3 Competition Institutions

3.1 Competition advocacy and market studies

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

The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy.

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

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

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

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

Draft Recommendation 41 — Market studies power

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

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

Draft Recommendation 42 — Market studies requests

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

All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy.
The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.

**Draft Recommendation 43 — Annual competition analysis**

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

**Draft Recommendation 44 — Competition payments**

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

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

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

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**ACCC view on Draft Recommendations 39-44**

The ACCC supports the Draft Recommendations in relation to:

- quantifying the expected net benefits of the reform agenda;
- competition policy payments to ensure that revenue gains from reform accrue to the jurisdictions undertaking the reform; and
- a statutory body to undertake monitoring and transparent reporting on outcomes, including where government commitments to competition reform are not being delivered.

The ACCC disagrees with the view expressed in the Draft Report that the ACCC should not perform a market study function.

The competition policy reform agenda proposed by the Review Panel has the potential to deliver major benefits for Australians. The ACCC agrees with the Review Panel that the institutional framework should be designed to sustain this reform agenda.

As discussed in section 5.1 of the ACCC’s Initial Submission, the ACCC supports the Review Panel’s Draft Recommendations in relation to:

- an intergovernmental commitment to competition principles;
- the Productivity Commission to quantify expected net benefits from the proposed reforms, and impact on government budgets;
- if disproportionate effects across jurisdictions are estimated, competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform; and
- a statutory body to undertake monitoring and transparent reporting on outcomes, including where commitments are not being delivered.
Where the ACCC disagrees with the Draft Report is the suggestion that:\(^{103}\)

- a competition regulator should not perform an advocacy or education role; and
- a market study function would conflict with the investigation and enforcement responsibilities of a competition regulator.

### 3.1.1 Competition advocacy and education

The International Competition Network (ICN) defines ‘competition advocacy’ as:\(^{104}\)

> those activities conducted by the competition agency related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.

Advocacy activities include promoting compliance with the law, and promoting a competitive environment by examining markets, seeking to understand barriers to competition and then proposing ways to remove those barriers. These barriers include public restrictions on competition.

The Draft Report view that ‘the ACCC should not undertake competition policy advocacy and education, as this may compromise stakeholder perceptions of impartiality’\(^{105}\) is completely inconsistent with international experience, public administration literature and actual practice in Australia.

Internationally, competition review of public restrictions on competition is usually a core responsibility for competition agencies. An even more formal competition advocacy function has been conferred on many overseas competition agencies. For example, the Korean Fair Trade Commission has a specific power to assess government regulation and then recommend anti-competitive rules be amended or set aside. The Italian Competition Authority has time set aside twice a year in the Parliamentary schedule to propose legislation to repeal competition restrictions in Italian law.

In public administration literature, education and advocacy is regarded as an essential function of a regulator. For example:

- Research on tax compliance by the Australian National University Regulatory Institutions Network found that compliance is most likely when the regulator displays and employs an explicit enforcement pyramid. The regulator starts with educative and/or persuasive strategies and then moves to increasingly punitive strategies if voluntary compliance fails. Voluntary compliance is significantly increased where the law is perceived as fair and in the interests of society including the relevant individual. Effective education and advocacy by the regulator is crucial to building a voluntary compliance culture, and reducing the need for costly enforcement action.\(^{106}\)

- The model of public administration developed by Mark Moore from the Harvard University Kennedy School of Government recognises that legislation cannot be designed so as to resolve all uncertainties and forestall all implementation problems. To be effective, the public administrator must form a view as to what public value the authority should produce after taking into account what will be substantively valuable and politically and administratively feasible, and then manage the authority and mobilise support from others beyond the authority so as to produce this value.\(^{107}\)

\(^{103}\) Draft Report pp 281 & 284.


\(^{105}\) Draft Report p. 292.


Malcolm Sparrow, also from the Kennedy School, argues that regulators, instead of responding to complaints on an ad hoc basis, should adopt a ‘risk-control’ or ‘problem-solving’ approach (or as Sparrow puts it, ‘pick important problems and fix them’). This requires a competition agency to actively review Australian markets to identify significant problems and to tailor a compliance and enforcement action plan to address the problem.\(^{108}\) Education and advocacy can be a key component of the action plan.

Further, the Review Panel's conception of a competition agency is not supported by actual practice in Australia. Given the insights that the ACCC gains from administering Australia’s competition law, it is common for governments to request advice from the ACCC to inform a policy process. For example:

- In relation to the Murray-Darling Basin, the *Water Act 2007* provides for the ACCC to advise the Commonwealth Minister on the water market rules and water charge rules, and advise the Murray-Darling Basin Authority on the water trading rules.
- In relation to the allocation of spectrum licences by auction under the *Radiocommunications Act 1992* (Cth), the ACCC has at various times provided advice to the Minister on request in relation to ‘competition limits’ to be included in the procedures for allocating the spectrum licences.

