten progress on a new agenda of regulatory reform
29 November 2008	COAG agrees to National Partnership to create 'Seamless national economy' with $550 million in payments linked to outcomes over six years

Source: King & Maddock 1996, Smith 1996, CRC 2008, NCC, Federal-State Committee.

Regulatory impact assessment

Systems for requiring regulatory impact statements are well established in Australia. Such statements are mandatory for decisions by all government bodies. A checklist similar to the one in the OECD competition assessment "toolkit" is incorporated into the preliminary assessment guide used in the Office of Best Practices Regulation.

6. Conclusions and policy options

A generation of reform to stimulate competition has laid a strong foundation for resisting backsliding. The well-conceived and well-implemented National Competition Policy programme, building on the trade, fiscal and monetary reforms in the 1980s, has produced clear economic performance benefits, largely from correcting substantial weaknesses in important infrastructure sectors and eliminating inefficient constraints on competition. The Productivity Commission, in its current form a product of the reforming drive of the national competition policy era, is a model for institutionalising evidence-based policy-making.

Strong institutions and political support for competitive reform should help Australia preserve the gains and the process that produced them even in the current difficult economic conditions. Before the economic crisis, there were some signs that policy makers were looking beyond competition reforms. The transition from a "national competition policy" to a "national reform agenda" suggests decision-makers felt that the competition problems have been resolved. Australia is certainly in a much better position than it was 20 years ago. But the effort of restructuring government-provided network services and legislation review to eliminate restraints has put Australia into the mainstream. It now has the same issues that are found in many, if not most, OECD Member jurisdictions. Reform in electric power is incomplete. Structural separation of the historic telecoms monopoly is not on the agenda; rather, the government is now trying to set up an independent open access fibre optic network. The extent of the derogations from competition law, from liner shipping to taxicabs, pharmacies to agricultural marketing boards, that survived the process which supposedly would cull them reveals the incorrigibility of some issues. Australia's experience shows that even a comprehensive reform programme will have trouble with these familiar hard cases. That does not mean they should be ignored, though.

After 15 years of experience, some aspects of the National Competition Policy package may need more thought. The access regime system has disappointed some of its original proponents. It has not quite been a general system. Rather, in most of the usual network-industry settings, the regime has been tailored by legislation to fit sectoral considerations and interests. In less obvious settings, the complex, time-consuming process has become a source of concern. The current proposals to streamline the process can do no harm, but they may not end the controversies. Any process can be gamed; where much is at stake, parties and their lawyers will find ways to string it out as a negotiating tool.

The substantive content of Australia's competition law has been subject to major review in the last six years. Most of the amendments recommended in the Dawson review and in a subsequent Senate Committee review have been implemented by the Trade Practices Legislation Amendment Act (No. 1) 2006. Some are recent, such as the cartel reforms. In these circumstances it is fair to say that Australian competition law is in a transition period and that it will take some years for the dust to settle, enabling proper assessment to be made of the advances. Nonetheless, some of the changes have raised particular questions.

Despite being the subject of extensive amendment in the last two years, the scope and effectiveness of the misuse of market power prohibition may be even less clear now than it was prior to the amendments. To some extent, this reflects the significant influence of small business 'politics' in Australian competition law. A consistent legally principled and economically robust approach to interpretation of this prohibition

by the courts over coming years will be critical to its prospects. It is of particular concern that there is now a prohibition that is intended to address predatory pricing but that has the potential to curb discounting by large corporations. Replacing a market power criterion with a market share threshold invites inefficient outcomes, promising protection of the interests of smaller firms but potentially resulting in higher costs to the consumer. Elaboration of ways to interpret "taking advantage of" market power may add complexity and uncertainty, too.

The design of the cartel offences has raised questions about their relationship with the civil prohibitions. Amendments and further explanations have addressed concerns that were expressed about coverage of "joint venture" activity. The authorisation and notification processes remain available. Conduct that enhances efficiency is not excluded from the prohibition. In Australia's two-tier regulatory framework, consideration of efficiencies is the domain of the administrative agencies, the ACCC and the Australian Competition Tribunal, in deciding whether to grant authorisations. But it will be costly, and perhaps inappropriate, to require economic actors to apply for prior authorisation of conduct that as a matter of policy should not be prohibited.

