



DEPARTMENT OF ECONOMICS

ISSN 1441-5429

DISCUSSION PAPER 56/13

## **Agenda for National Competition Policy inquiry**

**Stephen P. King and Graeme Samuel**

©Monash Business Policy Forum, 2013.

Suggested citation: *Agenda for National Competition Policy Inquiry*(2013)  
Monash Business Policy Forum, Monash University, Faculty of Business and Economics,  
Caulfield, Victoria, Australia.

This report has been prepared for the Monash Business Policy Forum by:

Chris Jose, Partner, Herbert Smith Freehills

Stephen P. King, Co-Director, Monash Business Policy Forum, Monash University

Graeme Samuel, Co-Director, Monash Business Policy Forum, Monash University

Inquiries to: [stephen.king@monash.edu](mailto:stephen.king@monash.edu)  
[graeme.samuel@monash.edu](mailto:graeme.samuel@monash.edu)

The Forum wishes to thank Professor Bryan Horrigan, Dean of Law at Monash University for his advice on unconscionable conduct and Hannah Lipshut and Sindy Yuen for their research assistance. The views reported in this document are those of the authors and of the Monash Business Policy Forum and should not be attributed to specific members of the Forum.

© 2013 Stephen P. King and Graeme Samuel

All rights reserved. No part of this paper may be reproduced in any form, or stored in a retrieval system, without the prior written permission of the author.

# Introduction

---

The recently elected federal government has announced that it will carry out a 'root and branch' Review of Australia's competition laws.

What should such a Review cover?

In this report, we consider the key areas that need to be covered by the Review. We highlight the key issues and, in some areas, present potential directions for reform.

The aim of this report is to present an agenda – not to present the 'solutions'. The first step of any reform process is to outline the scope of inquiry. That is the aim of the current report.

This report is divided into two parts dealing with two key influences on the continuing success of the National Competition Policy that emerged from the Hilmer report of 1993.<sup>1</sup>

The first part looks at Australia's core competition statute, the *Competition and Consumer Act 2010*, and considers the parts of this Act that should be considered by the Review and the areas that should be 'outside scope'. We make this delineation on both practical and policy grounds. In particular, the Review should consider how the competition provisions of the Act, and its operation and administration, can best serve the objective of enhancing the welfare of Australians.

The second part of this report considers areas outside the *Competition and Consumer Act* that impact on National Competition Policy objectives and which most urgently require attention. In particular, this part of the report focuses on the need for an integrated reform process of the type that emerged from the Hilmer report.

The recommendations of this report are summarised below. The Forum believes that these recommendations should form the basis of the Terms of Reference for the Review.<sup>2</sup>

---

<sup>1</sup> Commonwealth of Australia (1993) *National Competition Policy*, Australian Government Publishing Service, Canberra.

<sup>2</sup> For convenience, the terms of reference for the Hilmer and Dawson inquiries are provided in the appendix to this report.

# Recommendations

---

## Recommendations relating to the review of the *Competition and Consumer Act 2010*

### **Recommendation One: Objective of Part IV of the Act**

The Review should consider the objective of Australia's competition laws in Part IV of the Act. It should consider whether or not an explicit objective for these laws needs to be added to the *Competition and Consumer Act*, in addition to the overarching objective in Part 2 of the Act. At a minimum, such an objective should be based on sound judicial precedent, both here and overseas, that the objective of competition laws is to protect the competitive process, not to protect individual competitors.

### **Recommendation Two: Review of Part IV of the Act**

The Review should focus on the competition provisions in Part IV<sup>3</sup> of the *Competition and Consumer Act 2010*. Other parts of the Act, for example, Part VI (enforcement and remedies) should be addressed to the extent that they flow from the areas of key focus. The review of Part IV should be influenced by the comparative review of international approaches to competition laws (see Recommendation Seven) and should specifically include:

- a light-touch review of the relatively new cartel laws;
- an in-depth review into the concept of 'contract, arrangement or understanding' (the current test for 'collusion');
- assessment of the ongoing utility and drafting of the exclusionary provision law in section 4D of the Act;
- a review of Australia's inconsistent approach to joint ventures;
- either the removal of the prohibitions against anticompetitive disclosures in Part IV, Division 1A, or, if retained, amendments to give them appropriate general application;
- a review of the unsuccessful provisions in section 46(1AA) that attempt to deal with below cost pricing (the so-called Birdsville Amendments);
- rejection of amendments to misuse of market power laws (section 46) that aim to protect competitors rather than the competitive process;
- rejection of an 'effects' test for section 46; and
- reassessment of whether or not third line forcing (sections 47(6) and (7)) should continue to be *per se* illegal rather than subject to the usual competition test.

---

<sup>3</sup> This includes section 4D (exclusionary provisions) and Part VIII (resale price maintenance) of the Act which deal with specific conduct prohibited by provisions in Part IV.

**Recommendation Three: Exclusions from the Review**

The Review should exclude the industry specific regimes in Part XIB and XIC (telecommunications) and Part X (international liner cargo shipping) – while these provisions may need review, any such review should be part of industry specific inquiries. The Review should not include a broad-based review of the Australian Consumer Law – this relatively new law is still being ‘tested’ in the market place, by regulators and by the Courts. The Review should not include Part IIIA (which is currently the subject of a detailed review by the Productivity Commission).

**Recommendation Four: Authorisation, notification and clearance**

The Review should analyse the interaction between the laws explicitly regulating competitive conduct and the authorisation/notification/clearance procedures in Part VII of the Act. The aim of this analysis should be the simplification of the law and improving the accessibility to these processes that allow for appropriate exemption from specific competition law prohibitions where the benefits of such exemptions outweigh the detriments or otherwise provide business certainty through clearance. The Review should consider the current merger clearance processes (informal and formal). It should consider whether or not the 2007 reforms (that introduced formal clearance and required merger authorisations to go to the Australian Competition Tribunal) should be amended or reversed.

**Recommendation Five: Institutional structures**

The Review should consider the institutional and governance arrangements for Australia’s competition laws and, more broadly, Australia’s regulatory institutions established under Parts II, IIA, III and IIIAA of the Act. The Review should consider if the institutional and governance arrangements of Australia’s competition laws can be improved. The Review should specifically consider the current roles and allocation of functions and powers to the Australian Competition and Consumer Commission, National Competition Council and Australian Energy Regulator and whether institutional reforms would enhance the operation of both Australia’s competition laws and other relevant business regulation.

**Recommendation Six: Small business**

A key focus of the Review should be on small business. The Review should consider how best to meet the legitimate needs of small business through the Act, while maintaining appropriate competitive safeguards for and constraints on small business. The Review should consider whether it is appropriate to extend any parts of the Australian Consumer Law, such as the laws on unfair contracts, to small business. The Review should consider whether the current notification and authorisation procedures and provisions supporting Industry Codes could be improved to better assist small business.

### **Recommendation Seven: International approaches**

The Review should consider overseas experience in detail to ensure that Australia's competition laws are consistent with international best practice and whether international approaches suggest that there are opportunities to simplify and improve the law.

## **Recommendations relating to the broader review of Australia's national competition policy**

### **Recommendation Eight: Anticompetitive legislation and regulation**

The Review should focus its attention on areas where legislation and government regulation impede or create barriers to competition. It should consider a process for the on-going review of such market-level restrictions, and a methodology for evaluating the costs and benefits of those restrictions.

### **Recommendation Nine: Promoting competition policy reform**

The Review should consider the appropriate processes and institutional structures to promote competition policy reform at all levels of Australian government. It should examine alternative ways to create appropriate incentives for competition reforms and to imbed appropriate checks and balances into the legislative and regulatory processes to ensure that anti-competitive restrictions that may harm Australia's well-being are avoided and eliminated.

### **Recommendation Ten: Advancing competition policy**

The Review should provide a preferred process and timeline for advancing competition policy together with recommendations to ensure that the reform process is both inclusive and fair.

### **Recommendation Eleven: Institutional competition 'gatekeepers'**

The Review should consider the role of institutional 'gatekeepers' at both the state and federal level. The 'gatekeeper' would provide a 'competitive check' on anti-competitive regulations and carry out legislative review against competition principles. The Review should consider the role of these institutions, how they would operate, their interaction with government and their preferred structure.

### **Recommendation Twelve: Labour mobility, movement of goods and services and barriers to entry or exit**

The Review should consider three particular areas to test its recommendations for a process of competition reform:

- Restrictions on labour mobility in Australia;
- Restrictions on the free movement of goods and services within, into and out of Australia; and
- Restrictions that create barriers to entry or exit for specific industries.

The reform process must be able to deal with these three areas in a robust way to ensure that the reform process moves forward in these three areas.

# Part 1: The broad review of Australia's competition laws

---

## The objective of Australia's competition laws

The objective of the *Competition and Consumer Act* is stated in section 2 of the Act:<sup>4</sup>

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.

This is a broad, over arching objective that is appropriate for an Act that covers a wide range of conduct and a wide range of industries. However, more guidance could be provided by the Act on the specific objective of the competition provisions in Part IV of the Act.

**The aim of competition laws is the protection of competition, not the protection of specific competitors.**

It has been recognised by the Courts in Australia that the aim of competition laws is the protection of competition, not the protection of specific competitors. For instance, the High Court stated when considering section 46:<sup>5</sup>

...The objective [of section 46] is the protection and advancement of a competitive environment and competitive conduct by precluding advantage being taken of "a substantial degree of power in a market" for any of the proscribed purposes.

...

