1996

STANDING COMMITTEE ON UNIFORM LEGISLATION AND INTERGOVERNMENTAL AGREEMENTS

COMPETITION POLICY

Consideration of the Implementation of a National Competition Policy

Twelfth Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pendal, MLA
Laid on the Table of the Legislative Assembly
on , 29 January 1996.

ORDERED TO BE PRINTED

COMMITTEE MEMBERS

Chairman	Hon. P.G. Pendal, MLA (Member for South Perth)
Deputy Chairman	Dr E. Constable, MLA (Member for Floreat)
Members	Mr R.C. Bloffwitch, MLA (Member for Geraldton)
	Mr J.H. Day, MLA (Member for Darling Range)
	Mr F. Riebeling, MLA (Member for Ashburton)

COMMITTEE STAFF

Clerk/Research Officer	Ms Tamara Fischer
Legal/Research Officer	Ms Melina Newnan
Secretary/Stenographer	Mrs Patricia Roach

COMMITTEE ADDRESS

Legislative Assembly Annexe
34 Parliament Place,
West Perth WA 6005

Telephone: (09) 222 7483
Facsimile: (09) 321 9366

TERMS OF REFERENCE

On Wednesday 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference:

1. to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;

2. when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;

3. the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly;

4. each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;

5. no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;

6. when a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;

7. the Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;

8. if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and

9. in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

CHAIRMAN'S FOREWORD

Competition policy as part of overall marketplace reform in Australia is never far from the public consciousness. Indeed, as recently as the middle of this month, tensions were reported within the Federal Coalition on whether a new Government would exempt such industries as newsagencies and wheat marketing from competition policy.

This 12th report of the Western Australian Parliament's Standing Committee on Uniform Legislation and Intergovernmental Agreements is therefore a most timely arrival on the scene. The report is the result of 18 months' study within Western Australia and throughout Western Australia on the history and development of competition policy, and the legislative ramifications for the States, especially Western Australia, of the Hilmer proposals.

This Committee would be the first to acknowledge the comprehensive nature of the Hilmer Inquiry which essentially laid the groundwork for Australia's new phase of marketplace and competition policy reform. However, despite its comprehensiveness, that report did not adequately deal with how best to keep accountable those government business enterprises (GBEs) which are privatised or corporatised and where, despite their newer, arms-length or freer status, they are still seen as having community service obligations.

Members of the Western Australian Parliament would do well therefore to look closely at this element once legislation begins to come to the Parliament for the implementation of Hilmer. It would be ironic - and indeed unacceptable - if Australia was to achieve major competition reform only to find that Parliaments and Governments had indirectly diminished the customer focus of previous government enterprises which had seen this as their principal objective.

Thus it is that one of our major recommendations is for the establishment of a series of industry-specific Ombudsmen whose task would be to investigate and resolve complaints over service, billing or disconnection of services. In other words we do not see that reforms aimed at preparing us for the 21st century need to ignore the claims of the customers of water, gas electricity or other essential "public" services.

In the past Members of Parliament have played a key, although not exclusive, role in intervening *with government agencies* on behalf of aggrieved customers, usually constituents. To the extent that privatisation of government agencies takes place, this avenue will largely disappear. The right of the public to these basics-for-life is essential. Accordingly they need to be protected by an Ombudsman.

Underpinning the Hilmer reforms and our own work in this report is the fundamental tenet, which is that people must be the clear *net* beneficiaries. Unless the benefits clearly outweigh the disruption due to the changed process, and any loss of customer rights then the whole process will have been largely worthless.

This report represents a huge work commitment from my fellow Committee members, Dr Constable, and Messrs Bloffwitch, Riebeling and Day (who replaced Mr Johnson in late 1995). And from our Legal/Research Officer, Ms Melina Newnan, and our Clerk/Research Officer, Ms Tamara Fischer. I thank them all for a weighty task successfully concluded.

PHILLIP PENDAL MLA

CHAIRMAN

Table of Contents

Table of Contents cont'd

Table of Contents cont'd

Table of Contents cont'd

Table of Contents cont'd

ABBREVIATIONS

Throughout this Report -

"ACCC"	means the Australian Competition and Consumer Commission.
"Act"	means the *Trade Practices Act 1974* (Commonwealth).
"ACTU"	means the Australian Council of Trade Unions.
"Agreement"	means the Conduct Code Agreement.
"Bill"	means the Competition Policy Reform Bill 1995.
"COAG"	means the Council of Australian Governments.
"Commission"	means the Australian Competition and Consumer Commission.
"Competition Agreement"	means the Competition Principles Agreement.
"Competition Code"	means the text described in Part IV of the *Trade Practices Act 1974* or the text applying as a law of a participating jurisdiction.
"Competition Conduct Rules"	means rules against anti-competitive conduct as contained in Part IV of the *Trade Practices Act 1974*.
"CSO's"	means community service obligations.
"EC"	means the European Commission.
"EU"	means European Union.
"Fully-participating jurisdiction"	means a State or Territory that is a party to the intergovernmental Conduct Code Agreement and applies the Competition Code as a law of the State or Territory.
"GATT"	means General Agreement on Trade and Tariffs.
"GBE's"	means Government business enterprises.
"Hilmer"	means the Report by the Independent Committee of Inquiry on National Competition Policy, August 1993.
"NCC"	means the National Competition Council.
"OECD"	means Organisation for Economic Cooperation and Development.

"SMA"	means Statutory Marketing Authority.
"Standing Committee"	means the Standing Committee on Uniform Legislation and Intergovernmental Agreements established by the Legislative Assembly of the Western Australian Parliament on the 4 August 1993.
"The Principal Act"	means the *Trade Practices Act 1974*.
"TPA"	means the *Trade Practices Act 1974*.
"TPC"	means the Trade Practices Commission.
"WTO"	means the World Trade Organisation.

EXECUTIVE SUMMARY

The purpose of this report is to examine competition policy in Australia, to provide an overview of the recommendations of the Independent Committee of Inquiry into National Competition Policy (the Hilmer Report) and the legislative initiatives already introduced, or still needed, to implement those recommendations.

The Report of the Independent Committee of Inquiry completed in August 1993 called for Commonwealth and State legislation, the adoption of certain policies and principles and the formation of two new institutions in place of the existing structures.

The States and Territories have reacted positively to the proposed competition policy reforms, although concerns were raised about possible revenue implications. States and Territories earn large returns from their public monopolies. However, there is no evidence to indicate that these returns would actually decrease in a more competitive environment, given the low returns on assets typically earned. Reforms in electricity in New South Wales are a good example of the *win-win* potential of much needed change. In that case there have been benefits to consumers as well as increased dividends to the State Government from efficiency improvements.[1]

This report addresses the economic issues of competition and efficiency and the implications for national competition policy as a result of Australia's federal structure. Chapters Four and Five examine the history of competition law in Australia and the background and operation of anti-competitive regulations in the *Trade Practices Act 1974*.

Chapter Six examines the Hilmer competition strategies which required not only extension of the provisions of the *Trade Practices Act 1974*, but more significantly affect public trading enterprises and particularly public utilities.

Chapter Nine examines the implementation of the competition policy framework which requires the establishment of the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC). These bodies require substantial co-operation between Federal, State and Territory jurisdictions and reflect the national and multigovernmental focus of the competition policy agreement.

In Chapter Nine of the report the *Competition Policy Reform Act 1995* and the Intergovernmental Agreements which represent a complete response to the recommendations of the Hilmer Committee are also discussed. The reforms create institutions which can encourage businesses and governments to act in accordance with competition principles and importantly these principles apply to all Australian businesses regardless of ownership or legal form.

This report in Chapter Two acknowledges the crucial role of States and Territories in implementing a national competition policy and the importance of co-operative federalism. Chapter Two also notes the role of federalism and micro-economic reform and in particular the major changes already undertaken by all jurisdictions, especially infrastructure reforms by State Governments of public utility monopolies, the professions and agricultural marketing authorities. A number of government business enterprises have become significant multinational corporations, for example, Telstra and some State agencies have entered the international stage to maximise returns to the taxpayer.

---

1 National Competition Policy Review, *Issues Under Consideration by the Independent Committee of Inquiry*, February 1993, p 4.

The Standing Committee notes that governments are increasingly prepared to find ways to deliver services. While in the past Commonwealth/State co-operation was accomplished through formal intergovernmental agreements or the referral of State powers to the Commonwealth, governments are now willing to experiment with intergovernmental arrangements to avoid cumbersome outcomes. Federalism can be an instrument for future co-operation and be more pluralistic and adaptive to changing needs of society.

