11. Australia

Deborah Healey

1. INTRODUCTION

Australia has a population of 21.5 million and a liberal democratic system of government. In May 2011 it was rated as one of the best-performing economies in the developed world. With a satisfactory macroeconomic situation in the current global context, government debt the second lowest of all advanced economies, and relatively low unemployment, a return to budget surplus was predicted in 2012–13.[1] It has emerged from the global financial crisis in good shape, due in part to its strong resources trade with China.

Australia has a strong competition law, well-developed competition policy and a significant ongoing commitment to markets and competition.[2] This chapter considers the impact of competition law and policy on the Australian jurisdiction in the context of its particular political, legal and economic circumstances.

[1] OECD (2011a), 'Australia – Economic Forecast Summary OECD Economic Outlook 89'. Retrieved from http://www.oecd.org/document/15/0,3746,en_33873108_33873229_45268687_1_1_1_1,00.html (last accessed 2 February 2013); OECD (2011b), 'Employment Outlook 2011'. Retrieved from http://www.oecd.org/els/employment/outlook (last accessed 2 February 2013); Treasurer (2011), 'OECD Economic Outlook', 26 May. Retrieved from http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/060.htm (last accessed 2 February 2013).

[2] See, e.g., Minister for Trade Dr Emerson (2010), where he stated: 'At its essence, Labor's guiding philosophy of economic reform has been a commitment to markets and competition . . . Of course there can be a role for government intervention to correct for market failure, including anti-competitive behaviour and inadequate private incentives for research and development. But the presumption must be that competition is good, more competition is better and markets are better than governments in allocating scarce resources among competing commercial uses.' Retrieved from http://www.trademinister.gov.au/speeches/2010/ce_sp_101210.html.

2. POLITICAL AND LEGAL SYSTEMS

Australia is a former British colony which was federated in 1900 under a constitution[3] which formally brought together its States and brought the Commonwealth tier of government into existence.[4] The Constitution grants specific exclusive powers to legislate to the Commonwealth Parliament,[5] with the States having power to legislate on all other issues.[6] Legislative and financial powers are distributed between these two groups. The Constitution can only be amended with the approval of voters in a national referendum. A bill containing the amendment must be passed by both Houses of Parliament (one House in certain limited circumstances). A national majority of votes plus a majority of voters in a majority of States must approve any change. This has proven difficult in the past, with only eight of 44 proposals for Constitutional change having been successful since 1901.

Australia is an independent state, but its head of state is formally Queen Elizabeth II of Great Britain, who is also Queen of Australia. The Queen appoints the Governor-General on the advice of the elected Australian government. The Governor-General by convention acts on the advice of ministers on most matters. Australia's government is elected by the population on the basis of proportional representation. At the national (Commonwealth) level, parliament has two chambers: the House of Representatives and the Senate. Five of the six Australian States also have similar bicameral legislatures. One State (Queensland) and the two Territories have only one house each. Government is formed in the lower houses by the party commanding the majority of lower house seats in a general election. The Senate or upper house, however named, is a house of review for all legislation.

The existence of nine separate governments in a country of less than 22 million people is not without issues of duplication and conflicting regulation.[7] The Council of Australian Governments (COAG) is the peak

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[3] Commonwealth of Australia Act 1900 (UK); Commonwealth of Australia Constitution Act 1901 (Constitution).

[4] Each of the States and Territories also has its own Constitution Act. Further restrictions on the powers of the United Kingdom were implemented by the Australia Act 1986.

[5] Such as trade and commerce, corporations, defense, immigration and industrial relations.

[6] Some powers are concurrent and s109 of the Constitution provides that in circumstances of direct conflict the Commonwealth exercise of power prevails. See recent application in *Dickson v R* (2010) 270 ALR 1.

[7] Local government also forms a third tier of governance.

intergovernmental forum in Australia, established in 1992, which provides a forum for high-level consideration of national policy development issues and addresses some of these issues of overregulation. It is comprised of the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Local Government Association. COAG considers policy reforms in significant areas which require cooperative action by Australian governments, such as health, education and training, Indigenous reform, and microeconomic reform. COAG meets as needed, but usually four times per year. COAG communiqués set out its findings, and formal agreements between COAG members are contained in Intergovernmental Agreements.[8]

Australian law has developed from the traditions of English law. Original British settlers brought the common law of England with them but this was modified over the years by Australian case law and statute; common law now means the common law of Australia.[9] The primary sources of law are the Parliaments of the Commonwealth, the States and the Territories, and the determinations of the judiciary.

As noted by Vines, the Constitutional arrangements in Australian States '. . . were based on a number of doctrines, largely modeled on the United Kingdom. The doctrines of parliamentary sovereignty and responsible government, along with the independence of the judiciary set the basic framework.'[10] Australia adheres to the separation of powers doctrine, with the legislature making laws, the executive administering them and the judiciary interpreting the laws. The Constitution insists on a strict separation of judicial power, and this separation is rigidly enforced.[11] Australia thus has an independent judiciary.[12]

The judicial system is constituted by courts which consider both Commonwealth and State law. The State system includes a hierarchy of State courts for civil and criminal matters, with Supreme Courts at the

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[8] See official website of Council of Australian Governments (COAG) at http://www.coag.gov.au/about_coag/index.cfm (last accessed 2 February 2013).

[9] The High Court has stated that there is one body of common law for Australia, not separate bodies of law for each State: *Lipohar v R* (1999) 200 CLR 485. See generally Clark, D. (2010), *Principles of Australian Public Law* (3rd edn), Sydney: LexisNexis; Vines, P. (2009), *Law and Justice in Australia: Foundations of the Legal System* (2nd edn), Sydney: Oxford University Press.

[10] See Vines p. 186 (n 9),

[11] See Constitution Ch. III, and *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

[12] See King CJ in *R. v Moss; Ex parte Mancini* (1982) 29 SASR 385 at 388, cited in Clark (2010), at p. 259 (n 9).

highest State level. The Federal Court, created in 1977, has jurisdiction over a wide range of matters arising out of Commonwealth law. A Federal Magistrates Court was established in 1999 with extensive jurisdiction over less complex matters. The High Court is the superior court and court of review in Australia, with jurisdiction enshrined in the Constitution. The High Court has original jurisdiction in a number of areas[13] and appellate jurisdiction, with special leave, from its own original jurisdiction, from Federal courts and from State Supreme Courts.[14]

Australia was ranked eighth by Transparency International in its Corruption Perceptions Index in 2010.[15] It has signed and ratified the UN Convention against Corruption, has a number of State and Commonwealth bodies which regulate corruption in the public sector, and has comprehensive systems of administrative review at all levels of government. These are supplemented by Freedom of Information laws.[16] Each State and Territory and the Commonwealth has an Ombudsman charged with investigating complaints about administration of government departments, public statutory bodies, and local government.[17] A substantial number of criminal laws target corruption.[18]

3. ECONOMIC SNAPSHOT

Australia is an advanced, innovation-driven economy, ranked 20th in the most recent study of global competitiveness[19] and second on the United Nations Human Development Index.[20] The government has a demonstrated commitment to markets and competition, with limited government

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13 Constitution, ss75 and 76.

14 Ibid, s73.

15 Available at http://www.transparency.org/policy_reserach/surveys_indices/cpi/2010/results (last accessed 2 February 2013).

16 Freedom of Information Act (Cth) 1982.

17 See Clark, at p. 303 (n 9).

18 Available at http://www.ag.gov,.au/foreignbribery (last accessed 2 February 2013).

19 Schwab, K. (ed.) (2011), 'World Economic Forum Global Competitiveness Report 2010–2011', World Economic Forum, Geneva. Retrieved from http://www3.weforum.org/docs/WEF-GlobalCompetitivenessReport_2010-2011.pdf (last accessed 2 February 2013), at p. 26. This was a drop of four places since the previous report in 2009–10.