The ACCC’s education and advocacy role is also reflected in section 28 of the CCA which provides that ACCC has functions in relation to the dissemination of information, law reform and research. This includes:

- providing information to guide people on the functions of the ACCC;
- conducting research on matters affecting the interests of consumers; and
- examining and reporting to the Minister on laws relating to the protection of consumers in respect of matters referred to the ACCC by the Minister.

This is consistent with international practice. For example, the US Federal Trade Commission’s review included the following discussion on ‘advocacy’:\(^{109}\)

As an important complement to its law enforcement mission, the FTC engages in competition and consumer protection advocacy before other policymakers, including state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations, such as bar associations. In response to requests or where public comments are sought, the FTC issues advocacy letters, comments, and amicus briefs, providing policymakers with a framework to analyse competition and consumer protection issues raised by pending governmental actions or ongoing judicial disputes. Advocacy can play a particularly important role in addressing governmentally imposed restraints on competition, where other tools may be unavailable. There was strong support among those consulted for the FTC’s advocacy efforts.

Advocacy is regarded as complementary to the functions of a competition agency. The agency’s day-to-day experience in enforcing the competition law provides the agency with the knowledge to:

- advise policy reviews on the operation of legislation (e.g. the ACCC’s work in supporting the criminalisation of cartel conduct and effective industry codes, and in calling for laws to address anti-competitive facilitating practices across the economy).


• assist other government bodies in considering the impact on competition of
government decisions (e.g. ACCC’s work in advising on spectrum licences); and
• interact with constituencies across society to raise awareness of rights and
obligations under the CCA, and the benefits that competition policy can bring (e.g.
ACCC’s targeted education campaigns).

The ACCC therefore strongly suggests that the recommendations arising from this major
review of competition policy should not be based on the misconception that competition
regulators should have no advocacy or educative role.

However, the ACCC acknowledges it need not be the only body with such a role. The
proposed ACCP could play a significant role over and above the work of the ACCC.

3.1.2 Market studies

The Draft Report suggests two concerns with the ACCC performing a market study
function:\textsuperscript{110}

• a market study function is part of competition advocacy; advocacy is a ‘policy
function’ which may compromise stakeholder perceptions of impartiality; and
• enforcement under the CCA is adversarial – having the ACCC conduct market
studies could encourage the perception that a market study is a precursor to
enforcement action, which in turn could impact on participation including the provision
of information.

The advocacy and educative role of competition agencies is discussed above. In the
ACCC’s view, the perceived conflict between a market study function and competition
enforcement is not supported by international experience. The ICN makes the point that
market studies have a long history (since the early 20\textsuperscript{th} century in the United States, and in
Japan, since 1947) and that many overseas competition authorities use market studies as
part of their portfolio of tools. As set out in section 5.2.1 of the ACCC’s Initial Submission, a
2003 OECD report found that close to all of the respondent competition authorities
conducted general sector investigations or economic studies; a 2012 ICN report found that
40 ICN member authorities were using market studies. The performance by the ACCC of a
market study function should therefore not be regarded as an unusual suggestion; rather it is
a mainstream one.

The purposes for which a market study could be used by the ACCC were listed in the
ACCC’s Initial Submission, and further discussed in the ACCC’s Supplementary Submission
(No 2). Such a role could be helpful to governments, businesses and consumers by assisting
in the identification of market problems and possible solutions – or, alternatively, in
confirming that no action is needed, and that a market is in fact working effectively. The
identification of important problems and the appropriate response is essential to maximising
the benefits for Australians from the resources available to the ACCC.

\textsuperscript{110} Draft Report p. 281-283 and 284.
### 3.2 Institutional design

**Draft Recommendation 45 — ACCC functions**

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

**Draft Recommendation 46 — Access and pricing regulator functions**

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

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

Consumer protection and competition functions should remain with the ACCC.

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

**ACCC view on Draft Recommendation 45 & 46**

The ACCC supports Draft Recommendation 45 but does not support Draft Recommendation 46. The competition policy reform agenda proposed in the Draft Report is best supported by retaining a single economy-wide body responsible for competition enforcement, consumer protection and economic regulation with the single objective of making markets work to enhance the welfare of Australians.

Draft Recommendation 46 proposes the creation of a new statutory agency, responsible for access and pricing. The Draft Report lists three benefits of a single national independent access and pricing agency:

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

However, these benefits are already achieved under the current institutional arrangements, with the ACCC/AER regulating across multiple industry sectors. The current structure already minimises the risk of capture. In relation to scale of activities and the cost of multiple regulators, creating a separate access and pricing regulator would in fact make it:
• more confusing and burdensome for both businesses and consumers who would have to deal with two agencies – contrary to the direction of the May 2014 COAG meeting;\(^{111}\)
• harder for common issues to be addressed consistently across the agencies (or to prevent gaps where neither agency takes responsibility for the issue);
• significantly more costly for the Commonwealth government – contrary to the stated objective of the National Commission of Audit,\(^{112}\) creating a separate agency would require the Commonwealth to pay for duplicate corporate and in-house legal and economic services, along with the additional staff needed to duplicate industry knowledge, enforcement expertise and consumer outreach skills; and
• more difficult to attract and retain staff, along with high calibre external legal and economic services.