But the object of s.46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure'

---

<sup>4</sup> The then *Trade Practices Act 1974* originally had no objects clause. Section 2 was inserted into the Act in 1995 as part of the Hilmer reforms (by the *Competition Policy Reform Act 1995*).

<sup>5</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*. [1989] HCA 6, Mason CJ and Wilson J at [2] and [24]. Similarly, Deane J stated at [2], "The objective is the protection and advancement of a competitive environment and competitive conduct by precluding advantage being taken of 'a substantial degree of power in a market' for any of the proscribed purposes."

each other in this way. This competition has never been a tort and these injuries are the inevitable consequences of the competition s 46 is designed to foster.

This has been affirmed in other Court decisions, including by the High Court in the Boral predatory pricing case:<sup>6</sup>

The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor.

The Dawson committee endorsed this approach in 2003,<sup>7</sup> as did the Senate Committee inquiry into the effectiveness of the *Trade Practices Act* 1974 in protecting small business (2004).<sup>8</sup>

**The aim of protecting the competitive process – to enhance consumer welfare – is consistent with international best practice**

The approach is consistent with best practice from overseas jurisdictions.

For example, the US Department of Justice notes that the objective of US relevant antitrust laws is the protection of the competitive process, not the protection of individual businesses from the rigours of competition.<sup>9</sup> Indeed, the US Supreme Court stated that:

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.<sup>10</sup>

The Australian Courts have recognised that these principles from US antitrust decisions are reflected in Part IV of the Act. For example:<sup>11</sup>

The structure of Pt IV of the Act does, despite the considerable textual differences, reflect three propositions found in the United States antitrust decisions. The first is that these laws are concerned with "the protection of *competition*, not *competitors*". The second, stated in *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, is that "[e]ven an act of pure malice by one business competitor against another does not, without more,

---

<sup>6</sup> *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5 per Gleeson CJ and Callinan J at [87].

<sup>7</sup> Formally, Commonwealth of Australia (2003) *Review of the competition provisions of the Trade Practices Act*, Canberra, January. The Dawson inquiry considered Part IV and related provisions of the (then) *Trade Practices Act* 1974. In our opinion, the current review should be more expansive than the Dawson review.

<sup>8</sup> See paragraphs 1.18 to 1.26 of the Inquiry Report, March 2004.

<sup>9</sup> U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008) at Chapter 1 (IIID).

<sup>10</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

<sup>11</sup> *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5 per Gaudron, Gummow and Hayne JJ at [160].

state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'." The third, which appears from *Cargill Inc v Monfort of Colorado Inc*, is that it is in the interest of competition to permit firms with substantial degrees of power in the market (or, in the United States, a dominant position) to engage in vigorous price competition and that it would be a perverse result to render illegal the cutting of prices in order to maintain or increase market share.

At the same time, the European Union has moved to more explicitly make consumer welfare and productivity the overarching objective of its competition laws. While the laws protect the competitive process, it is recognised that competition is not an end in itself. Rather the competitive process leads to benefits, such as improved choice, lower prices and improved productivity that benefit consumers. For example, in 2005, Neelie Kroes, the European Competition Commissioner, noted that:

Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.<sup>12</sup>

One of the most recently enacted competition laws is Malaysia's *Competition Act 2010*<sup>13</sup> that usefully captures the relevant objective:<sup>14</sup>

An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers...

Competition laws aim to protect the competitive process in order to enhance consumer welfare. This relationship is recognised in parts of the *Competition and Consumer Act*. For example, section 152AB states that the objective of the Telecommunications Access Regime embodied in the Part XIC of the Act "is to promote the long-term interests of end-users".

### **The Review needs to consider the objective of the competition law provisions in Part IV of the Act.**

The above discussion about the objectives of the competition laws has the clearest application to Part IV of the *Competition and Consumer Act*.<sup>15</sup> The Act is, however, very broad in scope and different objectives

---

<sup>12</sup> Neelie Kroes (2005) *Speech to the European Consumer and Competition Day*, London, 15 September.

<sup>13</sup> This law came into effect from 1 January 2012.

<sup>14</sup> *Competition Act 2010* (Malaysia), Preamble.

<sup>15</sup> The may also equally apply to the industry specific provisions in Part XIB which deal with specific anticompetitive conduct in the telecommunications industry.



may apply to different parts of the Act. This point was expressed as follows by Chief Justice French AC of the High Court of Australia:<sup>16</sup>

Those who every now and again descend from the upper reaches of competition law practice into the real world will have noticed that many people in small business and their families and friends are unlikely to be greatly concerned about making distinctions between the protection of competitive processes and the protection of competitors. They will be concerned about market place bullying or the oppressive use of power, even if it falls within the boundaries of legitimate competitive conduct. The political process has registered and given legislative effect to those concerns. One development of importance in that respect has been the enactment of Pt IVA of the Trade Practices Act relating to unconscionable conduct.<sup>17</sup> The possibility that within the one Act there may be conceptual discontinuity between the objectives of competition law and the objectives of protecting particular classes of player has not proven to be an insuperable difficulty to legislators. And it must be said that when provisions serving different purposes are siloed in different parts of the one statute, the problem is perhaps less acute for the lawyer and courts than when different purposes are reflected in one section of a statute.

The Review of the competition provisions of the Act needs to consider the objective of the competition law provisions in Part IV. Is the overarching objective presented in section 2 of the Act sufficient or should the Act make the objective of the competition laws explicit? If a 'competition law objective' is made explicit, what should it be? Australian and international experience shows that, at a minimum, the explicit objective of competition laws is to protect the competitive process, not to protect individual competitors. However, it may be desirable to expand on this 'minimal' objective to make it clear that the objective of Australia's competition laws are to protect the competitive process in order to enhance the welfare of Australian consumers.

### **Recommendation One: Objective of Part IV of the Act**

The Review should consider the objective of Australia's competition laws in Part IV of the Act. It should consider whether or not an explicit objective for these laws needs to be added to the *Competition and Consumer Act*, in addition to the overarching objective in Part 2 of the Act. At a minimum, such an objective should be based on sound judicial precedent, both here and overseas, that the objective of competition laws is to protect the competitive process, not to protect individual competitors.

---

<sup>16</sup> French, R (CJ) (2009) *Speech to the Law Council of Australia Trade Practices Workshop*, Yarra Valley, 15 August, 'Surfing the wavefront', (2010) 18 TPLJ 77.

<sup>17</sup> Now Part 2-2 of the Australian Consumer Law.

## Focus of the review of competition laws.

Australia's key competition and consumer laws are embodied in the *Competition and Consumer Act*. This legislation covers a wide range of areas including:

- The procedures governing access to 'essential' services (Part IIIA);
- The competitive interactions between businesses (Part IV)<sup>18</sup>;
- The authorisation and notification of conduct by business that could otherwise raise a legal liability (Part VII);
- Merger clearance and authorisation (informal process and Part VII);
- Prices surveillance (Part VIIA);
- Procedures for review of decisions made by the ACCC to the Australian Competition Tribunal (Part IX);
- International liner cargo shipping (Part X);
- Specific telecommunications laws (Part XIB and XIC); and
- The Australian Consumer Law (Schedule 2).

These laws affect the way Australian businesses behave and the productivity of Australia's economy. However, some of these laws are relatively new and are still being 'tested' in the market place and by regulators and the Courts. The Australian Consumer Law is one example.

Other laws have been recently reviewed or are currently being reviewed. For example, the Productivity Commission is currently undertaking a review of Part IIIA of the Act.

Finally, some laws are industry specific such as Part XIB and XIC (telecommunications industry) and Part X (international liner cargo shipping) of the Act. While these laws may need review,<sup>19</sup> any such review should be a specific industry inquiry rather than a broad ranging inquiry.

**The key areas that should be focussed on by the Review are the competition provisions in Part IV of the Act.**

Given these restrictions, in our opinion the key areas of the Act that should be focussed on by the Review are the competition provisions in Part IV of the Act. These are the key competition laws that cover all Australian businesses and establish the 'rules of the market'. The last major review of these rules was by the Dawson committee. A broad ranging review covering these parts of Australia's competition laws is most likely to lead to significant community gains.

<sup>18</sup> Provisions defining and supporting specific prohibitions contained in Part IV are found in section 4D (exclusionary provisions) and Part VIII (resale price maintenance).

<sup>19</sup> The Forum notes, for example that Part X of the Act was last reviewed by the Productivity Commission in its *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, Inquiry Report No. 32, 23 February 2005. The response of the government of the day was not implemented. This suggests that a further review of Part X is required.

Some parts of these competition laws have only been legislated relatively recently. For example, the cartel laws under the Act were extensively revised with the insertion of the new Division 1 of Part IV which specifically deals with prohibited cartel conduct.<sup>20</sup> The laws were extended to allow for criminal prosecution of cartel offenders in certain cases.

### **A light-touch review of the cartel laws is needed.**

While many of the cartel laws are new, and have not been fully tested by the regulator and the Courts, it is sensible to have a 'light touch' review of these laws to ensure that they are clear and achieving their desired objectives. In particular, the interaction between the new cartel laws in Part IV, Division 1, of the Act, and the traditional laws on anti-competitive contracts, arrangements or understandings, in section 45 of the Act, should be considered.

### **Australia's approach to joint ventures is inconsistent and needs to be reviewed**

An area that warrants specific attention in the Review is the manner in which joint ventures are exempted from *per se* illegal conduct rules in the cartel prohibitions and the prohibition of exclusionary provisions (primary boycotts) in section 45/4D. There are currently different criteria for the treatment of joint ventures in the relevant exceptions/defences. Moreover, the approach to joint ventures is markedly different to the approach in other jurisdictions.<sup>21</sup>

Part IV, Division 1A of the Act includes rules on the anti-competitive disclosure of price and other information and came into effect on 6 June 2012. Currently, these laws just apply to the banking industry.<sup>22</sup> They include prohibitions on both private and public disclosures.