The priority given in Australia in the last 10-15 years to anti-cartel law and enforcement is in line with international trends. That said, there is some debate over whether the government has achieved the right balance in connection with the recent amendments given the scope of the new offences and prohibitions and the approach taken to joint venture activity. Whether concerns expressed about the over-reach of the provisions are borne out will become evident in the next few years. Inevitably, assessments in this regard will be influenced by the way in which the ACCC approaches enforcement, including the criteria and processes that it applies in distinguishing between criminal and civil cases and the outcomes in the early cases that are prosecuted.

The *per se* prohibition on third line forcing is difficult to justify on economic grounds. This is borne out by the large number of notifications received by the ACCC for such conduct each year, almost all of which are considered to raise insufficient competition issues to concern the Commission. The Dawson Committee recommended removing *per se* liability for third line forcing and subjecting it to a competition test, consistent with other forms of exclusive dealing.

Penalties for breach of the prohibitions on anti-competitive conduct have been low by international standards. However, under the civil penalty regime, this may now start to change with the 2007 amendment to the penalty maxima (allowing for calculation based on the gain from the contravention or 10% of turnover). For serious cartel conduct, the introduction of criminal sanctions is a significant step, and the 10 year maximum jail term is a clear signal that the legislature expects custodial sentences to be imposed when convictions are secured. The *Trade Practices Act* also offers a range of other forms of penalty or remedy such as community service orders, adverse publicity orders and disqualification from management. However, with the focus very much on penalties, these sanction options are seldom invoked.

The ACCC is generally highly regarded as an independent and effective enforcement agency. Well resourced, it is a model for combining complementary functions of sector regulation, consumer protection, market oversight and competition enforcement. Reflecting a formal Government decision on the separation of policy and enforcement functions, the ACCC eschews any formal or substantial role in competition advocacy or policy development, and it is perhaps for this reason that it allocates relatively few resources to its research and analysis division and has limited engagement with external academia.

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. On one view, it could do more – for example, all non-merger authorisation applications could be made directly to the Tribunal. On the other hand, since the Dawson

review there have been improvements made by the ACCC in response to concerns about timeliness in the authorisation process, and there are seen as significant practical benefits associated with the current system, particularly for small business. There is no longer a good case in Australia for a specialised competition court. Appreciation of the performance of the Federal Court has grown considerably in recent years. Each of these institutions appear to strive for continuous improvement in substantive calibre of their decision-making and the efficiency of their processes.

Cartel criminalisation brings a new agency into the enforcement arena in the form of the DPP. There are potentially substantial benefits for objectivity and independence in decision-making by virtue of the separation of investigatory and prosecutorial functions between the ACCC and DPP. However, reaping such benefits is contingent on a smooth and close working relationship between the two agencies. The preparedness of the DPP to amend its Prosecution Policy to accommodate the ACCC's policy on immunity is an early good sign in this respect, as is the considerable effort being made by senior ACCC and DPP representatives to participate together in conferences and explain the approach that they propose to enforcement of the new regime. The true test lies ahead in the decisions that will need to be made in connection with actual cases.

As compared with the high public profile and strong government backing of the enforcement activity of the ACCC, support for private enforcement of competition law, particularly about cartels,is less clear. The law provides for a right of action to recover damages, but it is relatively seldom invoked, and class actions by or on behalf of small traders or consumers are particularly unusual. (The ACCC can seek damages on behalf of persons who have suffered loss or damage as a result of a contravention of most provisions of the TPA (Section 87(1B), but it has done so only in consumer protection matters, not cartels or other competition cases.) The reasons for the lack of private enforcement relate in large part to the lack of financial incentives for such actions. There are also significant impediments to obtaining the information required for proof of liability and damages. In other countries private enforcement has been recognised as making an important contribution to enforcement, and regulators have led the way in exploring avenues for facilitating private actions while ensuring at the same time that public enforcement is not undermined.