The Draft Report suggests two other factors relevant to its Draft Recommendation; namely that:

• the culture and analytical approach required for a competition enforcement function and an access and pricing function are incompatible; and
• over time, states and territories could transfer functions to the new agency such as the national regulation of urban and rural water.

**Culture and analytical approach of regulators**

The Draft Report states that, in comparison to competition and consumer functions, there are fewer synergies between competition enforcement and access and pricing regulation. The Draft Report provides three arguments as to why competition enforcement and economic regulation functions are incompatible:

• economic regulation requires an ongoing and collaborative relationship with the industry it regulates; competition law is more likely to involve adversarial interactions;
• the views of an industry regulator about the structure of a particular market could influence a merger decision; and
• there are tensions between competition-related regulatory tasks and the ACCC’s role in protecting consumers.

The ACCC disagrees with these findings, in particular the inference that because some different skills are required for different tasks (albeit all with a strong economic base), it follows that they should be undertaken by separate agencies. To the contrary, provided the overarching agency objectives are consistent, having a diversity of capabilities within a single agency is likely to be more effective in fulfilling them.

**Synergies between competition, consumer protection and economic regulation**

It must be emphasised that both the ACCC and proposed new agency would be economic regulators. They would have a common base in economics.

As the Draft Report notes, the purpose of competition policy is to make the market economy serve the long-term interests of Australian consumers – it is about making markets work properly.\(^ {113}\) The ACCC’s Initial Submission (section 5.2.1) provided a range of points in

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\(^{111}\) COAG Communique, 2 May 2014. COAG agreed to look closely at improving the performance of regulators and the benefits of consolidating regulatory functions, including through the amalgamation of regulators, so that businesses, community organisations and individuals need to interact with as few regulatory bodies as is necessary.


\(^{113}\) Draft Report p. 15.
support of the case that a single agency is the most effective means of achieving this outcome, including:

- The objective of competition policy (making markets work to ‘enhance the welfare of Australians’) and the need to ‘join-up’ the tools to achieve this: competition law focuses on supply side efficiency; consumer law focuses on demand side efficiency, economic regulation focuses on replicating, as far as possible, the outcomes of a competitive market where competition is not feasible.

- The strengths of the current model including:
  - fostering a ‘pro-market’ culture across the three functions;
  - facilitating coordination and depth of analysis across common issues;
  - ensuring small business issues do not fall ‘between the cracks’;
  - providing one source of consistent information, guidance and education to both consumers and businesses about their rights and obligations;
  - administrative savings and skill enhancement through the pooling of information, skills and expertise;
  - in relation to a multi-sector economic regulator, reducing investor uncertainty and the need for regulatory intervention, reducing distortions across industries, and reducing the risk of regulatory capture;
  - providing the consumer protection and outreach expertise needed to support consumer engagement in new infrastructure related markets, and to ensure all interests are represented in economic regulatory processes; and
  - promoting greater accountability as the performance of one regulator is easier to monitor.

- The trend in other countries towards consolidation of functions to deal with problems arising from overlap and gaps in jurisdiction.

- OECD and other international assessments of the current Australian model.

- The ACCC/AER is already a relatively small agency with fewer staff than the ASIC and the Reserve Bank of Australia (RBA). The ACCC is only a little larger than the Australian Prudential Regulation Authority (APRA) and the Australian Communications and Media Authority which are industry specific regulators.

Competition law, consumer protection and economic regulation are complementary tools, with the single objective of improving the economic welfare of consumers. The tools need to work together, particularly in rapidly evolving markets. The synergies between, and the complexities of separating, competition, consumer protection and economic regulation are evident when the practical operation of two separate agencies is considered:

- In telecommunications, the ACCC would investigate claims of anti-competitive conduct in the communications sector under Part XIB, deal with consumer protection issues such as broadband advertising under the ACL, and monitor and report on prices and competition in the telecommunications sector under Part XIB of the CCA. The new agency would assess and enforce terms of access to the NBN in the special access undertaking from NBN Co, assess and enforce Telstra’s structural separation undertaking and plan to migrate its customers to the NBN, and set wholesale prices.

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114 As the Draft Report states (p. 187), competition law is ‘designed to ensure that the behaviour of competitors does not damage the competitive process to the detriment of consumers’.