### **The Review should consider the 'contract, arrangement or understanding' test for collective conduct.**

While these disclosure laws are relatively recent, they should be examined in detail in the Review.

---

<sup>20</sup> The new provisions prohibiting cartel conduct were introduced with effect from July 2009.

<sup>21</sup> When the cartel prohibitions were introduced, the *per se* treatment of exclusionary provisions was retained in section 45/4D. This resulted in the retention of the joint venture defence in section 76C for exclusionary provisions, but the insertion of new (and different) joint venture exemptions for cartel conduct in section 44ZZRO and section 44ZZRP.

<sup>22</sup> Specifically, they apply to lending and deposit-taking activities of authorised deposit-taking institutions within the meaning of the *Banking Act 1959 – Competition and Consumer Amendment Regulation 2012* (No. 1).

The disclosure laws are unusual in two ways. First, they specifically target unilateral conduct without the need for any collective element. This focus on unilateral conduct emerged from concerns that the Courts had imposed too high a burden to establish an ‘understanding’ in the cartel and general prohibitions against anticompetitive collusion. By focussing on unilateral conduct, the new law spreads a potentially wide net that may capture benign or pro-competitive conduct. This has, in turn, led to no fewer than 13 exceptions being included in the provisions<sup>23</sup> as well as a general ordinary course of business ‘filter’.

The Review should reassess whether the construction being given by the Courts to an ‘understanding’, for example under section 45 of the Act, warrants amendment to the law, having regard to approaches in other countries. In particular, have the courts set the bar ‘too high’ for proving an ‘understanding’ so that behaviour that would be viewed as unlawful anti-competitive collusion in overseas jurisdictions has been found to be legal by the courts in Australia? If so, should the Act be amended bring our laws in line with best international practice?

Second, the disclosure laws are unusual in that they only apply to banking. In general it is undesirable to have industry specific laws as part of a general competition law. Industry specific competition laws should only be introduced when there are clear reasons why the relevant industry raises distinct and different competition issues from other industries. Numerous laws, such as prudential requirements overseen by the Reserve Bank of Australia and the Australian Prudential Regulation Authority, cover banking. It is far from obvious, however, that banking raises distinct and different *competition* issues to other sectors in the Australian economy.

**The disclosure laws should either be removed from the Act or, if retained, given general application to all businesses**

It may be desirable to extend some or all of the disclosure laws to all Australian business. The laws involve two parts. The first part makes the private disclosure of price information to competitors (either direct or via an intermediary) per se illegal, even if the information is otherwise available. Legitimate disclosure can be authorised by the ACCC. Private price disclosure can be used as a collusive device by business to reduce competition, raise prices and harm consumers. The Review should consider whether this law should apply to all business, or whether it is better to deal with these issues through amendment to the relevant provisions in Part IV.

---

<sup>23</sup> A number of these exemptions are specifically tailored to activities in the banking industry and were formulated as a result of the consultation process on the draft legislation, in view of the initial banking industry focus. The regulations contemplate a consultation process before any regulation is made to extend the provisions to other goods or services. It is conceivable that other exemptions may be considered necessary if the provisions were extended. However, it is not clear how this would be dealt with in the current legislative framework given that any such exemptions would require an amendment to the Act and could not be dealt with by regulation.

The second part of the laws makes broad information disclosure illegal if it has the purpose of substantially lessening competition. It is far from clear that this restriction is better at addressing collusive behaviour than other parts of the Act. At a minimum, the review should consider together all the relevant parts of the Act dealing with collusive behaviour and consider whether these laws provide appropriate protections for competition.

In summary, the disclosure laws need to be reviewed. If appropriate the laws (or parts of the laws, such as the prohibitions on private price disclosure) should be extended to all areas of business, not just banking. If it is not appropriate to extend the laws to all businesses then the laws (or the relevant parts of the laws) should be removed from the Act.

**Amendments to the laws on misuse of market power (section 46) that aim to protect competitors rather than protect the competitive process, may harm consumers and should be rejected. An 'effects' test should not be added to section 46 .**

Section 46 of the Act makes it illegal for a firm with a substantial degree of market power to take advantage of that power for an anti-competitive purpose. The Act specifies three broad anti-competitive purposes.

Amendments to section 46 are regularly suggested. The Dawson committee considered a range of suggested amendments, including the inclusion of an 'effects' test, in detail. The Dawson committee concluded, under recommendation 3.1, that "no amendment should be made to section 46".

The Senate Committee inquiring into the effectiveness of the Trade Practices Act 1974 in protecting small business (2004) also considered section 46 in detail. The Committee recommended a range of amendments to clarify the operations of section 46.

As a consequence, and despite the Dawson committee recommendation, there has been a range of amendments to section 46 in the past decade. Some of these have clarified the section. For example, section 46(6A) clarifies and puts into legislation, judicial precedent about when a business has 'taken advantage' of its market power.

Other amendments, however, have been less desirable. For example, section 46(1AA) has been introduced. It requires that a corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost for an anti-competitive purpose. Despite a number of additional clarifying subsections, it is far from clear what are the implications of this amendment for market conduct. No case has been brought under this amendment in the 6 years since it became law.

Despite the recommendations of the Dawson committee, there is regular debate about the need or desirability to introduce an 'effects' test into

section 46. In the opinion of the Forum, this would be counter-productive. It risks making unlawful strong but fair competitive conduct by efficient businesses that benefits consumers but harms competitors. In contrast, the existing 'purpose' test makes it clear that unlawful behaviour involves more than just strong competitive conduct, it requires anti-competitive intent. Recent amendments to the Act allow the Courts more discretion to infer anti-competitive purpose and to add an 'effects' test to section 46 would create business risk with little if any gain. It is inconsistent with protecting the competitive process.

Similarly, there have been other recent suggested amendments to section 46 that would that widen its scope. For example, expressly prohibiting conduct by corporations with substantial market power 'if it is reasonably likely that the conduct will...result in...the elimination of, or substantial damage to, a competitor of the corporation...'<sup>24</sup>

These types of amendments are clearly aimed at protecting specific competitors rather than protecting the competitive process or benefiting consumers. Such amendments should be rejected out of hand. They are inconsistent with the underlying objective of competition laws.

Third line forcing is currently treated in section 47(6) and 47(7) of the Act as *per se* illegal conduct (i.e. without a requirement that there be a purpose, effect, or likely effect of substantially lessening competition). The usual rationale for conduct being prohibited *per se* is that 'the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition'.<sup>25</sup> It is an anomaly to treat third line forcing as *per se* illegal and successive reviews of the Act have recommended that it be subject to the usual competition test.

**The rationale for third line forcing to be illegal *per se* rather than subject to the usual competition test should be reassessed.**

In summary, to ensure that the review is comprehensive, all areas of Part IV of the Act should be reviewed. This will necessarily include specific prohibitions dealing with exclusionary provisions (in section 4D) and resale price maintenance (Part VIII) and related provisions such as those dealing with joint venture activity.

### **Recommendation Two: Review of Part IV of the Act**

The Review should focus on the competition provisions in Part IV<sup>26</sup> of the *Competition and Consumer Act 2010*. Other parts of the Act, for example, Part VI (enforcement and remedies) should be addressed to the extent that they flow from the areas of key focus. The review of Part IV should be influenced by the

---

<sup>24</sup> The *Competition and Consumer Amendment (Strengthening Rules About Misuse of Market Power) Bill 2013* introduced by Rob Oakeshott MP.

<sup>25</sup> See page 123 of the Dawson Inquiry Report, January 2003.

<sup>26</sup> This will also pick up section 4D (exclusionary provisions) and Part VIII (resale price maintenance) which deal with specific conduct prohibited by provisions in Part IV.



comparative review of international approaches to competition laws (see Recommendation Seven) and should specifically include:

- a light-touch review of the relatively new cartel laws;
- an in-depth review into the concept of ‘contract, arrangement or understanding’ (the current test for ‘collusion’);
- assessment of the ongoing utility and drafting of the exclusionary provision law in section 4D of the Act;
- a review of Australia’s inconsistent approach to joint ventures;
- either the removal of the prohibitions against anticompetitive disclosures in Part IV, Division 1A, or, if retained, amendments to give them appropriate general application;
- a review of the unsuccessful provisions in section 46(1AA) that attempt to deal with below cost pricing (the so-called Birdsville Amendments);
- rejection of amendments to misuse of market power laws (section 46) that aim to protect competitors rather than the competitive process;
- rejection of an ‘effects’ test for section 46; and
- reassessment of whether or not third line forcing (sections 47(6) and (7)) should continue to be *per se* illegal rather than subject to the usual competition test.

### **Recommendation Three: Exclusions from the Review**

The Review should exclude the industry specific regimes in Part XIB and XIC (telecommunications) and Part X (international liner cargo shipping) – while these provisions may need review, any such review should be part of industry specific inquiries. The Review should not include a broad-based review of the Australian Consumer Law – this relatively new law is still being ‘tested’ in the market place, by regulators and by the Courts. The Review should not include Part IIIA (which is currently the subject of a detailed review by the Productivity Commission).