20 The Human Development Index measures a country's achievements in areas such as longevity, knowledge and a decent standard of living. Available at http://undp.org/en/statistics (last accessed 2 February 2013).

intervention to correct market failure, and this has led to sustained economic growth.[21] Gross domestic product (GDP) per capita is almost US $56,000 per annum and this continued to rise between 2008 and 2010.[22] Australia has an extremely efficient financial system, a banking sector which is 'amongst the most stable in the world' and a highly ranked and improving education system. Public and private institutions are transparent and efficient. Negatives include lagging behind the top performers on innovation and business sophistication, two of the critical drivers for advanced economies.[23]

While governments traditionally played a large part in the economy, a more robust and broader market approach was taken in the 1980s when the government floated the Australian currency, cut tariffs and eliminated import quotas. Australia went from being '. . . an economy supplying a small domestic market protected by high tariff walls to an open, competitive economy supplying global markets'.[24] The reforms took Australia '. . . from a highly protected and over-regulated economy with short term and reactive macroeconomic policy focus, to an open, flexible and dynamic economy with expectations anchored by credible macroeconomic policy frameworks'.[25]

Farming makes an important contribution to the Australian economy, with 60 percent of total agricultural production by volume exported.[26] This represents almost 12 percent of total exports. 17.2 percent of the total workforce is employed in farming[27] and related industries and leading commodities include wheat, beef, wine, wool and dairy products.[28]

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[21] Productivity Commission (2005), 'Review of National Competition Policy'. Retrieved from http://www.pc.gov.au/projects/inquiry/ncp/docs/finalreport (last accessed 2 February 2013); see also Emerson, Craig, Minister for Trade (2010), 'The Future of Trade Policy in an Uncertain World', Address to Lowy Institute, 10 December. Retrieved from http://www.coag.gov.au/about_coag/index.cfm (last accessed 2 February 2013).

[22] Schwab, at para. 115 (n 19).

[23] Ibid, at p.28.

[24] See Emerson at p. 2 (n 21).

[25] Henry, K. (2007), 'Challenges Confronting Economic Policy Advisors', *ANZSOG, Views from the Inside*, No. 3. Retrieved from http://www.anzsog.edu.au/media/upload/publication/11_anzsog_inside_view_03.pdf (last accessed 2 February 2013).

[26] National Farmers' Federation Limited (2011), 'Farm Facts 2011', January, at p. 5.

[27] Ibid, at p. 6.

[28] In addition, sugar, barley and lamb are also important agricultural exports. See ibid, at p. 6, citing Department of Agriculture, 'Fisheries and Forestry at a Glance 2010'.

Australian farmers are among the most self-sufficient in the world, with government support representing just 4 percent of farming income.[29]

Australia recovered quickly from the global financial crisis of 2008 and the design of its stimulus package at that time was applauded by the eminent economist Joseph Stiglitz, who has stated that, because Australia implemented an appropriate stimulus package, '. . . its downturn was modest and it was the first of the advanced industrial countries to resume growth'.[30]

In 2010 the OECD forecast robust growth for Australia fueled by the mining boom,[31] and in May 2011 it forecast GDP growth of 2.9 percent in 2011 and 4.5 percent in 2012. These projections are less likely to be met following global economic developments in 2011, but nevertheless the Australian economy is still performing relatively well. Unemployment is relatively low in world and Australian historic terms.

The OECD applauded efforts by the government to take advantage of its favorable economic situation to put in place a carbon tax and pursue long-term structural reforms. In the same report the OECD predicted further a rebound of the economy after disruptions caused by natural disasters in early 2011.[32]

China is Australia's largest trade partner, with Japan second. China is the largest buyer of Australia's main export, iron ore, but Japan still takes a significant proportion of coal exports.[33] Australia is among China's top ten trade partners. Trade in commodities has always been important but has significantly increased in recent years. This has strained transport infrastructure, which lags behind the world's best.[34]

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[29] Such as the US (9%), EU (23%), Japan (47%), Korea (52%) and Norway (61%). National Farmers' Federation Limited, p. 9 (n 26).

[30] Stiglitz, J. (2010), *Freefall Free Markets and the Sinking of the Global Economy*, London: Allen Lane, p. 62. The same commentator also suggested that Australian recovery preceded that of China. Interview with Kerry O'Brien, 'The 7.30 Report', 27 July 2010.

[31] OECD. 'Economic Outlook, Volume 2010/2011', at p. 118.

[32] OECD (n 1).

[33] See Callick, R. (2011), 'China Growing Partnership', *The Australian*, Special Report on China, 6 June, at p. 25.

[34] Other infrastructure shortcomings identified include those caused by rapid population growth and an aging population, inadequate water supplies to large cities and water pricing, environmental concerns requiring scaling back of greenhouse emissions which will require substantial capital investment in energy and rural water management and the need to substantially improve broadband services. See Girno, C. (2011), 'Meeting Infrastructure Needs in Australia', OECD Economics Department Working Papers No. 851. Retrieved from http://dx.doi.org/10.1787/5kgg7sx3p7q0-en (last accessed 2 February 2013).

Australian governments have long been committed to trade liberalization. Australia has Free Trade Agreements with Singapore,[35] Thailand,[36] the United States,[37] Chile[38] and ASEAN–New Zealand,[39] as well as other long-term arrangements with countries such as New Zealand and Canada. It is currently negotiating agreements with China, Malaysia, Japan, and Korea.[40]

Productivity in Australia has slowed dramatically since 2002 for a number of reasons, including underinvestment in infrastructure and overregulation in a number of areas. Initiatives across a wide range of areas have been identified to improve productivity. The establishment and initiatives of Infrastructure Australia and the ongoing National Reform Agenda, discussed below, address some of the shortcomings which have been linked to productivity malaise.

The current Labor government lacks an absolute majority in parliament. Six independents have held that balance of power in the lower house since 2010, and this has restricted the ability of the government to carry out a number of reforms proposed prior to the election, or has changed their final form. Three important pieces of legislation have the capacity to significantly affect the Australian economy. The rollout of a new National Broadband Network has commenced.[41] Most recently legislation was passed to implement a 'carbon price mechanism' which will apply to approximately 500 of the nation's biggest polluters.[42] Legislation imposing a Minerals Rent Resources Tax on iron ore and coal mining, and extending the existing Petroleum Resources Tax to offshore petroleum and gas production from July 2012 has been passed by the House of Representatives and is awaiting Senate approval.[43]

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35 28 July 2003.
36 1 January 2005.
37 1 January 2005.
38 6 May 2009.
39 1 January 2010.
40 See generally Productivity Commission (2010), 'Bilateral and Regional Trade Agreements', Research Report. Retrieved from http://www.pc.gov.au/projects/study/trade-agreements/report (last accessed 2 February 2013).
41 See 'NBN Rollout: Statements of Expectations Joint Media Release' (20 December 2010). Retrieved from http://www.minister.dbcde.gov.au/media/media_releases/2010/121 (last accessed 2 February 2013).
42 The ACCC has been given significant resources to police misrepresentations in relation to carbon pricing. See generally Leary, D. (2012), *Renewable Energy Law*, Sydney: Federation Press, chapter 2.
43 For a description of the proposed tax, see http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2157 (last accessed 2 February 2013).

4. COMPETITION LAW AND POLICY

Australia has both a well-developed competition law and a strong holistic competition policy which has brought about many changes to the structure and workings of the economy over the last two decades. Australia can be described as a small market economy despite its relatively large population. This is because most of its industries are characterized by concentrated market structures due to population dispersion over a comparatively large geographic area, which leads to market regionalization. Other national markets are relatively far away. The result is an abundance of mainly oligopoly markets,[44] which raise issues of coordinated conduct and other competition law concerns.[45]

The Australian Competition and Consumer Commission (ACCC) enforces the Competition and Consumer Act 2011 (CCA), including Part XIB which applies to the telecommunications industry. The Australian Energy Regulator (AER), an independent statutory body within the ACCC, is responsible for enforcing the regulation of Australian energy markets and compliance with electricity and gas rules. The Australian Energy Market Commission is responsible for the National Electricity Rules.

A significant review of competition policy in the early 1990s delivered substantial benefits to consumers and the economy and is worth discussing in some detail as it has been used as a model for other countries.[46]

4.1 History of Competition Law

Australia has had some form of competition law since 1906, although it was dormant, for all practical purposes, until the enactment of the Trade Practices Act 1974 (TPA).[47] The TPA was the first serious Australian

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[44] See Gal, M.S. (2003), *Competition Policy for Small Market Economies*, Cambridge, MA: Harvard University Press, p.2.

[45] See Sims, R., Chairman ACCC (2011c), 'Some Perspectives on Competition and Regulation', Speech to Melbourne Press Club, 10 October. Retrieved from http://www.accc.gov.au (last accessed 2 February 2013).

[46] The Australian Model of National Competition Policy is featured widely in the OECD Competition Assessment Toolkit.