115 As the Draft Report (p. 294) states: ‘Economic regulation of monopoly or other infrastructure where there is limited competition among providers seeks to protect, strengthen and supplement competitive market processes to improve the efficiency of the economy and increase the welfare of Australians’.
and wholesale terms of access for declared services under Part XIC of the CCA. Under this model, where an issue arises in relation to network access or NBN migration, telecommunications access providers, access seekers and end-user groups would have to engage with both the ACCC and the new agency.

- In energy, the ACCC would enforce the competition and consumer protection provisions, assess energy mergers and authorisations and perform the AER’s function of monitoring retail energy markets and enforcing the laws regulating those markets. The new agency would set the prices charged by energy networks (electricity poles/wires and gas pipelines), and monitor wholesale energy markets and enforce the laws regulating those markets. Presumably, either the ACCC or the new agency would take over the AER’s current function of publishing information on energy markets. As a consequence, ‘gentailers’ (combined generators and retailers in the electricity market) would lose the continuity in the current regime which reflects the integrated and changing nature of energy markets.

- In fuel, the ACCC would enforce Part IV of the CCA and the ACL in relation to issues such as discount fuel shopper docket prices, price signalling and industry structure. In contrast, the new agency would presumably monitor fuel prices under Part VIIA. This means that one agency would have the industry knowledge that the other agency needs to perform its functions.

- In post, the new agency would assess notifications of proposed price increases for Australia Post’s reserved services, inquire into disputes about the terms and conditions on which Australia Post provides bulk mail services, and monitor for cross-subsidy between reserved and non-reserved services. However, complaints that Australia Post was using its market power in the reserved services market to reduce competition in related markets would also come within Part IV of the CCA. If the government undertakes any structural reform of postal services, the problems in practice of overlapping post regulators would increase in significance.

- In aviation, the new agency would monitor prices, costs and profits and quality of aeronautical services and car parking at Brisbane, Melbourne, Perth and Sydney airports, assess notifications of proposed price increases from Sydney Airport in relation to regional air services and assess notifications of proposed price increases from Airservices Australia. The ACCC would enforce Part IV and the ACL in relation to issues such as drip feed pricing and airline alliances. As a result, the aviation industry would be dealing with two separate regulators.

- In rail, the new agency would assess and enforce the undertakings submitted by the ARTC under Part IIIA of the CCA in relation to the Hunter Valley coal chain and interstate rail tracks. The ACCC would be responsible for assessing applications for authorisation of coal supply chain capacity management systems, and assessing proposed rail infrastructure access regimes that form part of section 87B undertakings or court enforceable undertakings. As discussed in section 2.16 of this submission (Part IIIA), the development of the Hunter Valley coal chain capacity allocation system was a highly complex process. Adding an additional regulator into the process would increase the burden on market participants and potentially lead to inconsistencies.

- In relation to the waterfront and shipping, the ACCC would investigate complaints in respect of international liner cargo shipping conference agreements under Part X of the CCA (or Part IV if Part X is repealed). The new agency would provide information on the performance of Australia’s container stevedoring industry (lifting containers on and off ships). In practice, this would require container stevedores and users of these

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116 Monitoring is traditionally regarded as an economic regulatory tool. Part VIIA of the CCA is based on the former Prices Surveillance Act 1983 which was administered by the Prices Surveillance Authority.
services to deal with two agencies both taking responsibility for competition in this area.

- In relation to wheat export supply chains, the new agency would enforce the Port Terminal Access (Bulk Wheat) Code of Conduct 2014, and perform the roles under that Code in relation to exemptions and capacity allocation systems. The ACCC would be responsible for investigating claims of anti-competitive conduct under Part IV and assessing applications for authorisation including capacity allocation systems. As discussed above in relation to coal supply chains, having two separate regulators involved in capacity allocation systems is unlikely to facilitate the process.

- In the Murray-Darling Basin, the ACCC would enforce the CCA with respect to water brokers, exchanges and irrigation infrastructure operators. The new agency would enforce the water market rules and water charge rules under the Water Act 2007 (Cth), monitor and report under that regime, determine regulated charges, provide advice to the Commonwealth minister on development of water market rules and water charge rules, and provide advice to the Murray-Darling Basin Authority on the development of water trading rules. However, as discussed in section 3.1 of this submission, the advisory role of the ACCC in respect of issues such as trading rules derives from the ACCC's competition expertise rather than access and pricing. Along with increasing the regulatory burden on Murray-Darling Basin market participants, separating the agencies will make it more difficult for each agency to effectively perform its functions.

The complementarity of competition law, consumer protection and economic regulation tools is illustrated by the following case study in relation to access to Telstra’s exchanges.

### Case study – Telstra exchange capping

To promote competition, the copper lines that connect customer premises to Telstra’s exchanges are regulated under the telecommunications access regime in Part XIC of the CCA. Access seekers rent the copper lines from Telstra to provide broadband services to customers in competition with Telstra. To do this, access seekers require Telstra to provide them with space in Telstra’s exchange buildings to install their own equipment.

