



# Competition Policy Review – Draft Report

Submission by the Australian Communications Consumer Action  
Network to the Competition Policy Review

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## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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## Summary

ACCAN welcomes the opportunity to contribute to the draft report of the Competition Policy Review. As the peak communications consumer organisation we know the important role competition can play in delivering long-term benefits to consumers.

The stewardship of the Australian Competition and Consumer Commission (ACCC) in access and pricing and the wholesale structure of the National Broadband Network (NBN) have placed competition at the centre of the communications industry. We recognise the Vertigan panel have made recommendations on competition issues related to the NBN, so we don't intend to deal with these here.

ACCAN's core concerns are the competition issues emerging in what businesses are able to provide over the top of underlying communications infrastructure. Competition institutions need to be empowered to look beyond traditional infrastructure competition. Exclusive agreements for the supply of content over these networks are already softening competitive pressure. As consumers increasingly derive their content online, rights holders, who are converging with telecommunications providers here and overseas, wield significant market power. This could deprive consumers of choice not just in content, but in the provision of innovative communications services. As former ACCC Chair Graeme Samuel put it, "if you can't control the arteries, what you do is get hold of the blood."<sup>1</sup>

We believe the Panel has in part heeded this warning by recommending changes to the way intellectual property is dealt with under the competition law. There is also potential for the power of market studies to influence and recommend more targeted responses to this emerging issue. ACCAN strongly endorses measures which recognise the increased complexity of ensuring competition in a converged market.

We do however urge a more cautious approach to a number of the recommendations made about institutions and governance. The ACCC has been vital in addressing competition issues in the communications market. Apart from the large structural changes post Hilmer, the wide and deep skill the ACCC has developed in administering access and pricing has greatly improved consumer choice, lowered prices and helped foster a market with a diverse array of profitable competitors. This has been achieved through its high level of consultation informing the ACCC's governance structures and a strong cultural focus on the long-term interests of consumers.

We invite the Panel to consider our recommendations on the Competition Policy Review Draft Report:

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<sup>1</sup> Samuel, G., 2014, '2014 TelSoc Charles Todd Oration by Graeme Samuel', available at: [http://telsoc.org/event/national/2014-11-05/charles\\_todd\\_oration\\_2014](http://telsoc.org/event/national/2014-11-05/charles_todd_oration_2014)

## Competition law

### Intellectual property

ACCAN endorses the intellectual property (IP) recommendations made in the Review. As identified in our submission anti-competitive IP arrangements are having a detrimental impact on consumer choice. This is particularly apparent to communications consumers who are increasingly using the internet to gain access to content and finding they are restricted by exclusive or geographic licence arrangements.

ACCAN has been particularly concerned by successive trade negotiations which have resulted in the adoption of copyright policies to the detriment of consumers. Policies such as lengthening the time for which copyright lasts and anti-circumvention measures for format-shifting have been introduced without being informed by independent and transparent analysis of the costs and benefits to Australians. We welcome the Panel's recommendation that an overarching review of IP be undertaken by an independent body, such as the Productivity Commission.

We also think it is time to recognise IP rights, like all property rights can be used in a manner that harms competition. As such, it is appropriate that commercial transactions involving IP rights are subject to the Competition and Consumer Act (CCA). We are pleased to see the Review adopt ACCAN's recommendation to remove the IP licensing exception from competition law by repealing subsection 51(3) of the CCA.

**Recommendation:** The Panel accept Draft Recommendations 7 and 8.

## Institutions and governance

### A national competition body

ACCAN recognises the importance of setting and reviewing competition policy objectives across the market. Having a body oversee competition policy, as the National Competition Council (NCC) has done, can help drive the implementation of an evolving competition policy agenda. We recognise that many of the competition policy issues identified in the Review relate to areas of state and territory government responsibility, whereas competition direction and expertise has coalesced in Commonwealth organisations such as the Productivity Commission (PC) and ACCC.

While we see some advantages, on balance we are not convinced of the value in establishing a new organisation to oversee competition policy direction. We see significant efficiencies in allocating these tasks to existing institutions with state and territory support, if necessary, sought through intergovernmental agreements. Given the advisory nature of the functions of the proposed national body we do not see a problem with these tasks residing with an existing Commonwealth institution.