The Treasury is responsible for advising the Minister on proposals for amendments, and does so in consultation with businesses, consumer groups and the ACCC. The Treasury is currently consulting with the public on possible amendments to deal with creeping acquisitions and possible amendments about the meaning of "understanding" under Section 45. The extent of consultation on law reform with the business sector and profession has increased recently.

The recent amendments to the TPA follow the detailed, prescriptive and complex style of statutory drafting that is a hallmark of the *Trade Practices Act*, as well as many other pieces of Australian legislation. This style seeks logical clarity and completeness, through precise definitions and explicit listing of possible applications, perhaps in an effort to close loopholes in advance. But a disadvantage of this style is that it encourages parties and judges to focus on logical analysis of the words of the statute rather than on the legislation's fundamental concepts and purposes.

Policy options for consideration

Consider more vigorous action to promote competition in telecoms and electric power

Considerable progress has been made toward setting up a competitive market for electric power on a national scale. Nonetheless, continued public ownership and retail price control may be hindering competition. To be sure, competition assessments have concluded that there is now adequate competition in Victoria and South Australia. Further privatisation and removing the ceiling on retail prices should be considered. Since the creation of the National Electricity Market, prices have risen faster in New South

Wales, where there is still a public monopoly, than in other states in eastern and south-eastern Australia, yet productivity gains have been smaller (OECD, 2008). Removal of retail price controls would depend on the state of competition in retail markets. As markets increasingly connect and competition expands, the need for retail price regulation to control market power should decline. States and territories may be using their price-control powers to support other policy objectives. As the retail market becomes competitive, though, those other objectives should then be achieved by less inefficient means.

Similarly, the continued, albeit indirect, public ownership interest in the historic telecoms monopoly and the failure to separate completely the network-monopoly elements from its competitive operations may be dampening competition and complicating regulation. Consideration should be given to separating infrastructure management from service provision, notably between the management of broadband Internet access infrastructure and marketing activities, in order to encourage construction of a fibre optic network without impairing competition. The plan for a separate fibre optical network is a promising approach. The government has announced that this network will be wholesale only. The government may invest up to AUD 43 billion with the private sector. Its financial involvement in constructing a fibre optic Internet system should not end up strengthening the dominant position of the incumbent. Competition and diversity of programme sources could also be enhanced by divesting Telstra from its ownership relationship with pay-TV providers.

Finish the unfinished business of the NCP legislation review

Some exemptions and special regimes remain, despite the 10 year programme of review and revision. These include liner shipping, at the national level, and state-level items such as taxis and pharmacies. The economic performance benefits of removing these remaining constraints may well be less than those of reforming utility infrastructure services. But a principle of equity, of eliminating special privileges and the rent-seeking abuse of regulation, as well as the prospect of some additional efficiency benefit justifies taking action. These special-interest protections are common in other jurisdictions, of course, and they have proven to be difficult to remove there too. Incumbents that benefit organise to retain their advantages, and overcoming that influence may require motivating competing interests. For example, consumer complaints in Ireland about poor taxi service achieved little; instead, open entry followed a lawsuit by would-be competitors who argued successfully that regulations limiting the number of licences denied them a constitutional right to engage in the business. Pharmacists' efforts to prevent entry have been countered by mass market retailers. Doubt about the effects of reform can be met by citing successful experience from countries such as Italy, Norway and New Zealand that have relaxed or eliminated controls on pharmacy chains or on entry by other firms.

Maintain the regular review to identify and correct constraints on competition

Competition issues are less prominent in the current COAG Reform Agenda than they had been under the National Competition Policy. The new themes, of harmonisation and coordination across jurisdictions to achieve a seamless national economy, are important, and if achieved they will support healthier competition. Eliminating inconsistencies about regulations such as construction codes, the environment and workplace health and safety will encourage entry. But the institutions supporting these efforts should also follow through on the NCP plan of regular reviews of the constraints that were nonetheless retained, to check whether the reasons for retaining them are still valid and to require rent-seekers to justify their special treatment.