From late 2007, the ACCC started receiving complaints that Telstra had contravened the telecommunications competition law in Part XIB of the CCA. The complaints related to delays associated with Telstra’s queuing system (allocation of space to parties seeking access to Telstra’s exchange buildings) and Telstra’s internal process for determining when there is no longer space available for access seekers in an exchange building (that is, the exchange is determined by Telstra to be ‘capped’).

Initially, the issue was investigated by the ACCC under the competition provisions. However, after reviewing the complaints, the investigation transitioned to focus on enforcing Telstra’s compliance with the access regime. In 2009, the ACCC instituted proceedings in the Federal Court alleging that Telstra had contravened its standard access obligations for the regulated services, and furthermore that it had breached consumer law. The standard access obligations require Telstra to permit interconnection of facilities, and to ensure that access seekers receive equivalent technical and operational quality and timing of interconnection to that which Telstra provides itself. In 2010, the Federal Court imposed an $18.55 million penalty for the contravention and found that, in addition to unlawfully rejecting the requests for interconnection from access seekers, Telstra made representations to those access seekers that were false, thereby engaging in conduct that was misleading or deceptive.
Importantly, in all aspects of the investigation, the ACCC’s objective was the same – to promote competition where it is in the long-term interest of consumers. If there had been two separate regulators, the businesses involved would have needed to deal with two separate regulators and potentially two separate sets of obligations that were seeking the same objective. Each regulator would have required its own staff with industry knowledge and enforcement expertise, and its own in-house legal and economic services – losing the synergies that currently exist and greatly increasing costs.

Consequently, in the ACCC’s view, combining competition, consumer protection and economic regulation is the model that best supports the Review Panel’s reform agenda of reinvigorating the incentives provided by competition to deliver benefits to Australians.

One of the key messages from the Draft Report is that the competition policy environment is not static. The reform agenda needs to evolve in response to changing market conditions. The 2010 Blueprint for the Reform of the Australian Public Service similarly noted the challenges posed by more rapid globalisation and technological change. However, contrary to the recommendation in the Draft Report, the Blueprint identified a need for greater coordination to ‘tackle multi-dimensional and interrelated issues’.117

**Compatibility between competition, consumer protection and economic regulation functions**

Against the synergies between competition, consumer protection and economic regulation, the Draft Report raises concerns with the compatibility of the functions. The ACCC disagrees with the Draft Report view that, in practice, there is a conflict between competition and economic regulation functions.

The ACCC currently has seven divisions:

- three divisions are focused on competition and consumer work: Enforcement; Merger and Authorisation Review; and Consumer, Small Businesses and Product Safety;
- a fourth division is focused on the regulation of infrastructure other than energy networks;
- a fifth division supports the work of the AER; and
- there are two support divisions: Legal and Economic; and People and Corporate Services.

This internal structure creates specific areas of focus, and fosters areas of expertise and skill development. The Commission decision-making structure (which is discussed in section 3.3 below) then allows consideration of individual matters within the broader competition, consumer and regulatory context.

The suggestion that competition law is adversarial and economic regulation is collaborative is overly simplistic. Such a distinction fails to recognise:

- the extensive educative work done by the ACCC with large and small businesses to promote a culture of compliance with the competition and consumer protection law; and
- that enforcement and ensuring compliance with regulatory obligations are core functions of the ACCC and AER’s responsibilities in relation to infrastructures sectors such as telecommunications, energy and the Murray-Darling Basin.

In performing these tasks, both the ACCC and the AER move between points in the regulatory pyramid (discussed in section 3.1 of this submission) with more cooperative

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strategies at the base of the pyramid and progressively more punitive approaches utilised if cooperative strategies fail.

The suggestion that the ACCC fails to apply the statutory test when assessing merger decisions or that combining consumer protection with economic regulation results in economic regulation focusing on short-term price reductions rather than the long-term interests of consumers, is an assertion not supported by any evidence. It also fails to recognise the extensive checks and balances (discussed in section 3.3 of this submission) which apply to public administration in Australia, and specifically to the administration of the merger provisions in the CCA.

In the ACCC’s experience, combining competition law, consumer protection and economic regulation is a highly efficient model for delivering the key objective of all the functions; namely making markets work for consumers. It also would make it easier to successfully implement the type of microeconomic reform agenda envisaged by the Review Panel. The ACCC would therefore be highly concerned if these synergies were lost due to a false perception of conflict between the functions.

Australia’s federal system of government

The Review Panel suggests that, over time, the new agency could assume responsibility for other state functions such as urban and rural water. This raises an issue as to how the funding and appointment process for the new agency will meet the requirements of Australia’s federal system of government.