## **Review of authorisations, notifications and clearance**

The authorisation and notification procedures in Part VII of Australia’s *Competition and Consumer Act* are intimately linked to the competition laws in Part IV of the Act. A comprehensive review of Part IV can only be undertaken if the authorisation and notification procedures in Part VII of the Act are reviewed at the same time.

The authorisation and notification procedures in Part VII of the Act are unique by international standards. They introduce a degree of flexibility to our competition laws that is either reduced or absent in overseas jurisdictions.

For example, in the United States, an ‘exemption’ process has evolved for some areas of antitrust law through the judicial system. The approach is called the ‘rule of reason’. However, the scope of the rule of

reason and its application depends on judicial precedent and is less clear than Australia's legislated approach.<sup>27</sup>

The Review needs to go further than just considering the authorisation and notification procedures in isolation. The way that these procedures are formulated, the tests applied by the ACCC for authorisation and notification, and the administrative efficiency of these procedures, feeds back into the competition laws.

For example, in the absence of an authorisation or notification process, the overarching rules for business conduct may be more complex and convoluted. Exemptions to competition laws must be precisely specified in the laws themselves.

**The Review should aim to simplify the 'black letter' law in the Act with the appropriate use of authorisation and notification procedures to deal with exceptions**

In contrast, if an efficient and effective authorisation and/or notification process is available, with appropriate guidance provided to the ACCC by the Act, then the competition laws can be written more succinctly and with a broader scope, allowing the authorisation and notification process to 'deal with the exceptions'.

As such, any review of Parts IV and VII of the Act must explicitly focus on the interaction of the specific competition laws and the 'exemption' processes available through authorisation and notification. A key aim of the Review will be the simplification of the 'black letter' law in the Act with the appropriate use of authorisation and notification procedures to deal with exceptions.

The simplification of the competition laws will improve certainty for business and allow Australia's markets to function more efficiently. At the same time, authorisation, notification and clearance processes can be used to deal with legitimate situations where businesses seek to engage in behaviour that could be in violation of specific competition laws but result in benefits to society that outweigh the competitive detriments that may flow from the behaviour.

Overall, an integrated review of Parts IV and VII of the Act can lead to clearer competition laws while maintaining considerable flexibility for business to apply for legitimate exemptions.

**The formal and informal merger review processes need review. The formal process is unused while the informal process remains opaque**

The Review should consider the regulatory decision making process for merger reviews. In 2007, a formal process for merger clearance was

---

<sup>27</sup> For a broad ranging discussion on the US 'rule of reason', see E. Cavanagh, "The rule of reason re-examined", Legal Studies Research Papers #12-0012, St John's School of Law, New York, September 24. The paper is available at [www.ssrn.com](http://www.ssrn.com)



introduced to the Act. Prior to 2007, business could only seek 'clearance' from the ACCC for a merger or other acquisition through an informal process.<sup>28</sup> While not intending to interfere with the informal merger process, the formal merger clearance process was recommended by the Dawson committee as a parallel process.<sup>29</sup> The Dawson committee was also concerned about the transparency of the informal clearance process.<sup>30</sup>

The formal merger process has not been used since it was introduced.

Also in 2007, merger authorisation was moved from the ACCC to the Australian Competition Tribunal. This reform was aimed at streamlining the merger authorisation process. However, rather than give the merger parties the option to either apply to the ACCC or the Tribunal, the 2007 reforms require that all merger authorisations go to the Tribunal.

There have been no merger authorisations since this reform.<sup>31</sup> Merger authorisations have never been prevalent but this reform may have reduced flexibility for business and led to a greater reluctance by business to seek merger authorisation.

While, compared to the situation before the Dawson inquiry, the ACCC provides more information about its merger decisions through 'statements of issues' and 'public competition assessments', these are voluntary and, in recent times, the 'flow' of public competition assessments has been highly variable.

The 'informal' Australian merger clearance process is unique in international terms and appears to be effective. That said, concerns are regularly raised about its transparency and whether it meets the requirements of procedural fairness. The procedures for merger review should be examined in detail as part of the Review.<sup>32</sup>

#### **Recommendation Four: Authorisation, notification and clearance**

The Review should analyse the interaction between the laws explicitly regulating competitive conduct and the authorisation/notification/clearance procedures in Part VII of the Act. The aim of this analysis should be the simplification of the law and improving the accessibility to these processes to allow for appropriate

---

<sup>28</sup> That said, as the Dawson committee report (section 2) noted, "[w]hen the Act was introduced in 1974, it provided that those proposing a merger might request a decision from the Trade Practices Commission specifying whether the proposal was considered to be likely to have the effect of substantially lessening competition. This process was voluntary; there was no requirement that proposed mergers be notified. The provision was repealed in 1977".

<sup>29</sup> Recommendation 2.2.

<sup>30</sup> See Recommendation 2.1.

<sup>31</sup> A potential merger authorisation application was announced during the preparation of this paper, but had not been formally lodged prior to the release of this paper. See: <http://www.mgc.com.au/wp-content/uploads/Announcement-release-ASX-Final-for-release.pdf>.

<sup>32</sup> Concerns may be raised about other 'merger issues' such as so-called creeping acquisitions and some vertical mergers. However, recent ACCC decisions suggest that these areas are currently being adequately addressed. For example, by using 'local market definitions' the ACCC has successfully opposed a number of transactions that could otherwise be viewed as creeping acquisitions. See for example ACCC (2013) "Woolworths Limited – proposed acquisition of supermarket site at Glenmore Ridge Village Centre", *Public Competition Assessment*, 25 October.

exemption from specific competition law prohibitions where the benefits of such exemptions outweigh the detriments or otherwise provide business certainty through clearance. The Review should consider the current merger clearance processes (informal and formal). It should consider whether or not the 2007 reforms (that introduced formal clearance and required merger authorisations to go to the Australian Competition Tribunal) should be amended or reversed.

## **Institutional structures and the procedures for the review of ACCC decisions.**

The Act currently provides for a range of institutional and governance arrangements for Australia's national competition policy. Any Review of the Act, and of broader issues of national competition policy, needs to consider these arrangements. Part II, IIA and IIIA of the Act establish the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC) and the Australian Energy Regulator (AER). Part III of the Act considers the Australian Competition Tribunal. The structure, roles and interactions between these bodies should be reviewed.

Some administrative relationships are core to decision making under the Act, such as the relationship between the ACCC as a primary decision maker and the Australian Competition Tribunal as an appeals body. The Review should consider this relationship.

Other administrative functions go beyond the competition provisions of the Act. However, these relationships impinge on the efficiency and effectiveness of broader competition policy.

The ACCC was established in 1995 by the combination of the previous Trade Practices Commission and Prices Surveillance Authority and followed the recommendations in the Hilmer Report.<sup>33</sup> For example, the ACCC has a broad range of functions, as illustrated in figure 1. It is unusual to have a single regulator with such a broad remit. The Hilmer Report expressly considered the pros and cons of the ACCC having such a broad range of functions and favoured an integrated regulator. For example, it 'considered there would be considerable advantages in administration of the general access regime with the broader competition responsibilities of the [ACCC]'.<sup>34</sup>

**Is it appropriate to have a single mega-regulator like the ACCC or would it be better to separate out the consumer law and infrastructure access functions to alternative regulators?**

---

<sup>33</sup> Hilmer Report, Chapter 14.

<sup>34</sup> Hilmer Report, p.328.

The Review should consider the range of functions covered by the ACCC and whether it is appropriate for them to be dealt with by a single regulator. For example:

- **Consumer Law:** In recent years, there has been considerable work between the commonwealth and the states and territories to rationalise consumer protection laws. However, the Review should consider if further opportunities exist to improve the national coordination and operation of consumer laws. For example, should the ACCC have jurisdiction over both the competition laws and the Australian Consumer Law (ACL)?<sup>35</sup> The Australian Consumer Law represents a significant area of reform in consumer law both in the substantive law as well as the introduction of pecuniary penalty and other enforcement powers. Consumer laws are administered not only by the ACCC but also state consumer protection agencies and in respect of financial services consumer law the ACL is administered not by the ACCC, but by the Australian Securities and Investment Commission.<sup>36</sup> The Review should consider, whether the consumer law functions of the ACCC and ASIC should be jointly administered by a single separate body. It should also consider whether this body should take over the functions and operations of the various State consumer protection agencies.
- **Access regimes:** The ACCC has jurisdiction over a variety of regulatory functions, for example in the general access regime in Part IIIA and telecommunications access regime in Part XIC. Is this either desirable or appropriate from the perspective of best practice regulation? The AER is a 'constituent part' of the ACCC. This relationship and its implications for energy regulation has been questioned. The Review should consider whether the AER and the other regulatory functions of the ACCC should be separated into a specialised infrastructure regulator.

### Does the current model with the AER as a constituent part of the ACCC provide the best outcome for energy regulation?

The appointments process for Members of the ACCC, NCC and AER involves federal, state and territory governments. In this sense it is inclusive, in that it involves a range of levels of government. However, it is also cumbersome. The Review should consider the appointments process, whether it is appropriate, whether it leads to the best

---

<sup>35</sup> At the time the ACCC was established in 1995, there was, of course, no Australian Consumer Law, with the consumer protection provisions found mainly in Part V and other Parts of the then *Trade Practices Act*. Including the Part IVA unconscionable conduct provisions.