Chapter Seven describes the benefits that competition will bring by way of economic efficiency to the Australian economy and outlines some of the approaches and processes being put into practice both in Australia and overseas.

It is critical to national economic success to develop policies for the development of competitive industries with access to efficient infrastructure, higher sustainable rates of economic growth, continued low inflation, more investment and job creation.

Chapter Ten raises issues concerning the fulfilment of community service obligations relating to the corporatisation and privatisation of some government business enterprises. The accountability of such organisations is a matter which has not been adequately addressed in either the Hilmer Report or the legislative package. This may be an area which requires further investigation and a separate report. The Standing Committee has made a number of recommendations which address some of those concerns.

Submissions and evidence from witnesses have been considered in the report. After considering these, the Standing Committee brings to the Legislative Assembly of Western Australia's attention, concerns raised by the agricultural sector about the anti-competitive effects of statutory marketing authorities which lead to inefficiency and costs. This we do in our recommendations.

Chapter Eleven outlines the position in Western Australia and concludes with an explanation of some of the issues and principles arising from national competition policy including its merits and limitations as well as its benefits.

The Standing Committee in its investigations found that there is general approval among governments, industry, unions and the community for a national competition policy. The Standing Committee notes that New South Wales has passed "template"[2] legislation (the *Competition Policy Reform (New South Wales) Act 1995)* which is the model for all of the other States and Territories. (See Annexure E). It is expected that all the other States and Territories in Australia will pass their own application of laws legislation in their respective jurisdictions within the next twelve months. At the time of this report the Western Australian application of laws legislation had been drafted, while some jurisdictions had passed legislation or were at various stages of the legislative process. (See Table 11 for a summary).

---

[2] This model is described in this Standing Committee's previous Reports as Structure 2 Complementary or Mirror legislation.

RECOMMENDATIONS

During the Standing Committee's considerations of issues relating to competition policy, concerns were raised relating to the fulfilment of community service obligations by, and the accountability of, utilities which have been corporatised or privatised.

Ministers responsible for the operation of utilities have in the past been able to intervene to ensure the maintenance of quality and service. Corporatisation and privatisation distance utility authorities from government. Such accountability mechanisms will disappear. It is considered essential that to determine the performance of such utilities the public requires access to information and a process of monitoring the performance of utilities.

The Standing Committee also notes that Parliament should have some input into the regulatory reform process to ensure that the benefits of public utility reforms are ultimately passed on to the public.

The services provided by utilities, for example, water, electricity and gas, are fundamental to the maintenance of basic standards of living. Corporatisation and privatisation of public utilities may need to include arrangements to encourage socially responsible decision-making by utility providers. This could include providing access to advisory services in cases of financial hardship and ensuring that connection, billing and repayment arrangements are socially sensitive.

The Standing Committee is of the view that these issues require further public debate and inquiry by the government when it prepares public utilities for restructure and corporatisation or privatisation.

Against this background, the Standing Committee recommends the following -

Costing Community Service Obligations

Recommendation One

1. (a) That the Parliament be informed of all community service obligations delivered by government business enterprises; and

(b) the associated costs of these community service obligations.

2. That government business enterprises identify and cost community service obligations delivered by them and report those findings in their Annual Reports in cases where this is currently not done.

Ombudsman

Recommendation Two

That industry-specific Ombudsmen be established to investigate and resolve complaints involving a range of issues including quality of services, billing, disconnection of services provided by the specific utility.

Licensing Regime/Code of Conduct

Recommendation Three

That participants in a public utility industry be required to be licensed or approved by an appropriate overseeing authority.

Quality standards should be part of the licence conditions. A breach of the licence conditions would occur through failure to comply with the standards.

Recommendation Four

That a Code of Conduct incorporating quality standards be developed by the relevant industry.

Adherence to the code would be a licence condition.

In the case of Recommendations Three and Four, breaches of licence conditions may require sanctions, such as penalties including monetary fines, rather than revocation of a licence as that may not be practical.

Legislation

Recommendation Five

That where minimum standards are necessary, legislation should specifically set out appropriate benchmarks for electricity voltage, water quality, safety and other related matters. Such standards should be consistent across the industry.

Contract

Recommendation Six

That a supply contract between the supplier and the consumer contain standards relating to quality.

A breach of the standards would entitle the consumer to claim damages for any loss caused by the breach. However, in such a case contract negotiations can be very one-sided when consumers deal with large monopolistic utility businesses; safeguards, therefore need to be established.

Consumer Charter

Recommendation Seven

That a consumer charter be developed between the regulator, the utility and consumer representatives and incorporated into standard form contracts to ensure that unreasonable terms and conditions are not imposed.

Consumer charters may be an appropriate way to ensure service and conduct quality, particularly in relation to less technical aspects of quality.

They can be flexible and specifically tailored to a particular agency or industry, including specific quantifiable targets which can be monitored to assess performance of the organisation.

Implied Regulation Threat

Recommendation Eight

That as a last resort an implied threat of regulation should exist to ensure all businesses provide quality services to consumers.

Regulation Review

The Standing Committee agrees with the need for regulation review in line with the micro-economic reform agenda and notes that most other jurisdictions have in place a formalised and systematic process for that review. The Committee therefore recommends -

Recommendation Nine

That a formalised system of regulatory review be established in Western Australia, which should report to the Parliament through the responsible Ministers and be referred to the appropriate Standing Committee for its response. (Refer to paragraphs 9.17 and 11.9).

Statutory Marketing Authorities

After considering the submissions received, the Standing Committee concluded it was necessary to bring to the Legislative Assembly of Western Australia's attention the concerns raised by a number of those submissions. In the agricultural sector submissions, serious doubts were raised about statutory marketing authorities. Statutory marketing arrangements were said to depend on anti-competitive practices and such practices would not conform to the wider public interest. Such arrangements, it was claimed, lead to unnecessary market inefficiency and costs and therefore limit economic growth in Western Australia and deter investment.

Some submissions claimed that statutory marketing authority mechanisms have tended to distort the market and market signals. Social objectives could be delivered more efficiently through alternative programs. The system of compulsory acquisition or vesting of crops, it was submitted,

removed individuals' freedom of marketing choice and caused significant logistical inefficiency. Such authorities have limited accountability.[3]

As a result of such evidence the Standing Committee recommends -

Recommendation Ten

That, as a matter of priority, the Government continues its review of any anti-competitive effects of statutory marketing authorities.

Parliamentary Direction

That in accordance with Standing Order 378(c) of the Legislative Assembly of Western Australia, this Standing Committee directs that the responsible Ministers be required within not more than three months, or at the earliest opportunity after that time if Parliament is in adjournment or recess, to report to the House as to the action, if any, proposed to be taken by the Government with respect to the recommendations of this report.

---

3 Submission: The Pastoralists and Graziers Association of Western Australia (Inc).

CHAPTER ONE

1. INTRODUCTION

1.1 Preamble

Against the background of the brief of this Standing Committee to examine and report to the Western Australian Parliament on uniform legislation and intergovernmental agreements, this report examines the intergovernmental agreements and legislation on competition policy which will result in Western Australia enacting legislation in line with those agreements. This report is intended to inform Members of the Parliament of Western Australia about the impact of such legislation. The report also looks at the general principles and the economic policy of competition policy in Australia and provides an overview of the recommendations of the Independent Committee of Inquiry into National Competition Policy (Hilmer Report) into competition policy. It also examines the legislative mechanism for the extension of the competition rules in the *Trade Practices Act 1974* to all areas of the Australian economy.

By way of background, in 1991 the Commonwealth, State and Territory Governments agreed to examine a national approach to competition policy. As a result the Hilmer Committee was appointed in October 1992. It reported in August 1993. All Australian Heads of Government endorsed the competition policy principles of the Hilmer Inquiry. The report was discussed at meetings of the Council of Australian Governments (COAG) in February and August 1994 and it agreed to a package of competition policy reforms and a draft legislative package to implement the competition reforms. These were released for public comment.

At the COAG meeting in April 1995 all governments agreed to implement a national competition policy based on the legislative package. At that meeting three intergovernmental agreements were signed by the Commonwealth, States and Territory Governments.

The first Agreement is the Conduct Code Agreement. (See Annexure B). Under this agreement the States and Territories agreed that the Competition Code applies to persons in their jurisdictions. The Competition Code is a modified version of Part IV of the *Trade Practices Act 1974*.