**Recommendation:** The functions of the proposed Australian Council for Competition Policy (ACCP) should be allocated to existing institutions.

### Market studies power

ACCAN sees significant benefit in the introduction of a market studies power. We have seen the benefit of similar powers the ACCC has for the telecommunications sector. As a principle, best practice policy making is most likely to occur in an environment informed by evidence.

#### *How should the power be used?*

While the natural monopoly features of telecommunications make ongoing mandatory information-gathering powers necessary, we understand the need to use these powers judiciously in some other sectors. A model which allows for this flexibility should be adopted.

However, we strongly believe that this power should reside with the ACCC. Far from “raising potential for conflicts between the ACCC’s investigation and enforcement responsibilities” we see this power as an important step for the regulator when assessing the level of competition in a market and developing a targeted response.

Assessing the competition issues in a market often requires a multi-factored approach. Market studies recognise this by analysing a broad array of features from traditional supply side problems with firm behaviour and market structures to more complex demand side issues like information failure and consumer conduct.<sup>2</sup>

An example of the ACCC’s aptitude for this task can be seen in how it responded to issues in the developing market of online product reviews. Consumers increasingly rely on online reviews to make purchasing decisions. Trustworthy consumer information is important in directing these decisions and promoting allocative efficiency within a market. After finding evidence of misleading conduct

<sup>2</sup> Advocacy Working Group, International Competition Network, 2012, ‘Market Studies Good Practice Handbook’.

within the online reviews of a removalist business the ACCC took enforcement action.<sup>3</sup> However it recognised in order to create lasting change its approach could not stop at enforcement. Given this was an emerging industry, yet to develop a level of best practice, the ACCC took on an educative role by producing a guide for business and review platforms.<sup>4</sup> It subsequently also produced educative materials targeted at consumers warning of common pitfalls.

This type of targeted and measured approach is most likely to occur where the regulator is being informed by the type of evidence produced by a market study. Taking enforcement action against those who breach the competition and consumer law will remain an important tool. However, a modern regulator requires an expanded range of options and a strong evidentiary basis on which to assess the most effective instrument(s) for the problem.

One of the difficulties with giving this power to a new organisation is the possibility of duplication and split purpose. Having a single organisation empowered to undertake research and follow through on its findings increases the likelihood that an appropriate remedy or range of remedies are adopted. When more than one organisation is tasked with a similar goal there is always tendency for duplication with each organisation attempting to achieve its goal with the different tools it has available. Giving the market studies power to the ACCC will prevent this duplication and lead to a more holistic approach to solving competition issues.

**Recommendation:** The ACCC should be given the powers to undertake market studies.

### *Market studies requests*

ACCAN agrees that market studies, as well as being generated internally should also have the capacity to be requested by market participants (including consumer groups). The power need not go as far as forcing the agency to conduct a market study if a request is made, but ensure adequate consideration to requests is given. This ability will improve responsiveness to emerging issues and ensure the agency is in touch with community concern.

**Recommendation:** Market participants, in particular consumer representatives, should be able to request market studies.

## Annual competition analysis

Identifying specific issues or markets that should receive greater attention each year will inevitably occur with any agency tasked with driving competition policy. The ACCC consults broadly in developing its strategic goals each year. We would expect this to continue if a new agency is developed.

## Competition and consumer regulator

ACCAN is pleased to see the Panel accept that enforcement of competition policy and consumer protection matters complement each other and should continue to be administered by the ACCC.

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<sup>3</sup> ACCC, 2011, 'ACCC: Removalist admits publishing false testimonials', available at: <https://www.accc.gov.au/media-release/accc-removalist-admits-publishing-false-testimonials>

<sup>4</sup> ACCC, 2013, 'Online reviews - a guide for business & review platforms', available at: <https://www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms>

**Recommendation:** The Panel accept Draft Recommendation 45.

## Access and pricing regulator

ACCAN urges the Panel to re-think its views on separating access and pricing from the functions of the ACCC. We agree with the Panel's view that there are synergies among the functions of competition, consumer protection and economic regulation that can assist the ACCC to develop wide and deep skills in understanding the operation of markets. However we disagree with the concern that the culture and analytical approach required to regulate an industry differs from those typically characteristic of a competition law enforcement agency.