<sup>36</sup> Section 131A of the Act, in effect, carves out the supply of financial services and financial products from the operation of most of the ACL. A separate consumer protection regime in Part 2 of the *Australian Securities and Investment Commission Act 2001* applies which is administered by ASIC,

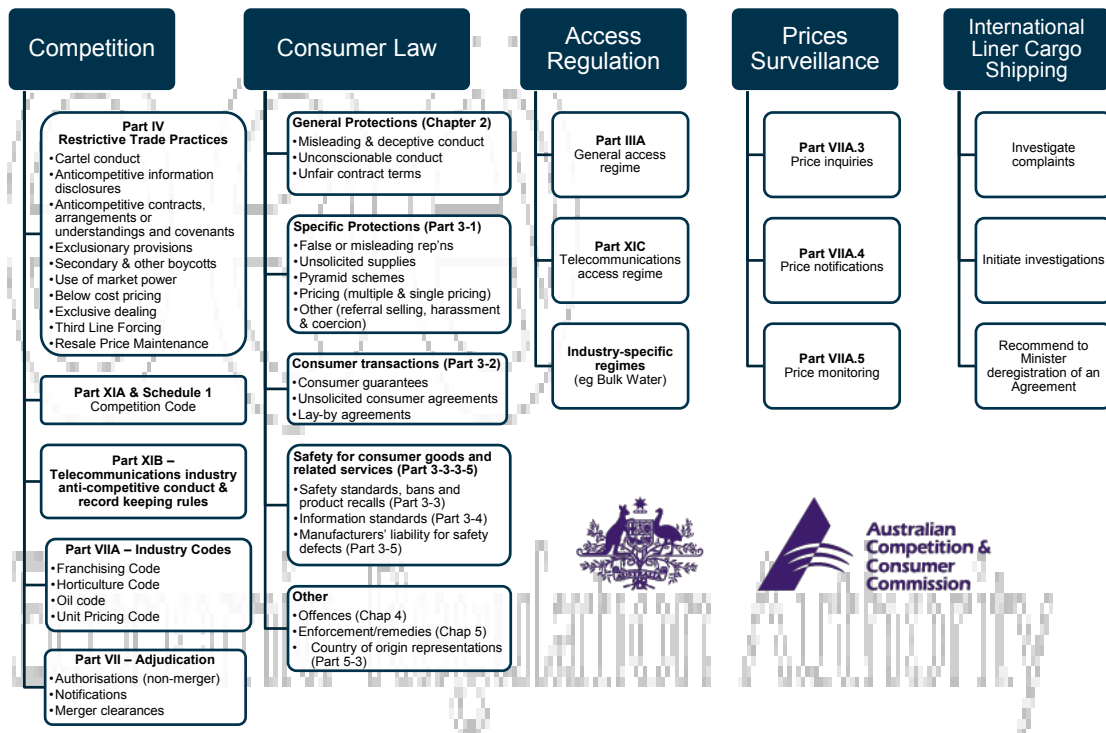
appointments to these bodies, or whether the process be reformed and stream-lined?

The National Competition Council was originally established under the Act with a broad role in the implementation of the Hilmer inquiry reforms. However, its role is largely limited today to the declaration of facilities under Part IIIA of the Act. Should the functions of the NCC be expanded to reinvigorate the NCC in a leadership role as part of a revitalised national competition policy, as envisaged in Part 2 of this paper? Alternatively, should the current role and responsibilities of the NCC be streamlined and transferred to other appropriate organisations? In summary, the Review should consider the role of the NCC, and whether it should be either expanded or eliminated.

**Is there a role for the NCC in the future or should its functions be transferred to other bodies?**

There are other regulatory bodies whose operations may be complementary with, or even overlap, the operations of those bodies established under the Act. For example, the Australian Prudential Regulation Authority has specific powers covering banks and other authorised deposit-taking institutions. The Review should consider whether there is appropriate clarity and consistency in regulatory functions in those areas where regulatory authority might overlap.

Figure 1: The ACCC's many functions.



### **Recommendation Five: Institutional structures:**

The Review should consider the institutional and governance arrangements for Australia's competition laws and, more broadly, Australia's regulatory institutions established under Part II, IIA, III and IIIAA of the Act. The Review should consider if the institutional and governance arrangements of Australia's competition laws could be improved. The Review should specifically consider the current roles and allocation of functions and powers to the ACCC, National Competition Council and Australian Energy Regulator and whether institutional reforms would enhance the operation of both Australia's competition laws and other relevant business regulation.

### **Small business**

There has been an increased recognition that small business faces different competition issues to either large business or consumers.

Small businesses are not consumers and breaches of competition laws, for example price fixing by small businesses, can have serious local community effects. However, small business also differs from big business and they may be more susceptible to anti-competitive, unconscionable (and 'unfair') behaviour by large businesses.

Current competition policies that are explicitly aimed at small businesses are diffuse. Small business needs, for example, are addressed by industry codes (e.g. the Franchise Code of Conduct), collective bargaining notification and authorisation (including the 'streamlined' process outlined by the ACCC in 2011), the unconscionable conduct provisions in the Australian Consumer Law, and the appointment of a Member of the ACCC with specific 'small business' expertise. There has also been discussion about whether or not other consumer laws (such as the law about 'unfair contract terms') should be extended to protect small business from unfair contract terms in standard form contracts.

Some areas of small business law are currently under review, such as the Franchise Code of Conduct. Some amendments to the competition laws that impact small business are relatively recent.

Section 46 of the Act is often raised in the context of small business. This section is discussed above. Section 46 is about the use of market power for a prohibited anticompetitive purpose.

A breach of section 46 will ultimately harm consumer welfare. It may also harm other businesses. However, these other businesses may be small, medium or large. There is no presumption that a misuse of market power will necessarily harm small business and it would be inappropriate to view section 46 as part of the competition laws aimed specifically at small business interests and issues. Indeed, to attempt to address small business issues through section 46, or by amending that section, will mire the law in conflicting objectives and will fail small business.

**The misuse of market power provisions in section 46 of the Act are not designed either to specifically protect small business or to meet the real needs of small business. Attempts to address small business competition issues through section 46 are inappropriate and ineffective.**

In recent years there have been a number of proposed amendments to Part IV of the Act aimed at dealing with the concerns of small businesses when they face large competitors. Most (if not all) have failed to find the right balance between prohibiting exclusionary and predatory conduct while preserving competition. These proposals have included:

- The reintroduction of price discrimination prohibitions;<sup>37</sup>
- Different tests for mergers by a corporation with a substantial share of a market;<sup>38</sup>
- Setting market share caps by prescribing limits on the market share that can be held in prescribed markets; and
- Divestiture powers that would permit the breaking up of businesses to reduce market share (and market power) in response to breaches of competition laws for breach of market conduct rules.

There have also been laws proposed to deal with sector specific issues, most notably in retail groceries where the perceived market power of the major supermarket chains is viewed as a 'problem' for small business.<sup>39</sup> The proposed laws included:

- The creation of a Commissioner for Food Retailing to promote prescribed 'competition and fairness principles' which (amongst other things) would specifically seek to protect suppliers and other businesses in their dealings with and competition with major supermarkets;
- Market share caps where the market share of major supermarkets would be reduced over a 5 year period to a prescribed percentage of 20% in markets to be defined as the national supermarket market and the national household retail market; and
- divestiture powers where a supermarket holds a market share above the prescribed cap.

---

<sup>37</sup> The *Trade Practices Amendment (Guaranteed Lowest Prices – Blacktown Amendment) Bill 2009*, introduced by Senator Xenophon and Senator Barnaby Joyce. This would have reintroduced the prohibition in respect of retailing activity within a geographical (35km) boundary. The previous more general price discrimination prohibition in section 49 of the *Trade Practices Act* was repealed in 1995, following recommendations of the Hilmer Report.

<sup>38</sup> The *Trade Practices Amendment (material Lessening of Competition – Richmond Amendment) Bill 2009*, introduced by Senator Nick Xenophon. This would have replaced the 'substantial lessening of competition test' for mergers where the acquirer had a substantial share of market to 'lessening of competition' and for others to 'material lessening of competition'.

<sup>39</sup> The *Reducing Supermarket Dominance Bill 2013* – introduced by Bob Katter MP and supported by Nick Xenophon MP and Andrew Wilkie MP.



In the Forum's view each of these proposed reforms, while borne of public concern about the plight of small business and the power of large corporations, expose serious risks that legitimate competition would be undermined to the ultimate detriment of consumers and contrary to the objectives of Part IV of the Act.

This is not to say that all of the proposed amendments should be dismissed out of hand. For example, divestiture powers exist and are used in some overseas jurisdictions. The Review should consider issues such as divestiture powers in an appropriate context using overseas experience to guide its recommendations.

**Attempts to meet the needs of small business through policies that aim to harm the ability of large business to compete are wrong-headed and are not in the long-term interests of small business**

The key point, however, is that these attempts to deal with perceived or actual abuse of market power do not represent policy that addresses the needs and concerns of small business. They reflect a view that large business is somehow antithetical to the interests of small business. This is, of course, false. In any well-functioning, competitive economy there will be a range of large, medium and small businesses.<sup>40</sup> These businesses will sometimes compete but they will also cooperate, for example, through complementary parts of a production process. To attempt to meet the needs of small business through policies that aim to harm the ability of large business to compete is wrong-headed and is not in the long-term interest of the small businesses themselves.

The Review provides the opportunity to consider the real concerns of small business in the context of a detailed consideration of the relevant laws.

For example, the Review should consider how the laws prohibiting unconscionable conduct can best assist the legitimate interests of small business. In vertical relationships, for example the dealings between suppliers and their customers, one party (either the buyer or the seller) may have a more dominant or powerful position in the commercial relationship. The Act enables the Courts to scrutinise these relationships if one of the parties has behaved unconscionably in relation to the other party.