The second Agreement, the Competition Principles Agreement, sets out principles to apply to structural reform of public monopolies, competitive neutrality between public and private sectors, access to essential facilities regime, legislation review and prices oversight of government business enterprises. (See Annexure C).

The third Agreement, the Agreement to Implement the National Competition Policy and Related Reforms, provides for the Commonwealth to maintain the real *per capita* guarantee of financial assistance grants to the States, the Territories and local government on a rolling three year basis. The Commonwealth also agreed to provide further financial assistance as States and Territories make satisfactory progress in implementing national competition policy and related reforms. COAG also agreed on a timetable for legislative and other action. (See Annexure D).

The National Competition Reform Bill was introduced in the Senate in March 1995. It was passed by the Senate in June and was introduced, debated and passed in the House of Representatives on 30 June 1995. It received Royal Assent on 20 July 1995 and came into effect on 7 August 1995.

The Hilmer inquiry into competition policy acknowledges the generally held belief that to be internationally competitive Australian industries will benefit greatly from a more liberal trading environment. This will be achieved if both government and industry in Australia continue the wide-ranging structural reform of the Australia economy. Other countries are committed to structural reform of their economies and this will provide opportunities for Australia.

The Hilmer Report took a broad view of competition policy and proposed extension of the *Trade Practices Act 1974*, to all government business enterprises, statutory marketing arrangements and unincorporated associations, which have not previously been subject to trade practices scrutiny. It also identified many Government regulations and interventions that impede the functioning of markets.

It is generally accepted that achieving a coherent framework for competition policy is important. Success in economic reform is dependent on co-operation between governments. The general consensus across Australia is that it is vital to build on existing processes and find ways which will allow Australia's federal system to work better to improve competitiveness of Australian industry.

1.2 Framework of the Report

In the first chapter of this report the Standing Committee introduces the purpose and definition of competition policy as adopted by COAG out of the Hilmer inquiry.

Chapter Two discusses competition policy and federalism and how they relate to micro-economic reform, economic efficiency and competitiveness.

In the third chapter the Standing Committee examines the concept and philosophy of competition and the relationship between competition and economic efficiency as part of competition policy.

Chapter Four discusses the history of pro-competition regulation in Australia and its development. It also reviews the various amendments to the *Trade Practices Act* (TPA) since its enactment in 1974.

Chapter Five deals with the legislative structure of the TPA and describes the main anti-competitive provisions.

Chapter Six examines the Hilmer Inquiry Report into national competition policy and discusses its key findings and recommendations.

Chapter Seven refers to the findings by the Industry Commission into the costs and benefits for all Australian jurisdictions, and to the Australian economy, of implementing the Hilmer competition reforms.

Chapter Eight outlines the developments and the thrust of competition policy in overseas countries, in particular Europe and the United States of America.

Chapter Nine describes the legislative package on National Competition Policy agreed to by the Council of Australian Governments (COAG) in August 1994 which was released for public comment in September 1994. The final legislative package as adopted by COAG in April 1995 is outlined.

Chapter Ten deals with issues of accountability related to the implementation of structural reform and the corporatisation and privatisation of government business enterprises. It also outlines concerns raised about the provision of community service obligations.

Chapter Eleven discusses the position taken by Western Australia and the application of competition policy reforms in Western Australia.

The conclusions are presented in Chapter Twelve.

1.3 Purpose of a National Competition Policy

The stated purpose of a national competition policy is to -

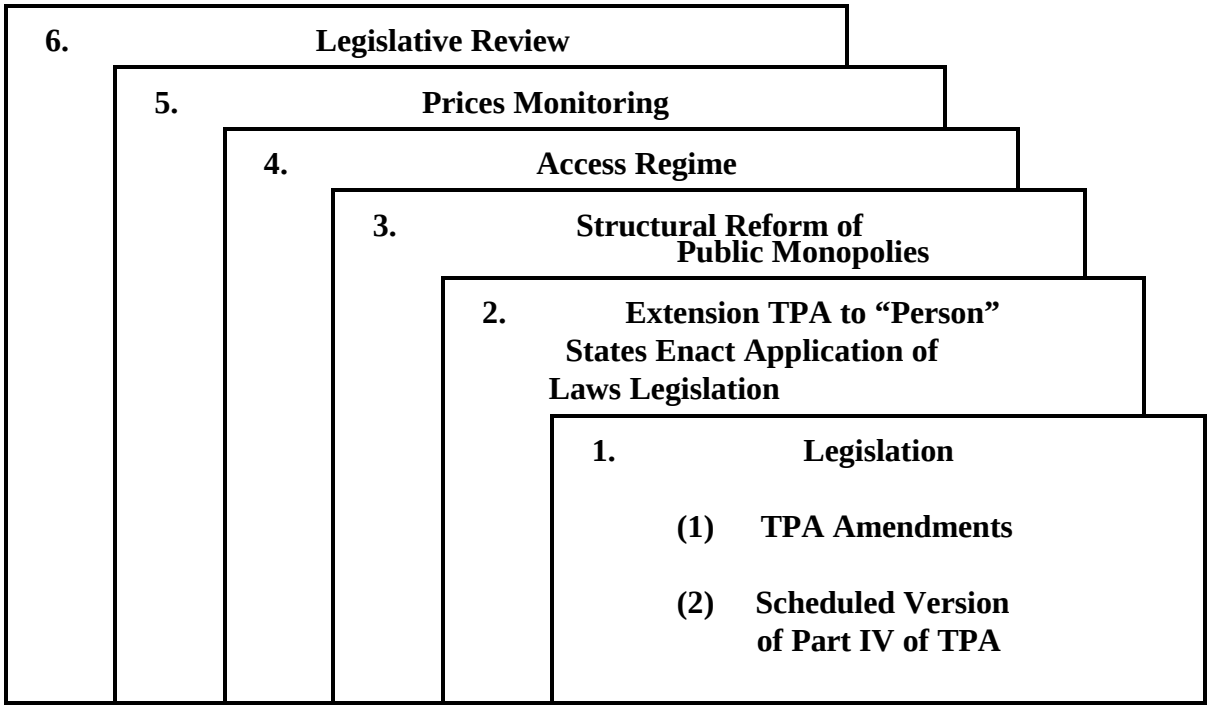
- facilitate effective competition in the interests of efficiency and economic growth while dealing with social objectives and concerns about potential market failure.

- promote policies governing the competitive behaviour of firms including prohibition on practices such as price fixing or misuse of market power, as well as prices surveillance or control where these measures are taken in response to deficiencies in the operation of normal competitive disciplines.[4]

Chart 1 below outlines the main reforms recommended to ensure the objectives of economic efficiency are introduced -

Chart 1

OBJECTIVES: ECONOMIC EFFICIENCY



4 National Competition Policy Review, *Op Cit*, February 1993, p 4.

1.4 Competition Policy

The Standing Committee's work has included a study of the Hilmer Report, various documents, reports, evidence and submissions received by the Committee.

Commonwealth, State and Territory Governments have been pursuing reforms including splitting government business enterprises into competing units, removing regulatory barriers to entry, making greater use of contracting out through competitive tendering and privatising some business activities and services. More can be achieved by governments acting co-operatively.

A national competition policy needed to consider a number of factors including -

- Increased competition results in higher productivity and growth in the economy.
- The fact that Australian industries have become more exposed to international trade and globalisation and as a result it has become imperative that all sectors of the economy be subject to competition to improve performance.
- Changes which have been occurring slowly in the area of government business enterprises and which have been subjected to reform.
- Increased competition in the private and public sector leads to improved productivity and economic performance.

Hilmer proposed competition policy principles to review restrictions on competition at a national level. The Hilmer Committee also examined structural reform of monopolies, access rights to essential facilities, limits on monopolistic pricing and ensuring that public and private enterprises compete on fair terms.

1.5 Micro-Economic Reform and Competition

In the past decade micro-economic reform has been central to Australian economic policy. Micro-economic reform involves government initiated change to institutional structures to improve economic efficiency. Interest groups, of course, have different priorities and interests in respect of how resources should be dealt with and the role of market forces and government initiatives.

However, it is generally accepted that micro-economic reform enhances the material well-being of the Australian community, through government reforms that raise productivity of the national economy while at the same time meeting its social, cultural and political objectives. Improvements in efficiency in the use and production of goods and services enhance living standards and the economy's income producing potential. Competition is considered one of the most important factors in micro-economic reform.