[47] The Australian Industries Preservation Act 1906 was declared unconstitutional by the High Court under a now-discredited view of constitutional interpretation. The 1965 Trade Practices Act was also declared to be unconstitutional and was replaced by the more limited 1971 *Trade Practices Act*. It was superseded by the 1974 TPA, which was amended and renamed the Competition and Consumer Act (CCA) in 2011.

competition law and was modeled on provisions of US and EU statutes operative at that time. The TPA was limited overall, however, as there were a number of important areas of business where it did not apply. A whole range of government and non-incorporated bodies were not subject to the TPA because of Constitutional limitations. The Australian Parliament's powers under the Constitution to make laws with respect to specific matters, including corporations[48] and interstate or overseas trade or commerce, provided the main Constitutional basis for the TPA.[49] Bodies which are not trading, financial or foreign corporations, or are not engaged in Constitutional trade or commerce are not within the Constitutional power of the Commonwealth to regulate in a competition law context. In addition, Constitutional and other limitations prevented the Australian Parliament from prohibiting State and Territory governments enacting laws within their own jurisdictions expressly exempting particular conduct or certain bodies from the application of the TPA.[50] The Australian States and Territories often made laws and regulations favoring their own industries and undertakings, and the Commonwealth could not control this. Finally, a common law doctrine, 'the shield of the Crown', gave government bodies immunity from the TPA and substantially limited the way competition laws could be applied to bodies which formed part of the Crown (or government) at Commonwealth, State, or Territory level.[51]

In 1977 the Commonwealth Parliament recognized that it was inappropriate for Government bodies carrying on business to have immunity from the TPA, and the TPA was made applicable to Commonwealth Crown bodies carrying on business. Under the Constitution, however, there was no power to make similar laws that were binding on the States and Territories.

4.2 Hilmer Review

The Australian economy was in decline in the 1970s and 1980s. In the words of the Australian Productivity Commission:

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[48] Trading, financial and foreign corporations: Constitution, s51(xx); TPA, s4(1).

[49] Trade or commerce power, Constitution, s51(i); TPA, s6(2). There are some other relevant constitutional provisions but those mentioned provide the major platform for the law.

[50] Under the TPA itself the Australian Parliament could also enact laws exempting particular conduct and certain bodies from the operation of the TPA without giving reasons.

[51] Courts have more recently taken a narrower view of the shield of the crown: *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1.

> . . . Output growth slowed, inflation and unemployment rose, and productivity growth was consistently low by international standards . . . high trade barriers and various regulatory and institutional restrictions on competition in the domestic market led to significant inefficiencies across the economy. They also created a business culture that focussed on securing government preferment rather than on achieving a competitive edge through cost control, innovation and responsiveness to customer needs . . . from the early 1980s, Australian governments embarked on a programme of extensive economic reform. As the reform programme gathered pace, it became apparent that aspects of Australia's wider competition policy framework were impeding performance across the economy and constraining the scope to create national markets for infrastructure and other services.[52]

A major review of Australian competition policy took place in 1992 and it emphasized that Australia was in fact one economy and should be treated as such. The Hilmer Review[53] was undertaken with the agreement of the Commonwealth, all States and the Territories. It took a national approach to competition policy, and emphasized that competition policy embraces a range of laws and policies, not just the competition law itself. The Hilmer Report emanating from the Review recommended a large number of significant reforms which were ultimately adopted by the Australian government and the governments of each of the States and Territories by agreement.[54] These reforms became known as the National Competition Policy (NCP).

The Report concluded that an effective competition policy for Australia should address six concerns:

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[52] Productivity Commission (n 21), at p. xiv.

[53] *Report of the Independent Committee of Inquiry into the Trade Practices Act, National Competition Policy* (1993) Canberra: AGPS (the 'Hilmer Report').

[54] The legislative package comprised the Commonwealth Competition Policy Reform Act 1995 and associated state and territory application legislation, which amended the existing TPA to incorporate Hilmer recommendations. Governments also signed three Agreements: the Competition Principles Agreement, which set out the principles agreed for implementing the NCP, including prices oversight, structural reform of public monopolies, review and reform of restrictive regulation, competitive neutrality, third party access to infrastructure services and application of these principles to local government; the Conduct Code Agreement, which set out the basis for extending coverage of the TPA and required State and Territory governments to notify the ACCC when they enact laws under s51; and the Agreement to Implement the National Competition Policy and Related Reforms, which set out other reform commitments and provided for payments to the States and Territories linked to compliance with commitments. See further details and the text of these documents at http://ncp.ncc.gov.au (last accessed 2 February 2013).

- Anti-competitive conduct of firms;
- Unjustified regulatory restrictions on competition;
- Inappropriate structures of public monopolies;
- Denial of access to certain facilities that are essential for effective competition;
- Monopoly pricing; and
- Competitive neutrality when government businesses compete with private firms.[55]

A body called the National Competition Council (NCC) was established to support the implementation of NCP. Under the Agreement to Implement Competition Policy and related Reforms there were three tranches of payments to the states and territories on a per capita basis subject to satisfactory compliance with NCP commitments. Where the NCC determined that a government had not complied with its NCP commitments, it recommended that the Treasurer reduce the expected payment.

This institutional structure and the incentives for compliance have proved to be largely effective.

4.3 Application of the Competition Law

The Hilmer Report stated that, as a matter of policy, competition law should apply to all entities carrying on business[56] and that the TPA could apply to State and Territory GBEs (Government Business Enterprises) in the same way that it already applied to Commonwealth GBEs.[57] It recommended that any exemptions or immunity should be of limited nature and implemented only after a transparent process.[58] It also recommended that

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[55] Hilmer Report, at p. 7.

[56] In addition to limitations under the Constitution noted above, exemptions also existed for groups such as statutory marketing bodies and the professions. Other groups were able to be granted specific exemptions by the laws of the States and Territories in a non-transparent way. Some conduct could be granted administrative approval by the regulator after a more transparent process called authorization and notification. So, for example, those engaged in professional activities such as doctors or lawyers were not generally caught by the TPA prior to these amendments – they were not incorporated and did not engage in interstate or overseas trade or commerce, i.e. Constitutional trade or commerce.

[57] TPA, s2A.

[58] Authorization which is an administrative sanction may be granted by the ACCC for most Part IV conduct on the basis of individual application if it can be justified on public benefit grounds – see CCA, s88ff.

GBEs should not enjoy any advantages when competing against private sector counterparts. Ultimately, the TPA was amended to reflect these recommendations. The States and Territories enacted laws corresponding to the major competition prohibitions of the TPA, to include any bodies not constitutionally caught by the TPA.[59] Each of the States and Territories agreed to maintain the standard Part IV Restrictive Trade Practices legislation in a uniform way in the future to create a single competition statute for the whole of the country.[60] New provisions[61] made State and Territory liable for breaches of Part IV prohibitions 'insofar as the Crown carries on business either directly or indirectly or by an authority of the State or Territory'.[62] Section 51 of the TPA was substantially narrowed to prevent legislated exemptions by governments except in limited well-justified and transparent circumstances with a sunset clause.

4.4 Legislative Review

The Hilmer Report recommended the review by governments at Commonwealth, State and Territory levels of all their laws to identify and amend those which unnecessarily restricted competition. Additional requirements for review of new legislation were imposed to prevent the enactment of laws that hinder competition without examination under a transparent process setting out the anti-competitive effect of relevant conduct and justifying it on public benefit grounds.[63]

Approximately 1,800 laws were reviewed, with 'nearly half' being 'in priority areas such as water, primary industries, communications, fair trading and consumer protection, insurance and superannuation, health, legal and other professions, planning and construction, retailing, social regulation and transport'.[64] Most legislation was reviewed and many

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[59] These prohibitions were caught at that time in Part IV, Restrictive Trade Practices, of the TPA.

[60] A new Part XIA was inserted into the TPA creating this Competition Code. Application legislation in each State and Territory makes the Competition Code part of the law of that jurisdiction. While the Competition Code repeats the substantive provisions of Part IV, it applies to 'persons' rather than to corporations to address the issue of the limitations on the Commonwealth Parliament's power to legislate in this area.

[61] CCA, s2B and s2C.

[62] CCA, s2B.

[63] Authorization, which is an administrative sanction, may also be granted by the ACCC for most Part IV conduct on the basis of individual application if it can be justified on public benefit grounds – see CCA, s88ff.

[64] OECD (2010), 'Reviews of Regulatory Reform, Competition Policy in

important reforms were implemented. Statutory monopoly marketing schemes and the dairy industry were deregulated, with a resultant fall in drinking milk prices; shop trading hours in Tasmania and bakery hours in NSW were deregulated; and liquor licensing controls were relaxed in several jurisdictions.[65] It has been recommended that the NCP plan of regular legislative review of ongoing constraints should continue.[66]

4.5 Structural Reform of Public Monopolies

Another Hilmer recommendation endorsed structural reform of public monopolies to facilitate competition. Before competition was introduced to a market involving any Commonwealth, State, or territory body, responsibilities for industry regulation were removed, and a merits review of the removal of any monopoly and potentially competitive elements of the business was conducted.