The Constitutional division of responsibility between the Commonwealth and the states is reflected in the current institutional arrangements for the ACCC and AER:

- The ACCC consists of a Chairperson and six members (in practice, referred to as Commissioners) appointed for a five-year term by the Governor-General. The Commonwealth的通知s states/territories (provided that they are a party to the Conduct Code Agreement 1995) of a vacancy, and invites suggestions. states/territories must be consulted on a proposed appointment. The Minister must be satisfied that a majority of states and territories support the appointment.

- The AER consists of a Chairperson and two other members (in practice, referred to as Board members):
  - The AER is a separate independent decision-making body. Staff are engaged by the ACCC but are assigned to assist the AER. The AER shares resources with the ACCC, particularly in the legal, economic and corporate areas.
  - Two of the three AER Board members are state/territory members nominated in accordance with the Australian Energy Market Agreement 2006. Decisions of the AER Board must be by unanimous vote of the AER members present and voting.
  - Recognising that there are commonalities between the roles of both bodies, one member of the AER Board is an ACCC Commissioner and one AER Board member sits on the ACCC’s Infrastructure Committee (detailed further in section 3.3 below).

The AER structure reflects state government responsibility for energy regulation. The proposal to create a new access and pricing regulator raises issues such as:

- whether the new body should be created by Commonwealth or state legislation;
- whether the process for appointing members should be based on the ACCC or AER model – the new agency would be performing both Commonwealth functions (e.g. telecommunications, aviation and post) and state functions (e.g. energy); and
• whether funding would be provided by the Commonwealth, states or specific industries.

3.3 ACCC governance

**Draft Recommendation 47 — ACCC governance**

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

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

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

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

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

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

**ACCC view on Draft Recommendations 47 & 48**

The ACCC supports the Draft Recommendations in relation to the:

- appearance by the ACCC before a broadly-based Parliamentary Committee such as the House of Representatives Standing Committee on Economics; and
- development by the ACCC of a code of conduct in its dealings with the media.

The ACCC does not support the options for replacing the Commission with a Board or adding an Advisory Board.

The Draft Report states that the ACCC has been a successful agency but that there is a question as to whether enhancements can be made to its governance structure to ensure it continues to perform well into the future.\textsuperscript{118} In particular, the Draft Report suggests that replacing the ACCC Commission structure with a Board like the RBA would:

- bring business and academic experience to the governance of the ACCC; and
- strengthen the accountability of the ACCC to the broader community as represented by external members of the Board.

However, these features are more likely to be achieved under the current ACCC structure (where external members are appointed for set terms) than a Board structure (which would

\textsuperscript{118} Draft Report p. 290.
in effect leave staff as decision-makers). In fact, a Board structure, which would require extensive delegation of decision-making to staff, weakens the ‘chain of accountability’.

**Current ACCC governance structure**

The ACCC’s current decision-making structure is set out in the ACCC’s Annual Report and in the chart at Attachment B to this submission. In summary:

- The ACCC consists of a Chairperson and six other full-time members. Commissioners have diverse backgrounds including from business, consumer, academia and the legal and economic professions. Commissioners are appointed by the Commonwealth (but appointments also require the approval of a majority of the states) for a set period not exceeding 5 years (although are eligible for reappointment). Importantly, the appointment period is independent of the political election cycle.
- The full Commission meets weekly (on Wednesdays) or more frequently when required.
- The ACCC has six subject matter committees which help streamline decision-making by the Commission:
  - Enforcement Committee – oversees ACCC actions to ensure compliance with and enforcement of the CCA and refers recommendations to the full Commission for decision; meets weekly.
  - Strategic Compliance Committee – considers emerging compliance issues and the ACCC’s response including opportunities for media, industry engagement and outreach; meets fortnightly.
  - Mergers Review Committee – considers merger reviews and refers certain recommendations to the full Commission for decision; meets weekly.
  - Adjudication Committee – considers authorisation applications, notifications and certification trademarks and refers recommendations to the full Commission for decision; meets weekly.
  - Communications Committee – considers telecommunications industry issues and refers recommendations to the full Commission for decision; meets fortnightly.
  - Infrastructure Committee – oversees access, price monitoring, transport and water issues and refers recommendations to the full Commission for decision; meets fortnightly.
- The six subject-matter committees consist of Commissioners, not staff. Decisions are based on detailed papers prepared by ACCC staff. These papers include staff recommendations to the Committees/Commission. There are strict protocols (published on the ACCC’s website) applying to the conduct of Commissioners including that Commissioners cannot direct staff recommendations.
- ACCC Commissioners are full-time due to the number of decisions that they are required to make. In 2013-14, Commissioners, through the Committee and Commission structure, considered a total of 1128 staff papers. On average, over 23 decisions are required to be made each week including on:
  - strategic compliance and enforcement – whether to: issue s 155 notices; obtain ‘reasonable grounds’ advice; accept a proposed s 87B undertaking; issue an infringement notice for an ACL contravention; institute court