Australia is not alone in recognising the importance of competition. There has also been international recognition that competition across domestic and international markets and the integration of national markets into global markets, contributes to national and international economic prosperity.

The Hilmer Report has been central to the process of micro-economic reform in the area of public utilities. The Hilmer Report recommended that government business enterprises should not enjoy a competitive advantage when competing with other businesses. In this respect the Hilmer Report

recommends that monopoly government business enterprises should be subject to structural reform prior to privatisation to ensure competition in a national market.

1.6 Need for Competition Policy

Competition policy seeks to facilitate effective competition, promote efficiency and economic growth while at the same time protecting the public interest.

Competition policy has traditionally been limited to Federal law dealing with anti-competitive conduct of firms under the *Trade Practices Act 1974*. The Act however does not deal with anti-competitive structures, even though structural reform of public utilities is central to micro-economic reform. Competition policy is not only trade practices law, it embraces broader policy and legislation which influences the national economy. Competition policy includes the removal of legislative obstacles to competition.

A national competition policy is needed because -

- The economic significance of national, State and Territory boundaries have diminished greatly with rapid advances, in transport and communication which allow firms to develop national and international trade networks.

- Tariff reductions and other trade policy reforms have increased the competitiveness of the sector that trades internationally. However, many goods and services provided by public utilities, professions and some areas of agriculture have been sheltered from international and domestic competition.

- Pro-competitive reforms have been implemented in certain sectors of the economy on an *ad hoc* basis, without a broader policy framework. A national competition policy allows for a consistent approach to reforms under the arrangements agreed to by the Heads of Government at COAG.

CHAPTER TWO

2. COMPETITION POLICY AND FEDERALISM

2.1 Federalism and Economic Performance

In recent years all Australian Governments have initiated reforms to improve productivity and competitiveness of industry. The development of national markets and the need for more efficient provision of government services under Australia's federal system requires co-operation and co-ordination of all governments to give effect to some reforms.

With the continued globalisation of markets and more intense international competition the need for change becomes more urgent. These questions of reform involve complex matters concerning intergovernmental relations. While it is accepted that more co-operation between Australian *Governments* is necessary to improve Australia's economic performance, the role of Australian *Parliaments* in intergovernmental agreements and uniform legislation is much neglected. In this context the primary focus of this Standing Committee is the scrutiny of those agreements and legislation.

While the need for co-operation has been recognised, and institutional arrangements have evolved to facilitate national policies and reforms through arrangements such as the Council of Australian Governments (COAG) and Ministerial Councils, there is concern that such executive decision making does not accommodate the need to involve Parliaments.

While the imperative for reforms, is recognised, in areas where the responsibilities of the Commonwealth, State and Territory Governments interact and overlap it is also important the Parliaments of Australia take part in such an important debate.

2.2 Federalism and Competitiveness

There is widespread acknowledgment of the strengths of Australia's system of government and the need to build on them. In this context industry competitiveness can be affected by a multitude of different regulations, taxation and provision of services by governments. Overlapping Commonwealth and State regulations and differences in regulatory regimes between the States may impede performance of Australian industries and create uncertainty for investment. Such regulations may also increase costs to industry while restricting the operation of national markets. Some regulations restrict land use and labour mobility and impede the best use of capital. Competition policy seeks to address these and other issues.

Efficiency of public enterprises can reduce industry costs, assist competition and reduce costs to consumers. Inquiries by the Industry Commission[5] have demonstrated improvements in industry competitiveness are closely linked to the performance of different governments in providing energy, transport and communication services through government business enterprises.

---

5 See Industry Commission Reports: Inquiry on *Impediments to Regional Industry Adjustment* 1993 found lack of co-ordination of infrastructure provision, that is roads, railways adds to costs. Inquiry on *Energy Generation and Distribution* 1991 found lack of an integrated interstate network for electricity transmission precludes efficiency gains. Report on *Rail Transport* 1991 found inadequate integration between State based rail system contributed to high costs for users.

It is widely accepted that integrated infrastructure across jurisdictions assists in the development of national markets and reduces costs to industry. A key area of intergovernmental co-ordination and co-operation is in developing integrated infrastructure networks.

Duplication of services and administration are a major focus for interjurisdictional reform. However duplication of services may not always be wasteful. Competition between governments in efficient service delivery and administration can make an important contribution to innovation and national economic growth. On the other hand, competition in the provision of subsidies to attract firms from the other States and Territories can distort locational decisions and result in industry fragmentation and higher costs.[6]

2.3 Federalism and Micro-economic Reform

All Governments in Australia have given priority to reducing impediments which arise from Australia's federal system to bring about better economic performance.

Interjurisdictional reforms have been addressed mainly through COAG and Ministerial Councils. These forums have given priority to the reduction of overlapping and inconsistent government regulations, duplication between governments and the improvement of accountability and transparency in service provision and the performance of government business enterprises.

Commonwealth/State agreements have established bodies to reduce overlapping and inconsistent regulations. These include the Australian Securities Commission, the National Food Authority, the National Road Transport Commission and the National Registration Authority for Agricultural and Veterinary Chemicals to name but some. All Governments except Western Australia, have introduced legislation to establish the National Environment Protection Council.

Already States and Territories have arrangements to reduce inconsistent regulation between their jurisdictions. For example, these jurisdictions have introduced a uniform system of prudential supervision of permanent building societies and credit unions. The scheme was implemented by template legislation passed by the Queensland Parliament followed by legislation passed by other State and Territory Governments adopting the Queensland legislation.[7]

The Commonwealth, States and Territories have introduced a system of mutual recognition of regulation of goods and services.[8] This Standing Committee in 1994 recommended Western Australia's entry into the mutual recognition scheme. The Premier announced, in response to the Committee's Report, that Western Australia would enter the scheme. The *Mutual Recognition (Western Australia) Act 1995* was passed by the Western Australian Parliament on 15 November 1995.

Integration of certain infrastructure networks has been initiated through intergovernmental agreements. For example, there is an agreement to establish an interstate electricity grid and a national framework for trade in gas across some State boundaries. The National Rail Corporation has been established to provide an integrated national rail freight service.

---

6 Industry Commission *Annual Report* 1993-1994.

7 *Financial Institutions (Western Australia) Act 1992*.

8 See the Standing Committee's *Sixth Report on Mutual Recognition*.

2.4 Reform of Government Business Enterprises

Arising from the Hilmer Report into competition policy, the Commonwealth, State and Territory Governments have been considering proposals to reform government business enterprises and have begun to implement change. While the national competition policy proposals are foremost in the current reform proposals, there is an ongoing need for co-operation between governments to ensure national economic efficiency.

2.5 Co-operative Federalism

In a federation decisions can be more responsive to local needs and more innovative with competition between governments. However, while some issues are best dealt with competitively others require co-operation and co-ordination. COAG is the focal point for such co-operation between Australian Governments. While all governments agreed in principle to reforms on competition policy, co-operative approaches can be slow and require agreement by all governments and delays can occur in clarifying roles and responsibilities.

Competition between governments complements intergovernmental co-operation by the establishment of best-practice models of reform. Governments implement reform within their own jurisdictions which can be emulated or modified by other jurisdictions.

Intergovernmental fiscal arrangements strongly influence the taxation, expenditure and regulatory decisions of governments in federal systems. The limited tax bases of State and Territory Governments may lead them to rely on dividends from government business enterprises and as a result they may be reluctant to open public enterprises to competition or private ownership.

COAG has agreed that all governments should share in the benefits of economic growth and revenue from national competition policy reforms. This was formalised in the Third Intergovernmental Agreement signed at COAG in April 1995.

Since 1989 Commonwealth business enterprises have been subject to State and Territory payroll taxes and as a result of an agreement in 1994 the Commonwealth has agreed that the States and Territories can collect tax equivalent payments from their own government business enterprises. New taxation arrangements agreed to by the Commonwealth, States and Territories are designed to ensure that decisions to privatise government business enterprises are based on the economic merits of the case and are not unduly influenced by taxation implications.[9]

2.6 Federalism and National Infrastructure Development

Australia's economic infrastructure involves both national and State based networks of services. With the growth of national and international markets, national networks have become increasingly important to facilitate the efficient production and distribution of goods and services between States and regions and to reduce the costs of Australian industry.

Competition between States, within a national infrastructure, creates the opportunity for supply to be sourced from lowest cost producers, resulting in increased production and employment in some States and a decrease in others.