The provisions of the Act relating to unconscionable conduct have proved difficult to interpret. Despite of a number of cases, generally speaking, the courts have not provided clear guidance as to what is and what is not unconscionable conduct. In part, this reflects the nature of judgments about unconscionable conduct and the structure of the law.

---

<sup>40</sup> Of course, the mix of businesses will also change over time. Successful small businesses will grow to medium or large firms while unsuccessful large businesses will diminish in size and may ultimately disappear through failure or takeover. This dynamic change in the mix of businesses is a key element in a competitive economy.

Unconscionable conduct, as currently interpreted, is more than just “unfair” conduct. It is sometimes summarised as being conduct that is without conscience, or is so outrageous as to be completely unacceptable in normal business dealings. But the application of even those general principles depends on the facts and circumstances of each case before the courts and in some cases, judicial decisions may reflect the personal attitude of the presiding judge on what might be acceptable business practice.

The laws on unconscionable conduct were amended in 2012, and these amendments are yet to be tested by the Courts. However, the lack of successful “test cases” suggests that the current approach to unconscionable conduct may not be meeting the needs of small business. At the same time, it is not obvious how to solve this problem.

It has been suggested that a statutory definition of unconscionable conduct could be added to the Act. However, unconscionable conduct is not easy to define in a clear, simple and practical way. Alternatively, the existing statutory indicators of unconscionable conduct could be redrafted in ways that swing the pendulum towards presumptions or even conclusions of unconscionability where particular indicators are satisfied. However, such a reform would be a considerable shift away from the current approach to unconscionable conduct.

A third option is to adopt a ‘wait and see’ approach. The courts have not tested the most recent changes to statutory unconscionability so it is unclear whether these amendments have adequately addressed the concerns of small business and consumers.

At a minimum, the Review needs to take stock of the current state of the law on statutory unconscionability and to consider each of the three alternatives outlined here.

Given the critical importance of the provisions concerning unconscionable conduct in considering the commercial relationships between big and small business, a rigorous analysis of these provisions should be an essential element of the Review. The Review should, at a minimum, consider the three alternatives outlined here and consider the costs and benefits of further changes to the law.

**The Review needs to consider the alternatives for further reform of the laws on unconscionable conduct including the option of allowing the most recent changes to the law to ‘take their course’.**

The Review should look broadly for the best approach to deal with legitimate small business concerns. While small business is different to consumers, it may be that small business concerns can be more appropriately considered in the context of reforms that examine aspects of the Australian Consumer Law. Obviously, laws relating to unconscionable conduct provide one example. A second example is the laws on unfair contract terms. These types of laws could be extended to small business so that these businesses receive equivalent or similar



protections to consumers in their market place transactions.<sup>41</sup> These laws are outside the competition provisions in Part IV of the Act, but might be more appropriate to meet the needs of small business. Similarly, considering the effective operation of Industry Codes may be another relevant tool.

**The Review should take a broad approach to addressing the legitimate concerns and requirements of small business, including examining areas of the Australian Consumer Law and Industry Codes**

In the view of the Forum, a root and branch Review of Australia's competition laws needs to have a core focus on competition policy and small business. In particular, the review needs to consider the interaction of competition policy with small business and how to best structure competition laws to limit anti-competitive behaviour that either impacts on or arises from small business.

In focusing on small business, however, the Review should ensure that any reforms remain consistent with the objective of Part IV of the Act and acknowledge the 'deliberate and ruthless' nature of competition that these laws seek to protect.

In this context the debate often makes reference to so-called 'fair competition'. While this phrase can be seen as an attempt to capture market place bullying (and therefore unconscionable conduct) when examined in detail the phrase is often used as a thinly veiled reference to a perceived need to protect segments of business from the full force of legitimate competition.

**Amendments to the Act to meet the legitimate concerns of small business must be consistent with the aim of competition laws to protect the competitive process. They must not be disguised attempts at protectionism that will harm both competition and consumers**

That is not to say that legitimate concerns such as those referred to by the Chief Justice of the High Court 'about market place bullying or the oppressive use of power, even if it falls within the boundaries of legitimate competitive conduct'<sup>42</sup> should not be the subject of specific provisions in the law. What is critical in law reform in this area is that the law continues to promote competition on the merits and does not preclude business (large or small) from legitimately competing.

---

<sup>41</sup> It is worth noting that section 22 of the Australian Consumer Law includes matters to which the court may have regard when considering potential unconscionable conduct, including the terms and conditions of the relevant contract. In this sense, there is some overlap between the legal protection against unconscionable conduct and protections provided to consumers by laws on unfair contract terms.

<sup>42</sup> French, R (CJ) (2009) *Speech to the Law Council of Australia Trade Practices Workshop*, Yarra Valley, 15 August, '*Surfing the wavefront*', (2010) 18 TPLJ 77.

## Recommendation Six: Small business

A key focus of the Review should be on small business. The Review should consider how best to meet the legitimate needs of small business through the Act, while maintaining appropriate competitive safeguards for and constraints on small business. The Review should consider whether it is appropriate to extend any parts of the Australian Consumer Law, such as the laws on unfair contracts, to small business. The Review should consider whether the current notification and authorisation procedures and provisions supporting Industry Codes could be improved to better assist small business.

## Overseas laws

Most developed countries have competition laws. The oldest formal competition laws are the US antitrust laws, which date back to the late 1800s and early 1900s.<sup>43</sup> The UK introduced its *Restrictive Trade Practices Act* in 1956.<sup>44</sup> More recently, the number of countries adopting competition laws has escalated rapidly. For example, most ASEAN countries have introduced competition laws in the past decade.

Australia should take advantage of the lessons and experience from overseas competition laws to ensure our laws reflect the state-of-the-art. As such, a review of Australia's competition laws needs to be carried out within an international context. The Review should draw on overseas experience as appropriate, including overseas legislation, legal decisions and the work of international bodies such as the International Competition Network.<sup>45</sup>

One feature of Australia's competition law is a penchant for codification and at times long and complex legislative drafting aimed at dealing with a specific and precisely defined mischief rather than providing a broad framework for competition. A longstanding example is section 4D and the most recent example is in the new 'price signalling' laws that seek to prohibit certain anticompetitive information disclosures.<sup>46</sup> The price signalling laws incorporate detailed drafting and no fewer than 13 specific exemptions.

It is interesting to consider this approach in the Act with the following statement of Senator Lionel Murphy in the Second Reading speech to the Bill which introduced the *Trade Practices Act 1974*:

---

<sup>43</sup> Formally, the US antitrust laws are founded on the 1890 Sherman Act and 1914 Clayton Act.

<sup>44</sup> This was preceded by earlier, less comprehensive laws in 1948.

<sup>45</sup> For example, the interaction between legislative exemptions, for example for small business, compared to the Australian authorisation approach can be informed by recent experience in Austria where there are explicit small business exemptions for cartel behavior that have proved problematic. Similarly, the drafting and scope of analysis for authorisation can be informed by considering recent South African experience in the Walmart/Massmart acquisition, where the Court imposed a range of welfare *reducing* conditions on the merger despite the merger not substantially lessening competition.

<sup>46</sup> Division 1A of Part IV of the Act.

I now refer to some features of the drafting of the Bill. Legislation of this kind is concerned with economic considerations. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision. Such an approach leads to provisions which are complex in the extreme and give rise to more problems than they remove.

The present Bill recognises the futility of such drafting. Many matters have, of course, had to be stated in detail. But other provisions, particularly those describing the prohibited restrictive trade practices, have been drafted along general lines using, wherever possible, well understood expressions. I am confident that this will be more satisfactory. The Courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional judicial role.

The approach to legislating against anticompetitive conduct in Australia's competition law is in stark contrast to the approaches in many other jurisdictions where general prohibitions are prescribed and detailed principles left to the developing jurisprudence.

**Recommendation Seven: International approaches to competition law:**

The Review should consider overseas experience in detail to ensure that Australia's competition laws are consistent with international best practice and whether international approaches suggest that there are opportunities to simplify and improve the law.

# Part 2: The Review of the national competition policy reform process

---

## Introduction

In its 2005 Review of National Competition Policy Reforms, the Productivity Commission noted that national competition policy had been the driver of continuous economic growth in Australia over the 1990s and 2000s, contributing to higher productivity, improved economic performance, household income growth and improved sustainability for Australia.<sup>47</sup> The OECD observed that Australia had become a model for other OECD countries through “the tenacity and thoroughness with which deep structural reforms were proposed, discussed, legislated, implemented and followed-up in virtually all markets, creating a deep-seated ‘competition culture’”.<sup>48</sup>

However, this reform process has stalled in recent years, placing Australia’s economic prosperity at risk.<sup>49</sup> In our opinion, it is important for the federal government to consider how the reform process can be renewed.

**In recent years, Australia’s National Competition Policy reform process has stalled. This places the welfare of all Australians at risk**

The ‘root and branch’ inquiry into Australia’s Competition laws may provide one avenue for a broader review of Australia’s national competition policy reforms. This broad approach was adopted in the terms of reference to the Hilmer Inquiry. Alternatively, it may be considered that a separate Review is required. A review of competition laws is predominantly legal with economic and business input. In

---

<sup>47</sup> Productivity Commission Report No. 33, 28 February 2005 “Review of National Competition Policy Reforms” Accessed from [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0016/46033/ncp.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0016/46033/ncp.pdf)

<sup>48</sup> OECD (Organisation for Economic Cooperation and Development) 2005, OECD economic surveys 2004, Australia, vol. 2004/18, Paris, February. Similarly, Professor Hilmer recently noted that Australia’s national competition policy “has been widely recognised as a model of both competition policy and its implementation by the OED and many governments considering similar reforms. Examples include Canada, Mexico, India and a number of our South-East Asian neighbours”. Hilmer, F. (2013) “National competition policy: Coming of Age”, *Annual Bob Baxt lecture in competition law*, The University of Melbourne, September 19 at p1.