4.6 Third Party Access Regime

A new third party access regime was introduced into the TPA (CCA) as Part IIIA to facilitate access to significant infrastructure facilities on recommendation of the Hilmer Review.[67] The policy objective in implementing the access regime was to enhance consumer welfare by ensuring that facilities exhibiting natural monopoly characteristics did not become bottlenecks. The access regime was aimed at ensuring competition in upstream and downstream markets to maximize efficiency in the supply of goods or services to consumers, while at the same time not acting as a disincentive to further investment.[68] Part IIIA provides a detailed framework for the grant of access to a service by means of a facility based on specified factors.[69]

Australia'. Retrieved from http://www.oecd.org/dataoecd/63/61/44529918.pdf (last accessed 2 February 2013).

[65] Ibid, at p.55. Not all commentators agree that this process has worked well. See, e.g., Margetts, D. (2007), 'National Competition Policy and the Australian Dairy Industry', *Journal of Australian Political Economy*, 60, pp. 98–129.

[66] OECD, at p.60 (n 64).

[67] See Competition Principles Agreement, which set out commitments for a regime to cover 'third party access to services provided by means of significant infrastructure facilities' (clause 6). The regime has been reviewed and amended several times since its introduction: Productivity Commission (2001); Trade Practices Amendment (National Access Regime) Act 2006.

[68] See, generally, King, S. and R. Maddock (1996), *Unlocking the Infrastructure: The Reform of Public Utilities in Australia*, Sydney: Allen & Unwin.

[69] See CCA, s44B, s44H.

The regime is made up of a complex web of declaration, negotiation and arbitration, dispute resolution, certification of State and Territory regimes, access undertakings, and industry codes far too detailed to set out in full here.[70] The National Competition Council, the ACCC, and the Australian Competition Tribunal are involved in these processes at national level.[71] This general access scheme is supplemented by other Federal and State access regimes, such as Part XIC of the CCA, which applies to aspects of telecommunications services,[72] and industry-specific regulation of gas and electricity infrastructure.[73] Access regimes are in place under the generic law or special regulations in sectors such as railways, airports, shipping and ports, electricity and gas, water and sewerage and postal services.[74]

4.7 Price Oversight

The Hilmer Review also recommended establishment of independent sources of price oversight on monopolistic government business enterprises. Very limited scope for price surveillance and monitoring is contained in the CCA.[75]

4.8 Competitive Neutrality

Competitive neutrality was systematically addressed in the Hilmer Report.[76] Government in Australia was traditionally responsible for the

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[70] The regime is well established, with a large number of determinations and court decisions on the record. For a detailed examination of the law and the cases, see Corones, S.G. (2010), *Competition Law in Australia* (5th edn), Sydney: Lawbook Co.

[71] See CCA, Part IIIA. The regime has been criticized for its complexity and reviewed by the Productivity Commission (2001), and was amended in 2006 and again in 2010 to address concerns.

[72] Carriers can also request access to facilities of other carriers under the Telecommunications Act 1997, Parts 3 and 5. In *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2010] FCA 790, Telstra was fined a total of $18,550,000 for failure to provide access under CCA, s152AR(5)(c) and s68(1), and Telecommunications Act 1997, c l.17 of Schedule 1.

[73] See Trade Practices Amendment (Australian Energy Market) Act 2004 which established the Australian Energy Regulator; Parer Review (2002) (Council of Australian Governments Energy Market Review), 'Towards a Truly National and Efficient Energy Market', Draft Report, AGPS, Canberra.

[74] Corones, S.G. (2010) 'Competition Law in Australia', 5th ed, *Lawbook Co*, Sydney at Ch 14.

[75] CCA, Part VIIA. Recent pricing inquiries involved petrol (2007) and groceries (2009).

[76] Competition Principles Agreement, clause 3.

delivery of a wide range of services in sectors such as utilities, transport and telecommunications. Shortcomings of government business operations, such as poor pricing practices and productivity negatively impacted the economy.[77] Competitive neutrality is recognition that significant government business activities which are in competition with the private sector can result in market distortions and inefficient resource allocation, and that government businesses should not have a competitive advantage or disadvantage simply by virtue of their ownership or control. Issues such as the lack of a requirement to recover costs or to price efficiently, the non-accountability of managers for their business performance and the conferral of monopoly rights on businesses (sheltering them from competitive pressures and discipline) were identified well prior to the Hilmer Report and governments had pursued a variety of reforms such as corporatization,[78] commercialization, privatization, and competitive tendering and contracting to address these problems.[79] Commonwealth, State and Territory governments agreed to address these issues.[80] All governments adopted individual policy statements, set up fair and transparent individual complaint mechanisms and undertook to report annually on implementation. In its 2005–06 Annual Report the NCC stated that all states and territories had corporatized major government businesses, other significant businesses had been exposed to competitive

[77] National Competition Council (2007), 'Competitive Neutrality Reform: Issues in Implementing Clause 3 of the Competition Principles Agreement', Canberra, at p. 2.

[78] The Hilmer Report (1993), at p. 300 recognized that 'corporatization' alone would not fulfill the requirements of an appropriate model. The model required embodies five basic principles: clarity and consistency of objectives; management authority and accountability; performance monitoring; effective rewards and sanctions; and competitive neutrality.

[79] The Hilmer Report (1993) noted that distortions relating to government business enterprises are generally: '. . . less deliberate and transparent, and typically flow from a failure to reform laws, policies and practices to keep abreast of developments as bureaucratic and monopolistic enterprises move to more commercial and competitive operating environments.' (at p. 295).

[80] Potential disadvantages of government ownership were also noted, including greater accountability obligations (such as administrative review and more detailed reporting obligations), community service obligations, reduced managerial autonomy, requirements to comply with various government policies on wages, employment and industrial relations. A government business may have additional accountability such as administrative review, and additional reporting requirements which do not apply to private businesses.

neutrality principles, and that complaints units had been established, but the majority of GBEs still failed to obtain commercial rates of return.[81]

4.9 Assessment of NCP

In 2005 the Productivity Commission reviewed the impact of NCP and related reforms on the Australian economy and the Australian community.[82] As part of NCP A$834m was paid to the States and Territories between 1998 and 2006. The Productivity Commission concluded that NCP had delivered substantial benefits greatly outweighing its costs, contributing to the productivity surge that underpinned 13 years of continuous economic growth and associated increases in household incomes. The annual benefit to the Australian economy was estimated at 2.5 percent of GDP or A$20bn annually. Reforms directly reduced the prices of goods and services such as electricity, gas, milk, freight rail, port charges and telecommunications.[83] Many households were estimated to have benefited from lower prices for goods and services made possible by cheaper infrastructure inputs for businesses, as well as from the longer-term stimulus to employment.[84] Business innovation, customer responsiveness and choice had been stimulated.[85] The Productivity Commission found that productivity growth in the 1990s and early 2000s was fueled by microeconomic reforms including NCP.[86] The NCP reforms had a very significant impact on the community generally and particularly benefited consumers in Australia.[87]

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[81] As to the measurement of rates of return in a competitive neutrality context, see generally Commonwealth Competitive Neutrality Complaints Office (1998), 'Research Paper Rate of Return Issues', Commonwealth of Australia, Canberra.

[82] The Productivity Commission (2005) also looked at the issue of ongoing competition policy reform.

[83] Ibid, at p. xix.

[84] Ibid, at p. xx.

[85] Priorities for reforms going forward included strengthening the national electricity market, building on the national water initiative, developing integrated national strategies on efficient and integrated freight transport services, and an overarching review of the health system.

[86] Productivity Commission (2005), at p. xvii (n 21).

[87] Not all commentators agree that this process has worked well. See, e.g., Margetts (n 65). The impact of the reforms on regional and rural Australia was considered by the Productivity Commission following a number of complaints: see http://ncp.ncc.gov.au/docs/PC%20inquiry%20report%208,%201999.pdf (last accessed 2 February 2013).

4.10 National Reform Agenda

Following the Productivity Commission Review of NCP, COAG in 2006 agreed to maintain the reform momentum by developing a new agenda based on the NCP collaborative national approach, the National Reform Agenda (NRA).[88] Poor productivity figures since that time have focused attention on a number of different areas.

Infrastructure is one key area for reform. The OECD, for example, has recently stated that infrastructure is important for Australia's continued growth, particularly because of the country's size, geographical dispersion of population and production centers, and remoteness from other markets. The infrastructure deficit due to past underinvestment is exacerbated by the strong demand generated by the mining boom, population growth, technological progress and environmental concerns. The OECD has advised that better regulation is needed to promote a more efficient use of existing facilities and well-targeted public and private investment decisions.[89]

The government recognized this in establishing the statutory body Infrastructure Australia in 2008 to advise governments, investors and infrastructure owners on planning and development. Infrastructure Australia is currently developing a strategic blueprint for unlocking bottlenecks and modernizing the nation's infrastructure[90] and is reviewing infrastructure finance.[91]

Infrastructure is also part of the NRA. The purpose of the NRA is '. . . boosting productivity, increasing workforce participation and mobility and delivering better services for the community'. It is supported by agreements and financial incentives for the States to meet commitments.[92] Progress will be monitored by a new body, the COAG Reform Council.