Eliminate the special prohibition of predatory pricing, or remove the 'market share' element

It is questionable whether there is sufficient evidence to support a view that the general prohibition under Section 46 does not cater adequately for predatory pricing cases. In its current form, the new dedicated prohibition risks causing undue and unproductive uncertainty in the business sector about pricing decisions and may even have a 'chilling' effect on competitive behaviour; in particular in light of the replacement of the 'power' element with a 'share' element in the predatory pricing prohibition. The current government has been thwarted in the Parliament in its attempts to address these concerns. In light of this, the government should monitor this area and take advantage of future opportunities to remove at least the market share aspect of the Birdsville amendment when they arise.

Clarify the scope of the per se prohibitions on cartel conduct and the approach to exemptions

The statutory regime applicable to cartel conduct appears complex and duplicative. As a step toward rationalising it, the existing per se prohibition on exclusionary provisions could be repealed, given its substantial overlap with the new *per se* prohibitions on output restriction and market allocation. Alternatively it could be amended to narrow its application to collective boycotts and thereby minimise the extent of overlap with the new prohibitions. The Dawson Committee made recommendations for amendment of the exclusionary provision prohibition that could be re-examined in light of the recent reforms.

The new *per se* prohibitions are generally consistent with the guidance of the OECD 1998 Recommendation, with respect to the categories of conduct that should be regarded as the most serious of antitrust violations. The OECD also recommended that prohibitions not extend to conduct that is "reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies." (OECD, 1998) Australian competition law relies on the authorisation procedure to recognise efficiencies and offer protection correspondingly. The availability of this ex-ante protection has been relied on in answer to concerns about the breadth of the new cartel prohibitions, as has the assurance that prosecutorial discretion will be exercised conservatively. Whether this is an optimal approach in light of the imposition of criminal liability is a matter that could be revisited once there has been some experience with enforcement of the new regime.

Make third line forcing subject to a competition test

Third line forcing should not be subject to a per se prohibition. It is inefficient and overly burdensome to require firms to notify conduct that in the majority of cases has been shown to be either benign or even pro-competitive. In light of the fact that Australian competition law is currently in a state of flux, with amendments having recently been made or under consideration for most of the prohibitions under the *Trade Practices Act*, a review of whether Australia's particular economic conditions continue to justify strict liability for third line forcing would be timely.

Consider including economic efficiency in competition analysis, rather than something outside it

The separation of competition and efficiency considerations is a long-established feature of competition regulation in Australia, reflecting initial concerns about judicial capacity to deal with efficiency analysis. In some other jurisdictions, efficiency considerations are incorporated into the test for infringement, such as in assessing vertical restraints under a "rule of reason". Given the significant development in Australian competition law jurisprudence over the last 35 years, there may be an opportunity to reflect on and possibly reconsider the two-tier approach to adjudication in the future. Any such reconsideration should acknowledge the substantial practical benefits associated with the way in which the authorisation procedure currently works for non-merger conduct, as well as the effectiveness of the informal clearance process for mergers.

Support private enforcement of competition law

Private enforcement has the potential to complement and strengthen public enforcement of competition law. Where private litigation has had a low profile, raising that profile requires a champion who will take an impartial principled position and consult widely and meaningfully with all stakeholders. The Australian Law Reform Commission might be given a reference to hold an inquiry into the subject. The ALRC has previously held inquiries into matters of trade practices law and is a highly regarded independent body. The issues are likely to range across areas of evidence and procedure, and thus the ALRC may be better positioned and skilled for this purpose than a body like the Productivity Commission. As part of such an inquiry, impediments to private litigation, in particular the requirement for ministerial consent where the relevant conduct has occurred outside Australia, could be reviewed.

NOTES

1. *Re Qantas Airways Limited* [2004] AComptT 9.

2. *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42, 677 (Trade Practices Tribunal, as it was then called).

3. International Competition Network, *Anti-Cartel Enforcement Manual, Cartel Working Group Subgroup 2: Enforcement Techniques"*, Chapter 2, Drafting and Implementing an Effective Leniency Programme, p10 [2.6.7], at *www.internationalcompetitionnetwork.org/media/library/Cartels/ManualIntro-2006.pdf*.

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