<sup>49</sup> The Council of Australian Governments recognized the importance of on-going reform when it stated that “Australia’s productivity performance is under threat, with further reform essential if the economic expansion of the last 14 years is to continue”. See COAG (Council of Australian Governments) 2005, Communiqué, Canberra, 3 June at p.5. More recently see the comments of Professor Hilmer, in the 2013 Bob Baxt lecture in competition law, *ibid*.

contrast, national competition policy is largely economic in focus with legal and broader business and public policy input.

Regardless of the exact approach taken by the government, the Forum is of the opinion that a Review of Australia's national competition policy reforms is an important priority for the federal government.

There are a range of areas that are in need of competition reform. We discuss some of these below. The Review should not, however, actively investigate these areas. That is the job for later work. Rather the review needs to consider the process for renewal of broad competition reform including:

- How to identify key areas for competition policy reform;
- Ways in which the federal, state and territory governments can work together to map out the process for reform in these areas;
- The process of identifying parties adversely affected by competition policy reforms and how these parties can be engaged and fairly treated through the reform process;
- How to provide appropriate incentives for all levels of government to pro-actively pursue competition policy reforms;
- Which institutional structures are most appropriate to successfully manage the process of competition policy reform; and
- How to renew the process of review for new legislation and regulation to prevent the roll-back of competition reforms over time.

### **The Review should focus on the process of reform. How can the reform process be embedded into the Australian economy?**

There are obviously a broad range of areas that would benefit from further reform, such as health and education. However, a 'root and branch' review of national competition policy should focus on the areas where the competitive process is a key element of reform. It should focus on those areas where legislation and government regulation creates barriers to competition, for example by creating artificial barriers to entry or expansion for market place participants. It should consider a process for the on-going review of such market-level restrictions, and a methodology for evaluating the costs and benefits of those restrictions.

For example, the Review should consider the two-stage test developed in the Hilmer report. This test asked two questions – do the benefits of any restrictions to competition outweigh the costs; and, if so, is there a way to achieve the same objectives that are less restrictive to competition? The Review should consider whether or not this test remains appropriate and, if so, how best to implement it across the spectrum of government policy.

The Review should aim to provide a roadmap for the reform process. The process needs to be robust and transparent.

The recommendations of the Hilmer report led to a reform process that operated well during the 1990s and early 2000s. These reforms were driven by the Council of Australian Governments and included major reforms to government business enterprises (GBEs). The reforms also introduced a robust process for legislative review to ensure that the gains from reform would be on-going. The reform process required the cooperation of governments through out Australia and included explicit incentives for government.

The Hilmer reform process, however, was highly centralised. It involved NCC monitoring and incentive payments to the States. This had two consequences.

First, the federal government faced less incentive to engage in the reform process than the states.<sup>50</sup>

Second, when the payments ceased, the state governments had less incentive to continue the reform process.

The Review should consider the best way for all levels of government to work together to promote competition reform and embed processes to avoid excessive restrictions on competition into all government activities. It would be desirable for a renewed reform process to provide incentives that operate equally at all levels of government and provide a robust on-going framework to avoid 'back tracking' in the reform process.<sup>51</sup>

**The Review should consider how all levels of government can promote competition reform and the role of explicit and implicit incentives.**

The Review should consider how to best use Australia's structure as a federation of states, to provide appropriate reform incentives. It should consider the role of both explicit incentives (e.g. the Hilmer incentive payments) and implicit incentives. For example, the Review should consider the performance monitoring tasks undertaken by the Productivity Commission. Is this monitoring being carried out and utilised in a way that provides appropriate incentives for governments to engage in reform and to compare the performance of their state-based institutions to the best-practice either in Australia or overseas?

Finally, and in parallel with the focussed review of sections of the *Competition and Consumer Act*, the Review should consider the role of institutions in the reform process. In particular, are the existing institutions appropriate to guide competition policy and competition

---

<sup>50</sup> For example, see the assessment of the federal government performance in National Competition Council (2005), *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne.

<sup>51</sup> For example, the Intergovernmental Agreement on Federal Financial Relations (2008) provides a clear process through National Partnership Payments to provide financial incentives to governments to implement agreed reforms. Thus, "[t]he Commonwealth will provide National Partnership payments to the States and Territories to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms or service delivery improvements".

reform? If not,, why not? What alternative structures could government use to best achieve the beneficial results of competition policy?

#### **Recommendation Eight: Anticompetitive legislation and regulation**

The Review should focus its attention on areas where legislation and government regulation impede or create barriers to competition. It should consider a process for the on-going review of such market-level restrictions, and a methodology for evaluating the costs and benefits of those restrictions.

#### **Recommendation Nine: Promoting competition policy reform**

The Review should consider the appropriate processes and institutional structures to promote competition policy reform at all levels of Australian government. It should examine alternative ways to create appropriate incentives for competition reforms and to imbed appropriate checks and balances into the legislative and regulatory processes to ensure that anti-competitive restrictions that may harm Australia's well-being are avoided and eliminated.

#### **Recommendation Ten: Advancing competition policy**

The Review should provide a preferred process and timeline for advancing competition policy together with recommendations to ensure that the reform process is both inclusive and fair.

### **Specific areas of concern**

1. **The Review of anti-competitive regulation:** As the former chairman of the Productivity Commission, Gary Banks, noted, there is 'much to be done' in the systematic review of anti-competitive regulation. Further:

In the case of anti-competitive regulation, a greater commitment to good regulatory process and review remains fundamental to getting better outcomes. It is achieving this in practice that is proving the hard part.<sup>52</sup>

The legislative review program that followed the Hilmer report had a significant impact. As Banks notes:

Key achievements included reforms to agricultural marketing monopolies — including barley, sugar, eggs and dairy; removal of anti-competitive arrangements in the legal, real estate, dental and veterinary professions among others; liberalisation of retail trading hours in most jurisdictions; rationalisation of the financial system regulatory framework and removal of regulatory barriers to technological innovation in that sector.<sup>53</sup>

That said, the legislative review process was not a complete success. As the National Competition Council noted in its 2005 report on the national competition policy agenda, of laws identified for review (by 2005) about 85% had been reviewed. However, national reviews were unsatisfactory and the timeframes set by COAG were not met.

---

<sup>52</sup> Gary Banks (2012) "Competition policy's regulatory innovations: *quo vardis?*", (presented at the Economists Conference Business Symposium, 12 July and the ACCC Annual Regulatory Conference, 26 July), Productivity Commission, Canberra at p.1.

<sup>53</sup> Ibid. p.3-4.



New legislation was required to be accompanied by a regulation impact statement. The NCC had concerns about the integrity of this process.<sup>54</sup> A key element of the process of regulatory review and reform was the institutional 'gatekeeper'.

The process of ensuring governments develop effective and efficient regulation is referred to as 'gatekeeping'. The 'gatekeeper' is the entity with responsibility for ensuring the requisite processes are followed to prevent poor quality regulation.<sup>55</sup>

The NCC argued that the optimal model for a gatekeeper was an independent statutory authority established under a separate Act. The authority would determine if a regulatory impact statement (RIS) should be undertaken and ensure the RIS is conducted in a timely manner. It would provide certificates of adequacy for a RIS and would be a public monitor.<sup>56</sup>

In practice, states have followed a variety of different 'gatekeeper' models. In Western Australia, the Regulatory Gatekeeping Unit is not an independent statutory authority but is part of the Department of Finance. In Victoria, the Victorian Competition and Efficiency Commission (VCEC) is an independent statutory authority with regulation review functions. However, these functions fall short of the NCC's optimal model and VCEC's role largely deals with compliance. The Review should consider the institutional arrangements at the federal, state and territory levels for the RIS process and how best practice can be adopted.

### **Recommendation Eleven: Institutional competition 'gatekeepers'**

The Review should consider the role of institutional 'gatekeepers' at both the state and federal level. The 'gatekeeper' would provide a 'competitive check' on anti-competitive regulations and carry out legislative review against competition principles. The Review should consider the role of these institutions, how they would operate, their interaction with government and their preferred structure.

- 2. Restrictions on labour mobility in Australia: the example of trade licensing reforms.** The free movement of labour within Australia is a key factor in the flexibility of the Australian workforce and national productivity. If labour faces mobility barriers then it prevents workers moving to more rewarding jobs that better use their skills. This is a loss for both workers and employers.

The goal of trade licensing reform is to establish uniform trade licensing systems across Australia. This will increase workforce mobility between states reducing imbalances in the labour market while raising national productivity.

The Council of Australian Governments (COAG) has guided considerable reform of occupational licensing in Australia. However,

---

<sup>54</sup> National Competition Council (2005), *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne.

<sup>55</sup> Ibid p.4.2

<sup>56</sup> Ibid Box 1.



the process is yet to be completed. For example, WA and the ACT have not yet passed laws to give effect to the National Licensing System Legislation.<sup>57</sup> This has in turn delayed the work of the National Occupational Licensing Authority. While progress is occurring in occupational licensing it is relatively slow and appears uneven between the states.