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119 ACCC & AER, Annual Report 2013-14 pp 152 (consultative committees) and 200 (corporate governance).
120 See the ACCC website for further information.
proceedings; appeal court decisions; seek leave to intervene in other proceedings; administer a product safety recall; make a recommendation to the Minister in respect of a mandatory product safety standard; provide advice on a code of conduct; and, more broadly, conduct an education or information campaign;

- mergers and adjudication – interim/draft/final authorisation determinations; whether to issue a statement of issues in relation to a proposed acquisition; whether to oppose an acquisition; and whether to accept a proposed s 87B undertaking;
- communications and infrastructure – draft/final regulatory decisions (e.g. Part IIIA access undertakings; Part VIIA price notifications; Part XIB record-keeping rules; Part XIC declarations, access determinations and special access undertakings; water charges); reporting on monitoring activities (e.g. Part VIIA price monitoring, Part XIB telecommunications reports and water monitoring); and enforcement for non-compliance with regulatory obligations.

• The ACCC has six consultative committees to inform the ACCC on the performance of its functions:
  - Consumer Consultative Committee – which provides a forum through which consumer protection issues can be addressed between the ACCC and consumer representatives; meets three-four times a year.
  - Small Business Consultative Committee – which allows industry and government to discuss competition and consumer law concerns affecting small business; meets two-three times a year.
  - Franchising Consultative Committee – which enables consideration of, and action on, competition and consumer law concerns relating to the franchising sector and other franchising issues; meets two-three times a year.
  - Fuel Consultative Committee – which promotes discussion between the ACCC, the fuel industry and motoring organisations, increases the ACCC’s understanding of fuel industry issues and helps the ACCC fulfil its role on issues related to competition and consumer protection in the fuel industry; meets twice a year.
  - Infrastructure Consultative Committee – which is an important means for the ACCC and AER to gain feedback from stakeholders and allows infrastructure representatives to learn about issues affecting the regulation of other areas; meets twice a year.
  - Wholesale Telecommunications Consultative Forum – which focuses on implementation of, and compliance with, Telstra’s Structural Separation Undertaking and migration plan. Participation allows the ACCC to identify and assist in resolving current and emerging issues in the forum’s area of interest, and facilitates open communication between Telstra, wholesale customers and the ACCC. Meets twice a year.

The ACCC also meets regularly with bodies such as the Law Council, Business Council of Australia and Australian Chamber of Commerce and Industry.

• Like ASIC and APRA, the ACCC, although it is a body corporate, is deemed to be a Commonwealth entity under the Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act). Under the PGPA Act, Commonwealth entities are subject to more prescriptive standards of governance, performance and accountability in comparison to Commonwealth companies. Reflecting the Australian approach to
In public administration, decisions made by Commissioners are subject to extensive checks and balances:

- The separation of executive and judicial power – in contrast to many overseas regimes, a court, and not the ACCC, determines whether Part IV of the CCA is contravened, and makes the orders.

- Judicial and merits review – ACCC ‘administrative’ decisions (e.g. authorisations, notifications and clearances; access determinations; issuing a s155 notice; freedom of information decisions) may be challenged through judicial review and, in many cases, merits review by a tribunal.

- Legal Services Direction 2005 and review by the Office of Legal Services Coordination – among other things, the Direction sets out a model litigant obligation, and a requirement for agencies to obtain ‘reasonable grounds’ advice from an independent legal advisor before the commencement of proceedings.

- Service Charters – each agency is required to produce a service charter. The ACCC’s Service Charter sets out what to do if a person is dissatisfied with the ACCC’s conduct.

- Commonwealth Ombudsman – which handles complaints about Commonwealth agencies including the ACCC.

- Australian National Audit Office – which audits Commonwealth agencies.

- Australian Public Service Commission – which evaluates the adequacy of Commonwealth agencies’ systems and procedures to ensure compliance with the APS Code of Conduct.

- Ministerial statements of expectation to the heads of Commonwealth regulatory agencies.

- Parliamentary inquiries e.g. Senate Estimates, Committees.

- Inquiries initiated by a Minister e.g. Productivity Commission inquiries, department reviews and reviews by independent bodies.

In addition to this, the ACCC produces guidelines which provide a check on the conduct of a specific matter.\(^{121}\)

**Operation of a Board structure in practice**

In contrast to the current ACCC structure outlined above, under a Board structure:

- the ACCC would be constituted by staff (executive members) as well as external appointments (non-executive members); and

- the decision-making functions of the ACCC would be delegated to committees consisting of executive members and/or other staff, given the frequency and volume of decisions to be made.