---

9 Industry Commission, *Op Cit*, 1993-94, p 31.

The development of national networks necessitates compatible reforms across jurisdictions, including administrative reform and corporatisation as well as major structural reform and privatisation. Structural reform involves vertically separating infrastructure systems into competitive and natural monopoly elements. This should facilitate greater competition and improvements in efficiency.

In most infrastructure industries, the owner of the network is also the provider of the service. For example, traditionally, railway authorities have owned the track as well as operated the trains. Historically, electricity generators have owned the transmission and distribution networks. The case for separation of the network and services is based on the premise that the provision of services is less of a natural monopoly than the provision of the basic network, so that separation introduces or expands competition. The separation of generation, transmission and distribution functions in electricity has commenced in New South Wales, Victoria and Queensland with review being undertaken in both Tasmania and South Australia. In Western Australia there has been a separation of gas and electricity of the energy utility in order to create competition.

2.7 Regulatory Arrangements

Regulations should ensure that all market participants compete on a fair basis. For effective competition new entrants must be able to compete fairly with existing State authorities. Regulations should ensure that competition is not constrained by monopoly elements. It is generally accepted a national view of regulation is required to ensure effective competition. At its February 1994 meeting, COAG approved a regulatory package consistent with the Hilmer Report recommendations.

CHAPTER THREE

3. CONCEPT OF COMPETITION AND MARKETS

3.1 Philosophy of Competition

Competition can be understood as -

> *The striving or potential striving ... of two or more persons or organisations ... against one another ... for the same or related objects.*[10]

The opening of a market to potential rivals - known as contestability - is recognised as having similar effects to actual head-to-head competition.

Conventional economic models suggest that in a properly functioning market, competition provides the discipline to ensure businesses continually strive to improve their performance and meet consumer needs. Responsiveness to consumer needs means competition ensures lower prices and improved consumer choice. Economic growth is stimulated and employment opportunities enhanced. However, institutional and other factors may negate the effective operation of markets and suppress competition to the detriment of consumers and economic efficiency.

Australia's industry structure tends to be oligopolistic; that is, only a relatively small number of firms in each industry. However, there does not have to be a large number of competitors for the effective working of competitive forces. Competition between a few large firms may provide more economic benefit than competition between a large number of small firms.

Competition need not be between identical products or services. There can be competition between substitutes. Competitive striving can be either innovative or adaptive, initiating changes or responding to them, and a source of both stability and instability.

3.2 Definition of a Market

The existence of a competitive market is an important factor determining the efficiency with which resources are used in the economy. What is less apparent, however, is the need for a number of competing domestic producers in order for the essential characteristic of a competitive market.

What constitutes a market is left to bodies like the Trade Practices Commission (now the Australian Competition and Consumer Commission (ACCC)), which are required to look at the extent of dominance or competition in a market.

It is not productive to try and define markets but to ensure that there are no barriers to entry to markets. That is why micro-economic reform and reduction of tariff barriers are important in ensuring a more efficient economy and introducing competition in Australia.

The notion of local or State markets has been disappearing. An example is the move to a national grid for electricity. A national market for a commodity like electricity means that power suppliers will cross State boundaries. This will result in trade in commodities that did not exist before.

---

[10] Dennis, F.G., *Competition in the History of Economic Thought*, Arno Press, New York, 1977.

3.3 Contestable Markets

One source of competition can be the existence of potential competition. This is especially pertinent where the optimal number of firms for an industry is low. The existence of excess profits or inefficiencies among existing firms would provide an incentive for new entrants to the industry. The possibility of such entry, then, may be an effective substitute for actual competition.

Critical to the effectiveness of potential competition is the presence of barriers to the entry of new firms. Entry barriers may include control over a key input, for example, raw materials or technology, or the requirement for a new entrant to undertake significant investments which could not be recouped on exit. A market characterised by costless entry and exit is termed perfectly contestable. A perfectly contestable market would yield outcomes identical to a perfectly competitive market, any excess profits or inefficiencies being competed away by the threat of hit and run entry.

3.4 Competition and Economic Efficiency

Competition drives efficiency and assists economic growth and job creation. Australian Governments at all levels have made reforms to enhance competition. Tariff barriers have been lowered to increase international competition, and restrictions within Australia have been relaxed in a number of sectors including telecommunications, aviation, egg marketing and conveyancing.

Competition policy seeks to facilitate effective competition to promote efficiency and economic growth while at the same time recognising that competition does not always achieve efficiency and may be in conflict with other social objectives.

Competition policy encompasses all policy dealing with the extent and nature of competition in the economy and is not solely confined to the provisions of Part IV of the *Trade Practices Act 1974* (Commonwealth). Competition policy forms part of a large body of legislation. As well, competition policy is effective government action. For example, government action influences -

- permissible competitive behaviour by firms;
- the capacity of firms to contest particular economic activities; and
- differences in regulatory regimes faced by different firms competing in the one market.

3.5 Definition of Efficiency

An economy is described as efficient if -

- the economy reflects consumer wants with no restrictions;
- production meets consumer needs at lowest possible cost; and
- it is an open and dynamic economy receptive to new ideas.

An inefficient economy reduces the choice of goods and services to the consumer, results in increased charges and reduces the volume of goods and services available.

3.6 Economic Efficiency Argument

To prosper, Australia must improve its productivity and international competitiveness. Organisations, irrespective of size, location or ownership, must become more efficient, innovative and flexible. Competition provides the spur for businesses to improve their performance, develop new products and respond to changing circumstances. Competition policy has been increasingly

recognised as a key element of national economic policy. The promotion of effective competition is consistent with maximising economic efficiency.

Economic efficiency is vital, it is argued, to enhance community welfare because it increases the productive base of the economy, providing higher returns to producers in aggregate, and higher real wages. It also ensures consumers are offered, over time, new and better products and existing products at lower cost. Because it spurs innovation and invention, competition helps create new jobs and new industries. The impact of increased competition on efficiency is illustrated by the entry of new players into the telecommunications market, which has resulted in consumers being provided with a wider choice of services at lower cost.

There may be situations where competition, although consistent with efficiency objectives and the interest of the community as a whole, is regarded as inconsistent with some other social objectives. For example, governments may wish to confer special benefits on a particular group for equity or other reasons. A public monopoly may be directed to provide goods or services to particular groups (such as pensioners) below the full cost of production, the deficit being funded through higher charges to other users. Some agricultural producers have, in the past been permitted by regulation, that is, by exemption from the *Trade Practices Act 1974*, to collude to restrict output or fix prices at least in part to raise farm incomes or regional employment at the expense of consumers or other producers. Finally, some suggest that competition rules should protect competitors, rather than the competitive process and prevent larger firms from engaging in efficient competitive conduct where that would cause less efficient firms to become non-viable. However, in all these cases governments can achieve these objectives in other ways less injurious to competition and the welfare of the community as a whole.

3.7 Competition Policy

Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interests of economic efficiency while accommodating social objectives.

It is recognised that application of the *Trade Practices Act 1974* is not of itself sufficient to enhance competition when the restrictions flow from government regulations or public ownership. Trade policy reforms since the early 1980s have substantially improved competition in the domestic economy. There has been a reduction in assistance to manufacturing. The reduction of import barriers has exposed industries to international competition and has provided incentives to improve product quality and innovation. Some recent reforms in the government businesses sector range from commercialisation and corporatisation to privatisation. However, improvements in efficiency in these sectors remain a national priority.

CHAPTER FOUR

4. HISTORY - COMPETITION POLICY

4.1 Background

The regulation of trade practices in Australia has developed from a combination of common law and statute law.[11] The first trade practices regulation was the common law restraint of trade doctrine, which determined that certain restrictive agreements would not be enforced by the courts. This restraint of trade doctrine continues to operate in respect of conditions and warranties in consumer and employment contracts.

Other common law actions in the restrictive trade practices area have included -

- the economic tort[12] of conspiracy with the motive to injure;
- conspiracy by illegal means or for an illegal end; and
- intimidation or interference with a contract.

Despite the range of actions available, however, early this century it was recognised that the common law failed to provide a practical, cohesive, and comprehensive restrictive trade practices regime.

4.2 *Sherman Act* - United States

The common law of restraint of trade was also part of nineteenth century United States law. The rapid expansion of commerce in the second half of that century in the United States produced a body of opinion concerned at the methods of business and the growth of its power. The concern centred on monopolies, cartels and trusts. In 1890 the *Sherman Act* was introduced, adopting the main features of the common law but also providing for both criminal sanctions and private actions. The simple provisions of the *Sherman Act* still remain the foundation of the now vast superstructure of American antitrust law.