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[88] See http://ncp.ncc.gov.au/pages/about (last accessed 2 February 2013).

[89] See 'Economic Survey of Australia 2010'. Retrieved from www.oecd.org/documentprint/0,3455,en_2649_34569_46255013_1_1_1_1,00.html (last accessed 2 February 2013).

[90] See Infrastructure Australia Act 2008; further information on Infrastructure Australia. Retrieved from http:www.infrastructureaustralia.gov.au (last accessed 2 February 2013). It reports to COAG.

[91] Infrastructure Australia released an issues paper on infrastructure finance in July 2011. Retrieved from http:www.infrastructureaustralia.gov.au (last accessed 2 February 2013).

[92] Productivity Commission (2006a), 'Potential Benefits of the National Reform Agenda Report to Council of Australian Governments', Research Paper. Retrieved from http://www.pc.gov.au/__data/assets/pdf_file/0003/61158/national-reformagenda.pdf (last accessed 2 February 2013).

There are three main streams to the NRA: competition, regulation and human capital. The competition reform stream focuses on productivity and economic efficiency in transport, energy, infrastructure regulation and planning, and climate change. Its activities include those relating to infrastructure such as ports and port authorities, handling and storage facility operations, rail freight infrastructure, the electricity transmission grid and gas pipeline operations.[93]

Business leaders have reported ongoing concerns about the burden of government regulation.[94] The NRA regulatory review stream comprises two distinct objectives: to promote best-practice regulation making and review, and to reduce the regulatory burden imposed on business by the three levels of government.[95] An important part of current regulatory reform is the National Partnership Agreement to Deliver a Seamless National Economy, which covers 36 streams of regulation and competition reform, with some reforms complete.[96] The objective is to replace piecemeal state and territory laws with uniform national regulation. Payroll tax, occupational health and safety, and trade and professional licensing and accreditation are among areas which have been targeted.[97]

Two important examples of national reform are the Australian Consumer Law and the regulation of the legal profession, both of which are discussed below as examples of the way the reform agenda works.

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[93] The current Chairman of the ACCC has suggested that, in the infrastructure area, incentives may assist in bringing competition to the fore in major reform areas. See Sims (2011b), at p. 6; see also Sims (2011c).

[94] Schwab (n 19). Business leaders surveyed for the Global Competitiveness Report have ongoing concerns about the burden of government regulation and rank restrictive labor regulation, inefficient government bureaucracy, tax rates, access to financing and inadequate supply of infrastructure as the most problematic factors for doing business.

[95] The three streams of government are Commonwealth, State and local government.

[96] See COAG Reform Council (2010), 'National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009–2010, Report to COAG 23 December'. Retrieved from http://www.coagreformcouncil.gov.au/agenda/competition.cfm (last accessed 2 February 2013).

[97] In March 2008 the Productivity Commission was asked to review the impacts and benefits of the COAG reforms every two to three years, specifically looking at whether reform potential was being achieved and the opportunities for improvement. See Productivity Commission (2011), 'Terms of Reference and Framework Report', 19 January. Retrieved from http://www.pc.gov.au/projects/study/coag-reporting (last accessed 2 February 2013). A Final Report on the current review is expected in March 2012.

4.11 The Australian Consumer Law

From 1974, when the TPA was enacted, consumer protection law in Australia was contained in both the TPA and in the consumer laws of the States and Territories. This meant that in a particular State both the TPA and State law potentially applied. Different jurisdictions had similar but often not identical consumer laws.[98] This created difficulties for businesses operating nationally and also for enforcement. Following two studies, a report on the material differences between Commonwealth, State and Territory provisions, and a report by the Commonwealth Consumer Affairs Advisory Council in 2009, the Productivity Commission recommended a single national generic consumer law based on the existing provisions of the TPA, with new consumer guarantees not dependent on contract.[99] The Ministerial Council on Consumer Affairs adopted both recommendations.[100] The Australian Consumer Law, operative 1 January 2011, is a single national law for fair trading and consumer protection applying across all Australian jurisdictions.[101] For Constitutional reasons it applies as a law of the Commonwealth under the CCA and as a law of each of the states and territories by separate state and territory application legislation.[102] This means that it has universal coverage.

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[98] See TPA former s75 (1) (repealed effective 1 January 2011).

[99] Productivity Commission (2006b), 'Review of the Australian Consumer Product Safety System: Research Report', 7 February, Canberra. Retrieved from http://www.pc.gov.au/projects/study/productsafety/docs/finalreport (last accessed 2 February 2013); Productivity Commission (2008), 'Review of Australia's Consumer Policy Framework, Final Report', Canberra. Retrieved from http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport (last accessed 2 February 2013).

[100] See MCCA (2010), 'Communiqué'. Retrieved from http://www.consumer.gov.au/htm/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf (last accessed 2 February 2013).

[101] The Australian Consumer Law is Schedule 2 to the CCA.

[102] See Trade Practices Amendment (Australian Consumer Law) No. 1 Act (Cth); Trade Practice Amendment (Australian Consumer Law) Act (No. 2) Cth; Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No. 1). The Australian Consumer Law adopts the application model previously used in relation to the competition provisions contained in Part IV of the TPA (now CCA) and the Competition Code set out in Schedule 1 of the CCA with the Australian Government as lead legislator. For a detailed description of this process see n 71, at 14.

4.12 Legal Profession Reform

Traditionally, admission to legal practice has been governed by State laws and Australia adopted the English approach where legal work was carried out by two separate branches of the profession. Solicitors provided legal advice and barristers appeared in court to argue a case. Several States subsequently allowed common admission of solicitors and barristers. While qualifications in one State are recognized in another, legal practitioners are currently required to apply for admission in each State in which they wish to practice.[103] The regulations are complex and inconsistent between the states and territories. The Law Council of Australia has been involved in encouraging the establishment of national consistency in the regulation of lawyers for a number of years.[104] COAG is now undertaking the National Legal Profession Project to rationalize regulation, reduce the regulatory burden, and minimize compliance costs by creating uniform rules of practice.[105] A taskforce was established in April 2009 to draft a Legal Profession National Law, and National Rules were released for consultation in April 2010.[106] The proposed structure includes the creation of two new bodies: a National Legal Services Board, and a National Legal Services Commissioner to oversee regulation Australia-wide. While most of the regulatory powers under the proposal would vest in these two bodies, the powers of the Commissioner would be exercised locally by State and Territory regulators. Where professional associations already exercise compliance and complaint handling functions, this will continue. Western Australia and South Australia, Tasmania and the ACT were originally involved but have not committed to the reform package in its

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[103] Mutual Recognition Act 1992. See generally Ross, Y. (2010), *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th edn), Sydney: LexisNexis, chapters 5 and 6.

[104] See e.g., Law Council of Australia (1994), 'Blueprint for the Structure of the Legal Profession: A National Market for Provision of Legal Services'. Retrieved from http://lawcouncil.asn.au/policies.html (last accessed 2 February 2013); for National Practice Model Laws Project and Model Provisions see generally Lamb, A. and J. Littrick (2011), *Lawyers in Australia* (2nd edn), New South Wales: Annandale Federation Press, at p. 40.

[105] See generally Lamb and Littrick (n 104), at p. 43; also www.ag.gov.au/www/agd.nsf/Page/Consultationsreformsand reviews_Back (last accessed 2 February 2013).

[106] National Legal Profession Reform – Consultative group – Background Paper (4 August 2009). Retrieved from http://www.ag.gov.au/Documents/Consultative_Group_Paper_Background_Information.pdf (last accessed 2 February 2013).

current format, citing the potential for consumers and practitioners to pay higher costs due to the complexity of the regulation. On 9 September 2011 the Commonwealth Attorney General released a revised package of legislation. On 19 October 2011 the Attorney General announced that the new National Legal Services Board and National Legal Services Commissioner would be established in New South Wales.[107]

On a more general level in relation to the legal profession, the implementation of the Competition Policy Reform Act 1995 (Cth), arising from the Hilmer Review, imposed the competition law in the form of the CCA and the Competition Code on the legal profession.[108] This ended many restrictive practices which mainly resulted from the rigid structures of the profession. The application of competition law to the profession was also consistent with increased client mobility and community demands for greater accountability.