The view that an industry regulator's ability to have a collaborative relationship would be harmed by the adversarial nature of an enforcement agency is unfounded. Firstly businesses which might be subject to access and pricing regulation tend to be quite large. This means that there are frequently distinct sections of the business interacting with different parts of the ACCC on these separate issues. So the potential for decreased cooperation due to personal animosity is minimised.

Directors of corporations by their nature are ultimately responsible to members or shareholders. Ascribing motivations outside of this relationship, such as a willingness to cooperate with a regulator, is problematic. It is natural that a robust relationship will develop between any business and regulator. Each party is pursuing different, often conflicting goals. At its most basic the regulator is attempting to benefit consumers through competition while business is rightly motivated towards extracting profit. In access and pricing the incumbent is generally attempting to protect a monopoly profit. So the belief that business might be more cooperative in this situation when compared with enforcement action needs to be properly interrogated.

While this process is not necessarily played out in the courts it is no more or less adversarial. From the outside the battle of differing economic cost models may appear relatively benign, but for monopoly providers the potential impact on business is more far reaching than some of the remedies available under enforcement action. So the perceived benefits of giving this function to another agency should be carefully scrutinised.

ACCAN is not concerned that a new access and pricing regulator would necessarily be captured by a single industry. However, there is potential that a standalone regulator would dilute the cultural focus the ACCC currently has in assessing the long term interests of consumers. In telecommunications this involves finely balancing consumer access to affordable services and ensuring infrastructure providers can gain a reasonable rate of return to incentivise the building and maintenance of networks. The ACCC's ongoing analysis of markets is vital to assessing this balance.

More vital from a consumer perspective is the ACCC's knowledge through its consumer protection work of the impact of a poorly functioning market on consumers. This real world effect is an experience which may be foreign to an agency assigned to pure access and pricing regulation. If the Panel's draft recommendation is accepted steps should be taken to ensure this consumer focus is not lost in the new agency.

Finally, this suggested approach seems targeted at addressing problems with the disparate nature of state and territory access and pricing arrangements rather than a substantive problem with the way the ACCC has managed the responsibility. There is a real risk that in attempting to solve a problem, which has its roots in the division of powers between state and Commonwealth at Federation, we damage what is an effective access and pricing regime.

**Recommendation:** The ACCC should retain its access and pricing regulatory functions.

## ACCC Governance

ACCAN is unaware of the problem the recommendations on ACCC governance is attempting to address. The ACCC already has a high level of consultation with consumers and small business through its consultative committees. ACCAN's experience, gained through its membership of the ACCC Consumer Consultative Committee, has been very positive. From the ACCC Chair down this committee has a high level of engagement. It maintains a register of consumer issues which are drawn upon to inform ACCC work and provide feedback to members on competition and consumer protection matters.

We recognise that a Board comprising executive and non-executive members is common practice in some sectors, but consider this a poor fit for an enforcement agency. Non-executive board members are likely to find it extremely difficult to function with the level and knowledge and engagement required in a law enforcement or regulatory decision-making body. The general functions of a board, such as establishing organisational goals, challenging the executive and ensuring good governance, lends itself to non-executive involvement. However, the functions of the ACCC in law enforcement and regulation over fast moving, complex and confidential matters are fulltime demands.

ACCAN sees the best way to achieve the goal of a diversity of views through an advisory board which draws on the strength of the ACCC's existing consultative functions.

**Recommendation:** The Panel draw on the success of the ACCC's existing consultation structure to inform its goal of promoting a greater diversity of views in ACCC governance.

## Media Code of Conduct

As a matter of course all organisations who engage with the media should be guided by some objectives. However we are concerned an overly prescriptive Code of Conduct placed on the ACCC may limit its ability to use the media to pursue its important education role. Distinguishing between education and advocacy is ultimately a matter of opinion, often guided by your side of the debate. It would be counter-productive if the ACCC could not in the strongest terms draw attention to offending behaviour. The media is an important tool for the ACCC not just in sending a warning to would-be offenders but to educating business and consumers. Steps which would limit this should be carefully examined.

**Recommendation:** The ACCC be left to set objectives which complement its competition and consumer protection role in dealing with the media.