4.3 *Australian Industries Preservation Act 1906*

The *Australian Industries Preservation Act* dating from 1906, which prohibited monopolies and restraints of trade, was modelled on the *Sherman Act*. Unlike the *Sherman Act*, however, the Australian version suffered from conservative judicial interpretation and constitutional restrictions. Sections 51(i) and 51(xx)[13] of the Australian Constitution provided the basis for the Act. The High Court found that the Act attempted to cover purely intrastate trade and commerce when engaged in by constitutional corporations, and that this was an invasion of States' rights.[14] The corporations power in section 51(xx) was thus given a restrictive ambit, and the sections of the

---

11 The common law comprises law developed through successive court decisions which are then binding on, or at least authoritative in subsequent proceedings, as distinguished from law created by enactment of legislatures.

12 Tort means *wrong*, and covers a range of civil proceedings involving both intentional and unintentional *wrongful* behaviour, the best known being the tort of negligence.

13 Trade and Commerce Power Section 51(i) and Section 51(xx) Corporations Power.

14 This decision was in line with the then prevailing doctrine of *reserved powers* of States, subsequently rejected in the Engineers' case (Adelaide Steamship Co Ltd v Amalgamated Society of Engineers (1920) 28 CLR 129).

Act based on it were held by the High Court to be invalid.[15] The sections of the Act based solely on the trade and commerce power were upheld.[16]

4.4 *Trade Practices Act 1965*

A further attempt at restrictive trade practices regulation came with the *Trade Practices Act 1965* which came into operation in September 1967. The main provision of this Act was the official register, to be kept by the Commission of Trade Practices. Companies were thereby required to register any agreements or understandings with their competitors. The Commissioner could challenge the agreements, and it would be a matter for the Trade Practices Tribunal to decide whether the agreements were justified in the public interest.

This Act was successfully challenged in 1971 by various manufacturers of concrete.[17] The Act relied on both the corporations power, section 51(xx) and the trade and commerce power, section 51(i) of the Constitution for its foundation. The High Court ruled that it was invalid because the way in which it was drafted meant that activities in intrastate trade (outside the trade and commerce power) and activities engaged in by corporations outside constitutional definition were within its ambit.[18] The Court held that a law regulating the trading activities of trading corporations was within the corporations power, although the power had not successfully been relied upon in the present legislation.

4.5 *RestrictiveTrade Practices Act 1971*

As a result of the successful challenge referred to above, the 1965 Act was repealed and the *Restrictive Trade Practices Act 1971* was enacted. This Act contained provisions similar to the previous Act but applied only to corporations. This was an interim measure pending the introduction of comprehensive new legislation.

4.6 *Trade Practices Act 1974*

The *Trade Practices Act 1974* became operative on 1 October 1974.[19] Restrictive trade practices were now prohibited by the Act itself rather than by a system of restraining orders made by the Trade Practices Tribunal after lengthy inquiries which existed under earlier legislation.

The *Trade Practices Act 1974* has been subject to judicial interpretation since its inception, as well as a number of reviews, reports and amendments.

The appropriate test for mergers has been the focus of much of the debate and the subject of many reports on competition law over the years. In the original 1974 *Trade Practices Act* the test was whether the acquisition was likely to have the effect of substantially lessening competition in a market.

Outlined below is a summary of the major reviews, reports and amendments to the *Trade Practices Act 1974.*

---

15 Huddart Parker & Co. Pty Ltd v Moorehead (1909) 8 CLR 330.

16 Redfern v Dunlop Rubber Australia Ltd (1964) 110 CLR 194.

17 Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468.

18 Significantly for future attempts at regulation the High Court expressly overruled the Huddart Parker case in the course of its judgment.

19 The Act marked a return to the proscriptive approach of the *Australian Industries Preservation Act 1906*.

4.7 Swanson Committee Report 1976.[20]

A review of the Act was undertaken in 1976 by the Trade Practices Review Committee (the Swanson Committee). The Swanson Committee Report confirmed the general thrust of both the pro-competitive and the consumer protection parts of the Act. Amendments to the Act in 1977 were important and strengthened the law against price collusion, improved some procedures, including section 45D on secondary boycotts and closed some loopholes. On the other hand, the market impact test of the merger provisions was liberalised significantly.

4.8 Amendments to the *Trade Practices Act 1974*

The first major amendments to the *Trade Practices Act 1974* were effected by amendments to the Act in 1977 which came into force in July that year. The 1977 amendments introduced various changes designed to bring about the recommendations by the Swanson Committee and included the re-definition of services to include services relating to land. Section 45D was introduced into the Act to prohibit certain arrangements with organisations of employees. The reference to dominance was written into section 50 (Mergers) and thereby prohibiting an acquisition which would result in a corporation being in a position to control or dominate a market.

Further significant amendments to the Act[21] came into force in December 1978. Section 45D was amended and aimed against secondary boycotts having the purpose or likely effect of substantially hindering a trader from engaging in interstate or overseas trade or commerce, or commerce within a Territory.

Provisions relating to secondary boycotts including section 45E came into force in May 1980. The new section 45E prohibited an arrangement between a union and another party which had the purpose of preventing or hindering customary dealings involving the supply or acquisition of goods or services to or from a target company.[22]

Further amendments occurred in 1989[23] and replaced the existing Part X of the *Trade Practices Act 1974*. That part covered agreements between ocean carriers providing liner cargo shipping services, carrying non-bulk cargo to or from Australia. Subject to limited exemptions most agreements were made open to public scrutiny via public registers, and investigation by the Trade Practices Commission.

Section 46 (Misuse of Market Power) was substantially amended in 1986[24] to lower the threshold test. Prior to the amendment the section was entitled Monopolisation. The section prohibited a corporation which was in a position substantially to control a market from taking advantage of that power for certain anti-competitive purposes. The test was changed to catch a corporation which has a substantial degree of power in a market.

The 1986 amendments also facilitated easier proof of the purpose of particular conduct by providing that the purpose may be ascertained by inference from the conduct or by other relevant circumstances.

---

20 Trade Practices Act Review Committee *Report to the Minister of Business and Consumer Affairs*, August 1976, AGPS, Canberra.

21 *Trade Practices Amendment Act 1978* and the *Trade Practices Amendment Act (No 2) 1978*.

22 *Trade Practices (Boycotts) Amendment Act 1980*

23 *Trade Practices (International Liner Cargo Shipping) Amendment Act 1989*.

24 *Trade Practices Revision Act 1986*.

Section 50 (Mergers) was amended in 1986[25] to counter difficulties which had arisen during its earlier years of operation. The amendment removed the words *control* from the control or dominate test to eliminate uncertainty with the concurrent use of the standards of control and dominate. Amendments also extended the application of the Act to acquisitions by natural persons, and removed bare transfers of monopoly power from the operation of the Act and provided for some control over acquisitions outside Australia which affect Australia.

4.9 Green Paper 1984

The Trade Practices Act Proposals for Change Report[26] set out proposals under consideration by the Government for amending the *Trade Practices Act 1974*. The paper was issued for public comment. Among its major recommendations was the repeal of sections 45D and 45E relating to secondary boycotts and amending the mergers section (section 50) of the Act to allow a bare transfer of monopoly power and replace the control or dominance test by a *substantially lessening of competition* test.

4.10 Trans-Tasman Arrangements[27]

New provisions covering the misuse of market power in trans-Tasman trade came into force in July 1990. Section 46A of the Australian *Trade Practices Act 1974* and section 36A of the New Zealand *Commerce Act 1986* extended competition law provisions to trans-Tasman trade in goods and were directed at prohibiting a corporation with a substantial degree of market power taking advantage of that power in trans-Tasman trade. The provisions came into effect as the anti-dumping controls on trade between Australian and New Zealand were removed by the Closer Economic Agreement - Protocol on Acceleration of Free Trade in Goods.[28]

4.11 Reports

An inquiry before the House of Representatives Standing Committee on Legal and Constitutional Affairs into mergers, takeovers and monopolies, (the Griffiths Report, 1989)[29] recommended that the sections relating to mergers and misuse of market power be retained to allow sufficient time for the court to interpret the sections.

The Attorney General responded in Parliament to the Griffiths Report on 22 August 1991[30]. In his response the Attorney General stated that the Government agreed with the Committee recommendations that the misuse of market power provisions in section 46 should be retained in the present form and like the Committee was not convinced that there was sufficient justification to reverting to the substantial lessening of competition test in the case of mergers (section 50).