5. CONCLUSIONS ON COMPETITION POLICY AND ONGOING REGULATORY REFORM

While Australia outperformed the OECD average in real GDP growth between 1993 and 2005, productivity growth has declined sharply since the early 2000s. Infrastructure and regulatory reform are likely to significantly assist productivity gains, and some of the steps being taken to address these issues have been outlined above.

Other commentators have suggested that a range of additional factors including droughts and floods have contributed to productivity stagnation.[109] More basic reasons for the productivity malaise, however, have been suggested by Professor Fred Hilmer, one of the architects of the influential Hilmer Report. He considers that productivity improvement depends upon '. . . enablers (for example, a more skilled workforce) and incentives (for example, competition policy)'. He argues that the current Australian reform approach emphasizes enablers over incentives and that

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[107] See Law Society of New South Wales (2011), 'Update on National Legal Profession Reform'. Retrieved from http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/national (last accessed 2 February 2013).

[108] Lawyers generally practiced in partnerships not as corporations, so unless they were engaged in interstate trade or commerce (which some larger firms were) they were not able to be covered by the TPA under the Australian Constitution.

[109] See Parham, D. and L. Shames (September, 2011). Productivity Commission Canberra, 'Productivity Master Classes', presented at Australian Economic Forum, Sydney.

both recent international studies, and Australia's own policy performance, suggest that incentives are more important as a productivity lever. His view is that there should be a renewed focus on incentives to improve productivity performance in Australia.[110] Professor Hilmer also suggests that the current government has taken a microeconomic approach which has moved the competition agenda from center stage,[111] introducing '. . . a lot of regulation that is making it harder for people to compete or it's creating de facto barriers to entry and that's why I think we are seeing a slowdown in our productivity growth'. He also emphasizes a number of previously identified issues: the need for infrastructure reform, streamlining some of the competition frameworks around essential facilities, and infrastructure delivery by private providers '. . . on terms that are as competitive as possible'.[112]

Significant steps are being taken to deal with infrastructure and regulatory issues.[113] Other issues raised above such as the nature of microeconomic reform and the reduced focus on competition are certainly worthy of consideration but are more contentious and may be more problematic to resolve.

6. COMPETITION LAW: THE COMPETITION AND CONSUMER ACT

This section will outline the working of the competition law itself. The stated purpose of the Competition and Consumer Act 2011 (formerly

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[110] See Sims, R., Chairman ACCC (2011b), 'Is Competition a Myth?', paper delivered at Australian Economic Forum, Sydney, 23 September. Retrieved from http://www.accc.gov.au (last accessed 2 February 2013).

[111] The Minister for Competition and Consumer Affairs has traditionally been the Treasurer, but under the current government the responsible parliamentarian is the Parliamentary Secretary to the Treasurer.

[112] Professor Fred Hilmer (2011). 'National Productivity: A Case of Missing Incentives'. Interview published by Knowledge@Australian School of Business, available at http://www.youtube.com/watch?v=h7BJ7SuUHAM&feature=youtube_gdata; see also Infrastructure Australia (2011), 'Communicating the Imperative for Action', Annual Report to COAG; see also Stutchbury, M. and A. Hepworth (2010), 'PM Gillard Retreats on Reform', *The Australian*, 7 December. Retrieved from http://www.theaustralian.com.au/national-affairs/pm-julia-gillard-retreats-on-reform-fred-hilmer/story-fn59niix-1225966672474 (last accessed 2 February 2013).

[113] See generally Infrastructure Australia (n 112) and 'National Reform Agenda'. Retrieved from http://www.tenders.tas.gov.au/domino/dtf/dtf.nsf/v-ecopol/27B1947162091B46CA25748600246335 (last accessed 2 February 2013).

TPA 1974) is: '. . . to enhance the welfare of Australians through the promotion of competition and fair trading and the provision for consumer protection'.[114] Ascertaining the legislative objective is important as Australian courts have emphasized that the purpose of the CCA is an important determinant of construction.[115] The CCA is concerned with promoting competition rather than competitors or protecting small businesses,[116] and the courts have recognized that competition is a ruthless process, with competitors injuring one another and taking business away as a normal part of the process.[117] The extent to which efficiency is relevant to the interpretation of the CCA in Australia has long been a subject of debate. Generally speaking, efficiency has only been relevant as a public benefit in authorization by the ACCC,[118] but in some circumstances, such as where a merger results in efficiencies, it may also be relevant since the existence of efficiencies may mean that the conduct in question has no anti-competitive impact.[119]

6.1 Prohibitions of the CCA

The CCA contains provisions dealing with anti-competitive conduct, more onerous provisions in relation to aspects of the telecommunications market, and access regimes in relation to essential facilities.[120] It also deals in depth with various areas of consumer protection and product liability.[121] Part IV of the CCA – Restrictive Trade Practices – contains prohibitions on anti-competitive conduct similar to those of other jurisdictions.[122]

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114 CCA, s2.

115 See, e.g., *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at p. 191 per Mason CJ and Wilson J, at p. 194 per Deane J and p. 213 per Toohey J.

116 See *Queensland Wire* (1989). This latter distinction has caused confusion, particularly in relation to the role of s46, Misuse of Market Power.

117 See *Queensland Wire* (1989) at p. 191.

118 Authorization is a process of administrative permission granted by the ACCC and discussed more fully below.

119 See ACCC (2008), at paras. 7.105–7.111.

120 CCA, Part IIIA.

121 See Australian Consumer Law CCA Schedule 2.

122 The Constitutional issues relating to its application have been discussed above.

6.2 Horizontal Conduct

The CCA prohibits a variety of horizontal conduct. Cartels were criminalized in 2009 to increase the detection and deterrence of cartel conduct.[123] The cartel provisions created four new per se prohibitions: two criminal cartel offenses and two parallel civil prohibitions. Each focuses on common elements including making or giving effect to contracts, arrangements or understandings that contain a 'cartel provision'. A cartel provision is a provision which involves price fixing, bid rigging restricting output, and market sharing.[124] There is no overt requirement of dishonesty in the criminal provisions, but there is a fault element of knowledge or belief. The major distinction between the criminal and civil prohibitions is that the criminal provisions are provable on a criminal standard, beyond reasonable doubt, and are potentially punishable by imprisonment. Both civil and criminal prohibitions are punishable by the same substantial fines for both corporations and individuals.

In addition, the existing civil prohibitions against contracts, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition in a market, or which constitute an exclusionary provision, were amended.[125] Exclusionary provisions are arrangements between competitors which have the purpose of restricting or limiting the supply of goods or service to, or acquisition of goods or services from, particular persons or classes of persons and they are prohibited per se.[126] These civil provisions are well established, with a substantial volume of case law supporting their application.[127]

These provisions are a concern because of their complexity and also because the courts have found it difficult to consistently apply the threshold for a finding that there has been an 'understanding', which is relevant

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[123] Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009; Hon Chris Bowen (3 December, 2008) Second Reading Speech at 12310.

[124] CCA, s44ZZRD.

[125] CCA, s45, s4D. Small businesses, particularly primary producers with a low turnover, may gain permission for collective bargaining with suppliers or acquirers. See s93AB(1A), s93AB (1).

[126] See, for example, *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447; *ACCC v Liquorland (Australia) Pty Ltd* (2006) ATPR 42-123.

[127] See, e.g., *Seven Network v News Limited* [2009] FCAFC 166; *Rural Press Ltd v ACCC* (2003) 216 CLR 53. A penalty of $36m was imposed on Visy Industries Holdings Ltd and $2m on individuals in 2007 for price fixing in the cardboard packaging industry *ACCC v Visy Industries Holdings Pty Ltd* (No3) (2007) 244 ALR 673.

to all of these provisions.[128] Price signalling amendments to the CCA in response to conduct such as banks signalling their proposed interest rate increases have also recently been made. These prohibit certain disclosures of price information to competitors in industries specified by regulation (at this stage only the banking industry) which do not constitute price fixing but have a similar effect. The amendments were passed in November 2011 and will be operative six months after assent.

6.3 Misuse of Market Power

Unilateral market power is dealt with under s46, Misuse of Market Power of the CCA – which performs a similar function to the abuse of dominance provision in other jurisdictions. Section 46 prohibits a corporation with substantial market power from taking advantage of that power for one of three nominated anti-competitive purposes.[129] It is generally directed at firms engaging in exclusionary conduct which seek to maintain or extend their market power. The threshold test for the provision is a 'substantial degree of market power', but the approach to measuring market power is similar to that used in the European Union.[130] The enforcement of this provision has been problematic and controversial.[131] There has been no general judicial agreement about a number of issues, including the approach to predatory pricing, the level of protection which should be afforded small business and the measurement of the threshold for application. Section 46 has been amended a number of times and was amended in 2007 with the addition of s46(1AA) (known as the 'Birdsville

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[128] See, e.g., *ACCC v CC(NSW) Pty Ltd* (1999) 92 FCR 375 at 408; *Apco Service Stations Pty Ltd v ACCC* (2005) ATPR 42-078; *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321.