The process for the reform of regulatory barriers considered by the Review needs to focus on barriers, such as trade licensing, that undermine Australia's productivity and harm Australian consumers, workers and employers. The Review could consider the reform process of occupational licensing as a case study for the COAG reform process. Any reform process recommended by the review must be robust enough to minimize the types of delay that have characterised the reform of trade licensing.

- 3. Restrictions on the free movement of goods and services: the example of parallel import restrictions on books.** Trade in well functioning, competitive markets benefits all Australians. Consumers can buy the goods and services that they prefer at competitive prices while sellers who can lower costs and supply innovative products that benefit consumers gain (at least short-term) profits.

However, in certain situations, government regulations directly restrict trade. These restrictions may be socially desirable where trade creates external harms. But in other situations, the benefits from trade restrictions are either low or non-existent and do not outweigh the costs to consumers.

One traditional area of concern is the parallel import of books. Parallel import restrictions provide territorial protection for the publication of many books in Australia, preventing booksellers from sourcing cheaper or better value-for-money editions of those titles from world markets<sup>58</sup> A 2009 Productivity Commission report found that parallel import restrictions place upward pressure on book prices and that this effect is likely to be substantial.

It is sometimes argued that the parallel import restrictions on books are necessary to protect local authors. In the absence of these restrictions, it is argued, local authors' income would be undermined by importers sourcing cheap editions of their books in overseas markets and reselling them in Australia.

While there is considerable debate about the benefits of parallel import restrictions on books, even if competition restrictions were desirable to protect Australian authors, careful analysis of whether or not the current restrictions are the least cost way to achieve these benefits is required. For example, current restrictions are apply of a long time period and cover overseas authors as well as Australian authors.

In their 2009 report, the Productivity Commission recommended many measures to reduce the restrictions on parallel imports of books. In particular, the Commission proposed that the restrictions on parallel

---

<sup>57</sup> COAG Reform Council "Seamless National Economy: Report on performance 2011-12" 28 November 2012

<sup>58</sup> Productivity Commission "Restrictions on the Parallel Importation of Books" 14 July 2009.

imports should apply for only 12 months from the date of first publication of a book in Australia, rather than the full term of copyright. Another proposal was the retention of parallel import restrictions only for books authored by Australian writers. To the degree that the import restrictions provide benefits to Australian authors, these same benefits could be achieved in a less costly way through the reforms suggested by the Productivity Commission.

The Federal Government responded to the Productivity Commission report with the decision to maintain the existing regulatory regime for parallel book imports. Since then, no reform has taken place in this area, and restrictions on parallel imports remain.

The process for the reform of competitive constraints considered by the Review needs to focus on legislative and regulatory restrictions that impede the free movement of goods and services. These restrictions harm Australian consumers. The Review could consider the reform process for the parallel importing of books as a case study of the existing reform process. Any reform process recommended by the review must be robust enough to minimize the types of delay that have characterised the reform of the parallel importation of books.

#### **4. Specific business restrictions: the example of pharmacy restrictions.**

Competition works best when the barriers to entry and exit are low in individual sectors of the economy. In these circumstances, business is forced to focus on consumers' interest or lose custom to their competitors. Innovators and early-adopters can rapidly begin to supply their goods and services ensuring the best products, with the highest quality and the lowest competitive price are available to Australian consumers.

Of course, not all industries have low barriers to entry and exit. Sometimes barriers exist due to technology. For example, if an industry involves a 'natural monopoly' technology then scale economies mean that entry can be unviable. Part IIIA of the Act was designed to deal with this situation.

In other situations, access to key resources needed for production can limit entry. For example, some natural resources are rare and a new business can only enter production if it has an appropriate mine or other source of the resource.

However, artificial barriers to entry and exit can be created through government regulations.

For example, the Pharmacy industry has significant industry regulation including government controls on the ownership of pharmacies, locations of pharmacies and the registration of pharmacists. Currently in Australia, the ownership of pharmacies is restricted to licensed pharmacists. There is legislation limiting the number of pharmacies that a licensed pharmacist is permitted to legally own depending of the locations of the pharmacies.

In some circumstances, government controls on entry can enhance the welfare of Australians. For example, it would be undesirable, for example, to allow waste disposal sites to be established in a residential

area. Entry is restricted to protect residents' amenity. Similarly, industries where addiction is a problem, often involve strict licensing conditions. These restrictions help prevent the spread of the relevant addiction and have community benefits.

However, in other cases, the specific business restrictions imposed by the government fail welfare analysis. The rules may provide little if any benefit to Australians but may create considerable costs through the restriction of choice and impairment of innovation. Even where there is an arguable case that the benefits from the restrictions outweigh the costs, rigorous examination is needed to ensure that the restrictions are the least cost way to achieve the desired objectives.

In the case of the pharmacy industry, the Council of Australian Government (COAG) national review in 1999 recommended that governments lift restrictions on the number of pharmacies that can be owned by pharmacists and remove provisions that discriminate against friendly societies operating pharmacies. Since then, individual states have moved to reduce or relax restrictions on ownership but progress differs between states.

The NCC, in its 2005 report, noted this slow and uneven progress. In particular, it noted the role of the Pharmacy Guild in campaigning to block reform.

"This resulted in the retention of competition restrictions with no parallel in other professions and for which no public interest justification was established".<sup>59</sup>

Indeed, the NCC noted that new restrictions had been introduced in the ACT and Northern Territory.

The process for the reform of constraints on the operation of business competition considered by the Review needs to focus on legislative and regulatory restrictions that create barriers to the entry or exit of business in particular industries. Where these restrictions exist they must be evaluated to ensure that the restrictions create benefits to the broader community that outweigh the competitive harm created by the constraints. The Review could consider the reform process for the pharmacy industry as a case study for failed industry level reform. Any reform process recommended by the Review must be robust enough to withstand vested interest lobbying by those who gain from the competitive constraints.

### **Recommendation Twelve: Labour mobility, movement of goods and services and barriers to entry or exit**

The Review should consider three particular areas to test its recommendations for a process of competition reform:

- Restrictions on labour mobility in Australia;
- Restrictions on the free movement of goods and services within, into and out of Australia; and
- Restrictions that create barriers to entry or exit for specific industries.

---

<sup>59</sup> National Competition Council (2005), *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne, Box 4.2.

The reform process must be able to deal with these three areas in a robust way to ensure that the reform process moves forward in these three areas.

# Appendix.

---

## **Terms of reference for the Dawson *Trade Practices Act Review*.**

Effective competition laws contribute to the productivity, efficiency and growth of an open, integrated Australian economy.

The Government considers it is timely to review some key provisions of the *Trade Practices Act 1974* (the 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.

In establishing a review, the Government is aware of concerns, among other things:

- that Australian businesses increasingly face global competition and need to compete locally and internationally;
  - that excessive market concentration and power can be used by businesses to damage competitors; and
  - the need for businesses to have reasonable certainty about the requirements for compliance with, or authorisation under, the Act.
1. The Committee is to review the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:
    - a. inappropriately impede the ability of Australian industry to compete locally and internationally;
    - b. provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
    - c. promote competitive trading which benefits consumers in terms of services and price;
    - d. provide adequate protection for the commercial affairs and reputation of individuals and corporations (in this regard, the Committee may examine the processes followed by the ACCC and the laws under which the ACCC operates, but is not to reconsider the merits of past individual cases);
    - e. allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances; and
    - f. are flexible and responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas.
  2. The Committee is to identify, where justified, improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law.

3. The Committee may consider other aspects of the Act and the recommendations of reviews currently underway or previously completed where relevant; but is not to include in this review a direct consideration of sections 45D-45EB, sections 51(2) and (3) of Part IV, or Parts IIIA, X, XIB or XIC.
4. In performing its functions, the Committee is to advertise nationally, consult with key interest groups and affected parties, receive public submissions, and take into account overseas experience. As the States and Territories each apply the competition provisions of the Act as their own laws, the Committee should seek the views of the State and Territory Governments.
5. The Committee is to protect the confidentiality of the affairs of individuals and companies during the course of its deliberations.

### **Terms of reference for the *National Competition Policy Review* (Hilmer review)**

- ...
2. The Committee is to inquire into, and advise on appropriate changes to legislation and other measures in relation to:
    - (a) whether the scope of the Trade Practices Act 1974 should be expanded to deal effectively with anti-competitive conduct of persons or enterprises in areas of business currently outside the scope of the Act;
    - (b) alternative means for addressing market behavior and structure currently outside the scope of the Trade Practices Act 1974; and
    - (c) other matters directly related to the application of the principles above.
  3. In conducting the review the Committee should consider, against the background of the nature of markets in Australia and influences upon them:
    - (a) whether the authorization and exemption provisions of the Trade Practices Act 1974 have sufficient scope, flexibility and transparency;
    - (b) the need for, and approaches to, the transition of government regulatory arrangements — including any associated revenue impact on States to more competitive and nationally consistent structures;
    - (c) the best structure for regulation including price regulation, in support of:
      - (i) pro-competitive conduct by government business and trading enterprises and in areas currently outside the scope of the Trade Practices Act 1974; and
      - (ii) the interests of consumers and users of goods and services; and
    - (d) the past and present justification for the current exemptions from application of the Trade Practices Act.

4. In performing its functions, the Committee is to:

- (a) take into account:
  - (i) the principles stated in [the preamble to the terms of reference];
  - (ii) legislation other than the Trade Practices Act and other arrangements that affect market behavior and structure; and
  - (iii) the fact that some government, business and trading enterprises may operate in industries having aspects, including pricing, of natural monopoly; and
  - (iv) current moves to reform government trading enterprises; and
  - (v) overseas experience.

...