---

25 *Trade Practices (Transfer of Market Dominance) Act 1986*

26 *Trade Practices Act: Proposals for Change*, February 1984, AGPS, Canberra.

27 *Trade Practices (Misuse of Trans-Tasman Market Power) Act* 1990 (Australia) and the *Law Reform (Miscellaneous Provisions) Act 1990* (New Zealand).

28 The closer Economics Relations Trade Agreement between Australia and New Zealand came into operation in 1983. The main objectives of the Agreement expand free trade and eliminate barriers to trade between both countries. A memorandum of understanding was signed by Australia and New Zealand on the harmonisation of business law on 1 July 1988.

29 Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?*, House of Representatives, Canberra, May 1989.

30 Attorney-General, *Ministerial Statement: Standing Committee on Legal and Constitutional Affairs, Government Response*, House of Representatives, Canberra, 22 August 1991, pp 384-389.

The Attorney General referred to a further review of the merger and misuse of market power provisions of the Act being conducted by the Senate Committee and indicated that the Government would reconsider the proposals in light of the report of the Senate Committee.

The report by the Standing Committee on Legal and Constitutional Affairs (the Cooney Report)[31] was released in December 1991. The test under section 50 of the *Trade Practices Act 1974* was that of dominance. Submissions called for a return to the substantial lessening of competition test. The Committee came to the conclusion that the section is about the promotion of competition and so a return to the *substantially lessening of competition* test was recommended. The Committee was also of the belief that a change away from the dominance test would bring Australia's competition law in line with many foreign tests.

The Committee recommended that monetary penalties be increased substantially for all breaches of Part IV of the Act.

Following this review amendments relating to mergers, pecuniary penalties, pre-merger notifications were implemented and came into effect on 21 January 1993.[32]

---

31 Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, Senate, Canberra, December 1991.

32 *Trade Practices Legislation Amendment Act 1992*.

CHAPTER FIVE

5. LEGISLATIVE FRAMEWORK OF THE *TRADE PRACTICES ACT 1974*

5.1 Introduction

This chapter describes certain provisions of Part IV of the *Trade Practices Act 1974*. In August 1995, certain minor amendments to some of these provisions came into effect. Where appropriate these amendments are indicated in this chapter. All amendments to the *Trade Practices Act 1974* brought about by the *Competition Policy Reform Act 1995* are reported in more detail in Chapter Nine of this report.

Part IV of the *Trade Practices Act 1974*, Restrictive Trade Practices, is aimed at creating a situation in which the forces of competition can operate actively in the marketplace. Part V, Consumer Protection, is aimed at improving the position of the consumer in his dealings in the marketplace. By controlling the conduct of those who supply the consumer, the competitive position of other suppliers may also be improved in the absence of unfair practices. Provisions are enforced by penalty and injunctions. With some specific exceptions, approaches could be made to the Trade Practices Commission, now the Australian Competition and Consumer Commission (ACCC), for authorisation of conduct that might otherwise be illegal.

5.2 Source of Constitutional Power

The main constitutional basis for the Act is the corporations power, section 51(xx) of the Constitution. Section 6 of the *Trade Practices Act 1974* provides the constitutional support based on the trade and commerce power (section 51(i)), the Territories power (section 122) and powers governing dealings with and by Commonwealth Agencies.

5.3 Anti-competitive Contracts, Arrangements or Understandings

Section 45 prohibits horizontal arrangements between competitors which have the effect or purpose of lessening competition. This includes *per se* prohibitions[33] of all price agreements or agreements containing exclusionary provisions. Exclusionary provisions under the *Trade Practices Act 1974* are collective refusals to deal with another party (primary boycotts), or where supplies to or from a third party are purposely hindered in order to lessen competition or damage a business (secondary boycotts).

5.4 Misuse of Market Power

Section 46 prevents a corporation with a substantial degree of market power, either as a supplier or consumer of a product, from using this power to threaten or damage existing or potential competitors in any market. The provision covers predatory conduct designed to eliminate or damage a competitor, prevent entry of a possible competitor, or deter or prevent competitive behaviour.

5.5 Anti-competitive Exclusive Dealing

Section 47 prohibits a supplier or buyer attempting to directly or indirectly interfere with the freedom of its respective buyers or suppliers from dealing with whom they choose. Generally,

---

[33] Restrictive trade practices are prohibited *per se* under the *Trade Practices Act 1974* when there is no requirement to satisfy the lessening of competition test.

exclusive dealing is only prohibited where such conduct has the purpose or effect of substantially lessening competition, except for third-line forcing which is strictly prohibited[34]

5.6 Resale Price Maintenance

Section 48 prohibits vertical supply arrangements designed to underpin price levels, except in the case of genuine recommended retail prices or loss-leader selling. A supplier cannot in any way seek to prevent his goods being resold or advertised below a certain minimum price stipulated or approved by him, for example by threatening or actually suspending supplies.

5.7 Anti-competitive Price Discrimination

According to section 49, a supplier could not price discriminate (for example, by differential price discounting) between purchasers of like products (that is, those at the same grade or quality), if a substantial lessening of competition is thereby caused, either from the magnitude of the price discrimination or the recurrence of such behaviour. This provision, however, recognises some valid reasons for price discrimination, such as discounting for large volumes, and, as a result, had largely fallen into disuse. The *Competition Policy Reform Act 1995* repeals this section. (See paragraph 9.7).

5.8 Mergers

Mergers are prohibited by section 50 where the acquiring corporation would be in a position which would have the effect of substantially lessening competition in a market due to the merger. [35]

5.9 Exemptions

(a) Exemption by Authorisation

Exemption by authorisation under sections 88 to 91 can be granted by the Trade Practices Commission (now the Australian Competition and Consumer Commission (ACCC)). The authorisation procedure recognises that some restrictive trade practices can provide net benefits to the community. Thus, to succeed, an authorisation application must satisfy a public benefit test.

The authorisation procedure requires the organisation or body to make a submission to the Trade Practices Commission (now the ACCC) listing the likely public benefits to be gained from new marketing arrangements and any anti-competitive detriment. Authorisation is then considered through a public process where any interested party likely to be affected can submit information. At the completion of this process, a draft determination is issued. In the case of objections, a conference can be requested by the dissatisfied party to further discuss the issues before the final determination is made. The final determination is reviewable, on appeal, by the Trade Practices Tribunal and ultimately, the courts.

---

34 Third-line forcing is supplying goods or services on condition that the purchaser will acquire other goods or services from another supplier, even a related company.

35 Up until 21 January 1993, this section prohibited mergers and acquisitions which resulted in dominance in the market. As a result of the adoption of the *substantially lessening competition* test, Australia has moved away from the approach taken by the European community and is closer to the approach taken by the United States and Canada.

(b) Exemption by Notification

Exclusive dealing conduct (section 47, except third line forcing) may be notified to the Trade Practices Commission (now the ACCC) and remains protected until such time as the Trade Practices Commission (now the ACCC) determines whether or not such conduct is in the public interest, using the public benefit test. As a result of the 1995 amendments third line forcing may be notified but is subject to a different notification process than applies to other forms of exclusive dealing.

5.10 Penalties and Remedies

The *Trade Practices Act 1974* contains sanctions and remedies for contravention of any of the restrictive trade practices provisions of Part IV.

Criminal proceedings cannot be instituted for a breach of Part IV, although pecuniary penalties may be imposed which may, in turn, be recovered in civil proceedings. The maximum penalty is $500,000 in the case of a person not being a body corporate, or $10 million in the case of a body corporate.

Other remedies include -

- injunctions;
- ancillary orders where the affected party suffers loss or damage. Such an order may include the return of property or money, specific performance[36], recision or variation of contracts, and provision of repairs or spare parts; and
- divestiture orders (divestiture of shares in relation to an unlawful merger).

Individuals and corporations, through private action, can seek a remedy from the Federal Court for a breach of one of Part IV's restrictive trade practices. Remedies include damages, injunctive relief, ancillary orders and divestiture orders.

---

[36] The remedy of specific performance of a contract is a court order requiring a party in default to complete its part of the bargain.

CHAPTER SIX

6. HILMER INQUIRY

6.1 Introduction

An inquiry into competition policy was established in October 1992 by the Prime Minister, who in agreement with State and Territory Governments at the Premiers' Conference in March 1991 recognised the need for a national approach to competition policy to replace the existing fragmented Federal and State arrangements. The Independent Committee of Inquiry was chaired by Professor Fred Hilmer, Dean and Director of the Australian Graduate School of Management at the University of New South Wales, and included Mr Mark R Rayner, Director and Group Executive of CRA Ltd, and Mr Geoffrey Q Taperell, International Partner at Baker & McKenzie. The Hilmer Committee reported in August 1993.