[129] Eliminating or substantially damaging a competitor; preventing the entry of a person into that or any other market; deterring or preventing a person from engaging in competitive conduct in that or any other market: CCA s46(1)(a), (b), (c).

[130] Explanatory Memorandum to Exposure Draft Trade Practices Amendment Bill 1984 at para. 39 (the enactment including this particular threshold test) cited *Europemballage and Continental Can v Commission* (1973) CMLR 199; *United Brands Co & United Brands Continental BV v Commission of European Communities* (1978) CMLR 429 and *Hoffman La Roche v Commission* (1979) 3 CMLR 211 on this issue, although the threshold tests were different.

[131] See, for example, *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177; *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 ; *Rural Press Ltd v ACCC* (2003) 216 CLR 53. A penalty of $14m was imposed on Cabcharge Australia Limited in 2009 for contravention. *ACCC v Cabcharge Australia Ltd* [2010] FCA 1261.

Amendments') in response to '. . . populist pressure to protect small business competitors'.[132] The new provision prohibits corporations with a substantial market share pricing below relevant cost for a sustained period and has been heavily criticised and has not been applied to date.[133]

6.4 Vertical Conduct

Exclusive dealing (s47) and resale price maintenance (s48) are prohibited. The provisions on exclusive dealing are intricately drafted and cover conduct such as solus agreements, requirements contracts and minimum quantity obligations, and bundling and tying.[134] Provisions are based on the concept of supply or acquisition of goods or services on a specified condition, or a refusal to supply for the reason that such a condition is not agreed. Most types of exclusive dealing are prohibited only if they have the purpose, effect, or likely effect of substantially lessening competition in a market. Third line forcing, which is found at s47(6) and s47(7) of the exclusive dealing provisions, and involves supply on condition that the acquirer take a different product or service from an unrelated third party, is prohibited per se or absolutely without consideration of purpose or likely effect. A refusal to supply for failure to accept such a condition is also prohibited.[135] There appears to be no real justification for this tougher treatment of third line forcing.[136] Resale price maintenance, or fixing the price at which goods are to be resupplied, is prohibited absolutely under wide-ranging provisions.[137] The ACCC has been particularly successful in prosecuting resale price maintenance with substantial penalties over a number of years.[138]

These vertical restraint prohibitions in the CCA are generally based

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[132] N 71.

[133] The current government has stated that it does not support the provision in its current form. It has attempted to amend it and will continue to do so. See 'Australian Government Response to OECD Review of Regulatory Reform Australia', at Recommendation 16. Retrieved from http://www.finance.gov.au/deregulation/docs/australian_government_response_to_oecd_2009_review_of_regulatory_reform_australia.pdf (last accessed 2 February 2013).

[134] Although this is more contentious. For examples of the application of s47 see *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529; *ACCC v Baxter Healthcare Pty Ltd (*2005) ATPR 42-066; (2008) ATPR 42-247 (on appeal).

[135] CCA, s47(6), (7). See *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395.

[136] See, e.g., Healey, D. (2009), 'Third Line Forcing: Has the Problem Gone Away?', *University of New South Wales Law Journal*, 32(1), p. 249.

[137] CCA, s48, s96–105.

[138] See, e.g., *ACCC v Jurlique International Pty Ltd* [2007] FCA 79 (8 February 2007).

on an outmoded view of their economic impact. More recent economic evaluations of such conduct recognize that exclusive dealing can allow a supplier to leverage market power from one market into another as was envisaged by the Harvard School, but also that such arrangements can promote efficiency and increase competition. Chicago School economists regard any attempt to regulate vertical restraints as misconceived as the intention of these restraints is said to be the maximization of profits and the avoidance of free riders. This dichotomy was recognized by the High Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*,[139] where the distinction in competition terms between restrictions on intrabrand and interbrand competition was noted. While acknowledging the Chicago School view that resale price maintenance may not be anti-competitive in relation to some goods, the judge in *ACCC v Jurlique Pty Ltd* was necessarily bound to apply the per se provision contained in CCA s48.[140]

6.5 Mergers

Mergers and acquisitions are prohibited under s50 CCA if they have the effect or likely effect of substantially lessening competition.[141] This competition test is not structural but is focused on the impact of the conduct in the market.[142] In evaluating the impact, the courts and the ACCC apply a future 'with' and 'without' test, which compares the likely competitive effect on prices and the potential impact on consumers. 'Merger factors' contained in s50 (3) must be considered in applying the test.[143] The ACCC

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[139] (2001) 205 CLR 1.

[140] (2007) ATPR 42-146 per Spender J. See also *Leegin Creative Leather Products, Inc v PSKS, Inc* 551 US 877, where the US Supreme Court reversed the earlier law on vertical price restraints under s1 of the Sherman Act, changing the test from per se illegality to rule of reason.

[141] Some offshore acquisitions may be caught under s50A which provides a different path for consideration and has never been applied.

[142] CCA, s50(6) provides that the impact of the conduct is a substantial market in Australia, a State, a Territory or a region. Proposed amendments will delete the word 'substantial' to allow consideration of 'creeping acquisitions'.

[143] These are issues such as the actual and potential level of import competition, height of barriers to entry; level of concentration; countervailing market power; likelihood that acquirer would be able to increase prices or profits; availability of substitutes; dynamic characteristics of the market; removal of a vigorous competitor; nature of vertical integration.

has issued Merger Guidelines which explain its approach to assessing mergers.[144]

Notification to the ACCC is not compulsory above set thresholds as in other jurisdictions; rather, the parties to a merger assess the likelihood that it will infringe and may approach the ACCC under one of three options if they believe it is likely to do so. Most parties use the informal clearance approach under the Merger Review Process Guidelines.[145] This involves approaching the ACCC to see whether it is likely to oppose the merger in court if it goes ahead. Market definition is, of course, critical to this process. The ACCC releases a Statement of Issues if it believes that the merger is likely to offend, and interested parties and the merger parties may make submissions. This provides the merger parties with the opportunity to propose solutions by giving enforceable undertakings.[146] Parties cannot get an indicative view from the courts by way of declaration to determine the issue, but if they go ahead with a merger which the ACCC deems to be anti-competitive, or do not notify, the ACCC may seek relief in court.[147] Formal merger clearance involves more formal timeframes but has never been used.[148]

The third option for parties to a merger is to seek authorization from the Australian Competition Tribunal on public benefit grounds.[149] The Tribunal must not grant the authorization unless it is satisfied in all the circumstances that the acquisition would be likely to result in such a benefit to the public that it ought to be allowed to occur.[150] In considering

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144 ACCC (2008).

145 Ibid. Informal clearance may be undertaken by the ACCC on a confidential or non-confidential basis.

146 CCA, s87B.

147 See CCA, s80; s163A and, for example, *ACCC v Metcash Trading Limited* [2011] FCA 967 (25 August 2011), *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 (30 November 2011), where the Full Federal Court disagreed with the ACCC's view of the merger and it subsequently went ahead. In limited circumstances the court may grant a declaration in respect of a merger: *Australian Gas Light Co Ltd (No 3) v ACCC* (2003) 137 FCR 317.

148 CCA, s95AC (1), ACCC (2007) Review Process for Formal Merger Applications available at accc.gov.au.

149 CCA, s95AZH (1).

150 See, e.g., *Re Qantas Airways Ltd* (2005) ATPR 42-065, although this was an appeal under the earlier process where the ACCC determined merger authorizations with appeal to the Tribunal. Following amendments, all merger applications now go straight to the Tribunal. In determining the issue, the Tribunal in the Qantas case applied a modified total welfare standard when looking at public benefit.

this issue, the Tribunal must have regard to a significant increase in the real value of exports, a significant substitution of domestic products for imported goods and all other relevant matters relating to the international competitiveness of any Australian industry.[151]

In the 2010–11 financial years, the ACCC examined 345 mergers under its informal clearance process, of which 129 required further review. 85 percent were reviewed within eight weeks. Three mergers were opposed outright[152] and six were resolved by undertakings.[153]

The CCA is enforced by the Australian Competition and Consumer Commission (ACCC) and private actors through the court system, generally the Federal Court.[154] The courts are generally required to assess the effect or likely effect of conduct on competition in a market. In relation to cartel conduct, the ACCC is responsible for investigating and preparing the necessary evidence. However, the Commonwealth Director of Public Prosecutions prosecutes criminal cartel offenses.[155] The ACCC has a well developed and often-used immunity policy for cartel conduct.[156]

The ACCC is an administrative body which besides undertaking enforcement activities and performing other functions[157] makes administrative determinations assessing individual applications for authorization and notification (administrative permission based on weighing anti-competitive detriment and public benefit), which are available for most types of conduct under the CCA.[158] Public benefit in this context means

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151 CCA, s95AZH (2).