The Draft Report does not discuss the potential role of an ACCC Board. For example, whether it is intended that:

- the Board would make substantive decisions in specific investigations (and, if so, for all matters or just a subset of investigations); or

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\(^{121}\) For example, the guidelines applying to a competition investigation include: compliance and enforcement policy (Feb 2014); dispute management policy (June 2013); accountability framework for investigations (May 2013); immunity & cooperation policy for cartel conduct (September 2014); collection and disclosure of information (June 2014); section 155 (currently under review); section 87B undertakings (April 2014).
• the Board would be limited to setting the broad strategic framework within which specific investigations are conducted, and overseeing the governance of the organisation (such as the internal budget and resourcing, the risk management framework and workforce planning).

However, in practice, the Board model would necessitate extensive delegation of the ACCC’s decision-making functions. As outlined above, the work load involved and the fast moving nature of ACCC matters means that it would be impossible for decisions to be made at a monthly meeting by a body that includes part-time members.

Another important difficulty with decisions being made by part-time ACCC Board members is that such members are more likely to have a conflict of interest.

This can be contrasted to the RBA. The RBA is managed by the Governor, and has two boards:

- Reserve Bank Board (responsible for monetary policy and financial stability and the Bank’s policy on other matters excluding payments system policy); and
- Payments System Board (responsible for matters relating to payments system policy).

The Reserve Bank Board consists of nine members:

- three ex officio members – the Governor (who is Chair), the Deputy Governor (who is Deputy Chair) and the Secretary to the Treasury; and
- six non-executive members who are appointed by the Treasurer.

The Reserve Bank Board normally meets eleven times each year, with meetings generally taking three to three and a half hours. The principal function of the Board at each meeting is to set the cash rate to meet an agreed medium-term inflation target. While a cash rate can be set by a Board at monthly meetings, it is not possible to conduct the ACCC’s functions on this basis.

Accountability

Extensive delegation of decision-making, as would be necessary under a Board model, would weaken the ‘chain of accountability’, rather than strengthen it.

The relationship between statutory authorities and the responsible minister was considered in the Uhrig Review, and the recent PGPA Act. In Australia, there are two different governance templates:

- Where the government is able to provide a wide delegation and the authority can operate with ‘entrepreneurial’ freedom, a board will be the optimal mechanism (with the board setting internal strategy, appointing the CEO and supervising management, and overseeing risk).
- Where the government establishes a discrete set of outputs to be delivered by the statutory authority, a CEO or a collection of office holders (a commission) is better. The role of the Minister is to determine policy and overall strategy for the statutory

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122 See the RBA’s website.
123 Public sector accountability is a linked chain of participants each with unique accountability functions. In Australia, the relationship between the legislative and executive arms of government is governed by the Westminster model of ministerial accountability: a cabinet minister is responsible for the actions of their ministry or department; the minister is responsible to Parliament; and Parliament consists of elected members who are responsible to the community.
125 The 2013 reform recognised that the ‘label’ of Board or Commission does not provide a guide as to how a statutory body should be categorised. The AER is a good example of this. Although labelled a ’Board’, the body meets weekly, and there is relatively limited delegation of decision-making powers.
authority. This type of arrangement, with a clear understanding of what is to be achieved and concise delegation of authority to the CEO or commission is regarded as providing a straightforward basis for accountability.

Changing the current ACCC structure to a governance model that is used for government business enterprises would weaken the chain of accountability, and result in less external expertise through the inclusion of staff on the Board.

**Advisory Board**

As an alternative, the Draft Report suggests an Advisory Board that could advise the ACCC on 'operational and administrative practices'. However, it is not clear what this would add to the current appointment of external members as ACCC Commissioners, and the ACCC’s existing consultative committees.

Prior to the Dawson Review, the ACCC had established a comprehensive consultative committee which met bi-annually and comprised representatives from business, consumers, government departments and the professions. The Dawson Review recommended substantive changes to this model to 'make the ACCC more immediately accountable, to enable useful discussion of problems encountered in the administration of the Act and to provide a source of informed advice to the ACCC where appropriate'.

In response to the Dawson Review, the ACCC put in place more formal arrangements for meetings of its consultative committees which now consist of the six committees described above. Replacing these six committees with an Advisory Board is likely to reduce the input of external views into the ACCC although the ACCC recognises that the current committee structure could be reviewed (such as whether to formalise existing arrangements by which the ACCC obtains feedback from large businesses) to ensure there are no significant gaps.

### 3.4 Federal Court of Australia

**Draft Report - Federal Court procedural practices for competition law proceedings**

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

**ACCC view**

The proposal for an economist to preside with a trial judge raises constitutional issues in respect of which the Review Panel may wish to obtain advice.

While complex competition law proceedings present significant procedural challenges to the Court (and to parties), Federal Court judges have the tools required to direct procedures.

As the Review Panel has recognised, competition law proceedings in the Federal Court generally require judges to determine complex issues relating to economic concepts such as 'markets', 'market power' and 'substantial lessening of competition'. The ACCC supports, in

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126 Dawson Report chapter 11.