152 NAB/AXA, Metcash /Franklins and Ashahi/P&N.

153 7-Eleven/Mobil, Peregrine/Mobil, Novartis/Alcon, Scandinavian Tobacco/Swedish Match, Aspen/Sigma Pharmaceutical, Onesteel/Moly-Cop. See Walker, J., Commissioner ACCC (8 June, 2011), 'Developments in Competition Law', RBB Economics Australian Conference, pp. 6 and 7. Retrieved from http://www.accc.gov.au/content/index.phtml/itemId/993868/fromItemId/8973 (last accessed 2 February 2013).

154 Jurisdiction of Courts (Cross Vesting) Act 1987 (Cth).

155 See Sims, R., Chairman ACCC (2011a), 'ACCC: Future Directions Speech to Law Council of Australia Competition and Consumer Workshop'. Retrieved from http://www.accc.gov.au (last accessed 2 February 2013); 'Prosecution Policy of the Commonwealth' (November 2008). Retrieved from http://www.cdpp.gov.au (last accessed 2 February 2013); 'Memorandum of Understanding between CDPP and ACCC'. Retrieved from http://www.treasury.gov.au/documents/1330/PDF/Draft%20ACCC%20DPP%20MOU%20080108.pdf (last accessed 2 February 2013).

156 ACCC (2009), 'Immunity Policy for Cartel Conduct' July. Retrieved from http://www.accc.gov.au (last accessed 2 February 2013).

157 See, for example, CCA, s28.

158 See generally CCA, s88.

mainly economic benefits, although other benefits have been taken into account, and relies on a type of total welfare standard.[159] Appeals from these authorizations and similar permissions are heard in the Australian Competition Tribunal.[160]

The ACCC has cooperation agreements with a number of other competition law agencies.[161]

The ACCC has extensive powers to investigate and enforce the TPA and has done so in areas related to both restrictive trade practices and consumer protection.[162] The successful high-profile prosecutions that it has taken over the years undoubtedly have raised the consciousness of both business and consumers, and have acted as a significant deterrent to businesses contemplating conduct that might breach the TPA.

In enforcing the TPA, the ACCC has regularly stated that its priorities are promoting vigorous, lawful competition and informed markets. When deciding whether or not to pursue court action the ACCC looks at issues such as whether the matter involves:

- conduct that is in blatant disregard of the law;
- conduct that is by a person, business or industry with a history of previous contraventions of competition law, including overseas contraventions;
- conduct that causes significant detriment to consumers and/or business, and/or a significant number of complaints or has disproportionate effect on disadvantaged groups;
- conduct that is of major public interest or concern; or
- a situation that has the potential for action to have a worthwhile educative or deterrent effect and achieve a likely outcome that would justify the use of the resources.[163]

A wide range of remedies are available to the ACCC in enforcing the competition provisions of the TPA.[164] The ACCC may take a matter to

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159 See *Re Qantas Airways Ltd* (2005) ATPR 42-065 at p. 185.

160 See CCA, s101.

161 See www.accc.gov.au (last accessed 2 February 2013).

162 There have been far more consumer protection cases taken under the TPA than cases involving restrictive trade practices. In 2005–06, e.g., 87% of total enforcement outcomes related to breaches of Part V. See Samuel, G., Chairman, ACCC (2007), 'The Foundations of Good Consumer Protection Policy: Strong Law, Vigorous Enforcement and the Educated Consumer', Speech to National Consumer Congress, at p.1.

163 See ibid. These views have been expressed by the ACCC on many occasions over the years.

164 Private remedies are also available to parties under the TPA.

the Federal Court and seek civil pecuniary penalties. These penalties are currently set at the greater of A$10m, three times the value of the benefit from anti-competitive conduct, or 10 percent of the turnover of the body corporate and all its related bodies corporate during the period of 12 months ending at the end of the month during which the act or omission occurred.[165] Individuals involved in conduct are liable for pecuniary penalties for up to A$500,000. Penalties are levied in respect of 'each act or omission',[166] so that the cumulative total of penalties may theoretically be much higher than the levels set for an individual breach.[167]

The ACCC may seek injunctions restraining future similar conduct,[168] and other orders.[169] It has the ability to reach binding agreements called enforceable undertakings, which settle court proceedings.[170] In this context, or where respondents admit liability, penalties may be negotiated and an agreed figure on penalty is sometimes presented to the court.

The ACCC may seek orders that individuals be disqualified from managing corporations for a specified period.[171] The ACCC may investigate complaints lodged by consumers or traders or initiate its own inquiries. In its investigations it has wide administrative powers to gather information and obtain evidence, including orally[172] or by search and seizure.[173] These powers are regularly used and have been increased.

Private parties may seek remedies, including injunctions or other orders, and may seek damages for loss caused by the conduct independent of any action which the ACCC chooses to take.[174] There have been relatively few concluded cases on damages although a number have been commenced but have settled prior to or during hearing.

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165 CCA, s76 (1), s76 (1A), s76 (1B). The Crown is immune from pecuniary penalties: CCA, s2B (2).

166 These are not criminal provisions. Contraventions must be proven on the balance of probabilities and have been characterized as 'quasi-criminal' due to the size of the potential pecuniary penalties. Criminal liability exists for 'hard-core cartels'.

167 Factors relevant to penalty setting are set out in s76(1) and additional factors have been set down in cases such as *TPC v CSR Ltd* (1991) ATPR 41-076 at pp. 52, 152–3.

168 CCA, s80.

169 CCA, s87.

170 CCA, s87B.

171 Parties may also take proceedings in relation to breach of Part IV of the TPA, and have access to relief such as injunctions, other orders and damages under s82 for loss or damage flowing from a contravention.

172 CCA, s155.

173 CCA, s154D, s154E.

174 CCA, s80, s87, s82.

The role of the ACCC involves ensuring compliance with the CCA and investigating complaints. It is able to litigate or accept undertakings to resolve a matter and possibly to obtain compensation for consumers injured by the conduct. The emphasis which has been given to each of these elements of enforcement has changed over time. Under the Chairmanship of Graeme Samuel there was a trend to resolution of proceedings by enforceable undertakings outside court as a cost-effective method of obtaining compliance. However, the recently appointed Chairman of the ACCC, Rod Sims, in commenting on the role of the ACCC, has emphasized that an effective enforcement strategy will sometimes require the agency to take on cases where the outcome is less predictable. While recognizing the obligation of the ACCC to act as a model litigant, Mr Sims stated:

> . . . the ACCC will back its judgment. If we see what we believe is a breach of the Act we will seek to enforce the law. If there is uncertainty as to how the law applies in that situation, we will not shy away from our view on the law and its application. If this requires arguing the case before a court, the ACCC will pursue it so the law is clarified.[175]

7. EFFECTIVENESS OF COMPETITION LAW AND POLICY IN AN AUSTRALIAN CONTEXT

The CCA, formerly the TPA, has been robustly enforced in Australia by the ACCC and its predecessor for nearly 40 years. The CCA has been amended and enforced to take account of changes in market conditions and economic developments. Over that period of time, ACCC staff numbers have grown substantially, which is an indicator of both the importance of the area in policy terms and the expanding range of ACCC activities in areas of competition law and policy. The Chairman of the ACCC has emphasized the roles of the ACCC both in the promotion of competition under the prohibitions of the CCA and in its complementary regulatory role in monopoly areas such as electricity, gas and other essential facilities where markets do not 'have the foundations for effective competition'. He notes:

> When faced with monopoly assets all the sections of the old Part IV and V of the Act on their own are manifestly deficient in yielding good community outcomes.[176]

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[175] Sims (n 45).
[176] Sims (n 155).

Following on from the Hilmer tradition, the Chairman thus recognizes the importance of other areas of competition law and policy as substantial supporting mechanisms for the traditional enforcement of the general prohibitions of the CCA. Coupled with significant ongoing developments in other areas of regulation which are described in this chapter, these comments support the view that competition law and policy are complementary and integral to the Australian economy as a whole. Competition law in Australia is active and evolving. Competition policy has played a significant role in reshaping the Australian economy in the recent past. Clearly both law and policy will continue to do so in the future.

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