6.2 National Competition Policy Principles

The Commonwealth, State and Territory Governments agreed on the need to develop a national competition policy which would give effect to the principles summarized in Table 1 below -

Table 1.[37]

AGREED PRINCIPLES FOR A NATIONAL COMPETITION POLICY	
(a)	*No participant in the market should be able to engage in anti-competitive conduct against the public interest;*
(b)	*As far as possible, universal and uniformly-applied rules of market conduct should apply to all market participants regardless of the form of business ownership;*
(c)	*Conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;*
(d)	*Any changes in the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms -*
	(i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition;
	(ii) in recognition of the increasingly national operation of markets, to reduce complexity and administrative duplication

6.3 Competition Policy Laws

Part IV of the Commonwealth *Trade Practices Act 1974*, (TPA) remains the principle instrument promoting competition in Australia. The TPA seeks to enforce a competitive framework across Australia. There are several limitations to the application of the TPA, these include constitutional

---

37 Independent Committee of Inquiry, *Report on National Competition Policy*, August 1993, AGPS, Canberra, p 17.

constraints; the shield of the crown doctrine; exclusion by other acts or regulations; and exclusion or special treatment within the Act itself, including many government businesses, the professions, and statutory marketing arrangements for agricultural products. There is provision for authorisation of some anti-competitive practices, on public benefit grounds.

The Hilmer Inquiry examined a number of areas of economic activity not subject to competition laws such as many government instrumentalities and the professions.

The Hilmer Committee considered competition policy in terms of six specific elements as outlined in Table 2 below -

Table 2[38]

SIX ELEMENTS OF A NATIONAL COMPETITION POLICY	
Concern 1. Anti-competitive Conduct of Firms.	*Current Approaches* □ competitive conduct rules in Part IV of the *Trade Pracitces Act* (Cth), but with numerous exemptions;
2. Unjustified Regulatory Restrictions on Competition.	□ reviews by individual governments without a systematic, national focus;
3. Inappropriate Structure of Public Monopolies.	□ mostly examined on a case-by-case basis by individual governments; recent inter-governmental work on electricity and rail;
4. Denial of Access to Certain Facilities that are Essential for Effective Competition.	□ some arrangements in place or being developed on an industry-specific basis (e.g. telecommunications); no general mechanism capable of effectively dealing with these issues across the economy;
5. Monopoly Pricing.	□ surveillance of declared firms' prices under Commonwealth *Prices Surveillance Act* with important exemptions; various mechanisms in the State and Territories;
6. Competitive Neutrality when Government Businesses Compete with Private Firms.	□ largely addressed on an ad hoc basis by individual governments; increasing moves towards corporatisation but on disparate models.

6.4 The Need for a National Competition Policy

The Hilmer Committee reported the need for a national competition policy based on -

- acknowledgment that Australia is a single integrated market;
- the decreasing economic significance of State and Territory boundaries with advances in transport and communications allowing even small firms to trade around the nation;

38 *Ibid*, p 7.

- Australian Governments recognising the increasing national orientation of commercial life through a number of co-operative reforms including the National Rail Corporation, road transport regulation, the Corporations Law, the mutual recognition of product standards and occupational licensing, and the regulation of non-bank financial institutions;

- trade policy reforms increasing the competitiveness of international trade. However, many goods and services provided by public utilities, professions and some areas of agriculture are not subject to international or domestic competition;

- micro-economic reforms which highlight the limitations of the *Trade Practices Act 1974* with coverage depending on ownership or corporate form;

- reforms being implemented on a sector-by-sector approach without a broader policy framework;

- the difficulty of achieving overall pro-competitive reforms when they are negotiated on a case-by-case basis; and

- a national competition policy which will progress reforms in a consistent way and avoid the costs of establishing diverse industry-specific and sub-national regulatory arrangements.

6.5 Economic Reforms

The Hilmer Inquiry took a broad view of competition policy. It included not only the *Trade Practices Act 1974*, but also legislation and government actions, whether State or Federal which influence competition in Australia. The Hilmer Committee considered that competition policy could build on co-operative economic reforms in areas such as mutual recognition, electricity, rail and gas and saw these precedents as steps towards effective national reform rather than models in themselves.

6.6 Inquiry Process

The Hilmer Inquiry received submissions from approximately 150 organisations and interested parties and met with Premiers, Chief Ministers, Ministers and senior officials of each State and Territory Government as well as several Commonwealth departments and agencies. The Hilmer Committee also consulted with a number of business, industry, professional and consumer organisations.

The Hilmer Inquiry took account of overseas approaches, particularly countries with federal systems of government and the European Community. In particular the Hilmer Committee considered New Zealand because of its similar competition laws and the desirability of harmonising business laws in accordance with the Australia/New Zealand Closer Economic Relations Trade Agreement.

6.7 Key Findings and Recommendations

The Hilmer Committee released its report on 25 August 1993 and called for the implementation of a national competition policy for Australia. It made six major recommendations, namely -

- universal application of competitive conduct rules as contained in Part IV of the *Trade Practices Act 1974*, to cover areas such as unincorporated businesses and State and Territory Government business enterprises;

- review and reform of anti-competitive regulations;

- review and reform of anti-competitive structures of public utilities;

- introduction of appropriate regulation of natural monopolies, especially regarding terms and conditions of access to natural monopoly facilities;

- continuation of prices surveillance in a modified form; and

- principles to achieve competitive neutrality between government-owned businesses and private firms when they compete in the same market.

The report called for -

- the establishment of a **National Competition Council** to provide advice to governments and co-ordinate and implement co-operative reforms; and

- the establishment of an **Australian Competition Commission** based on the merger of the Trade Practices Commission and the Prices Surveillance Authority.

The report recommended that the Commonwealth and States co-operatively develop a national competition policy.

6.8 Competitive Conduct Rules

All modern market economies have rules against anti-competitive conduct. Such rules generally prohibit agreements or arrangements that increase the market power of firms and prohibit firms which individually possess substantial market power from using that power in an anti-competitive way.[39]

The Hilmer inquiry reviewed the provisions of the *Trade Practices Act 1974* and found them satisfactory and consistent with overseas approaches. Those provisions could apply to currently excluded sectors without substantial revision.

6.9 Content of the Rules

The rules in Part IV of the *Trade Practices Act 1974* protect the competitive process by prohibiting anti-competitive agreements, misuse of market power, resale price maintenance, price discrimination and certain mergers or acquisitions.

The Hilmer Report recommended some changes to the current rules by -

- strengthening the prohibition on price fixing arrangements by removing the distinction between goods and services;[40]

---

39 In Australia such rules are contained in Part IV of the Commonwealth *Trade Practices Act 1974*.

40 Section 45 of the *Trade Practices Act 1974*.

- relaxing the prohibition on third line forcing by requiring that such conduct, substantially lessen competition, to bring it into line with other forms of exclusive dealing;[41]

- permitting authorisation of resale price maintenance where it is demonstrated there are public benefits;[42]

- repealing the specific prohibition on price discrimination[43], as any anti-competitive conduct is addressed under the prohibition on the misuse of market power[44]; and

- removing the distinction between goods and services.

6.10 Exemptions from the General Conduct Rules

The Hilmer Report accepted that the application of competitive conduct rules should be suspended on public interest grounds in certain cases, where the benefits of the conduct outweigh the anti-competitive detriment. At present there can be up to seven overlapping exemptions.

These include -

- authorisation by the Trade Practices Commission.

- specific exemptions in the *Trade Practices Act 1974*, namely for labour agreements, certain intellectual property matters and overseas shipping.

- exemptions under Trade Practices Act Regulations, for example, for certain conduct of primary commodity marketing bodies.

- exemptions by State or Territory Statutes or Regulations.

- exemptions by Commonwealth Statutes or Regulations.

- Shield of the Crown Doctrine which provides that a statute will only bind the Crown by express words or necessary implication. Since 1977 the *Trade Practices Act 1974* has expressly bound the Crown in right of the *Commonwealth* in so far as it engages in business. The Act's silence on the question of whether it is intended to bind the Crown in right of the *States and Territories* has led it to be interpreted as not binding them.[45]

- constitutional limitations - a business may escape the operation of the Act by virtue of its non-corporate status unless it engages in interstate or overseas trade or commerce.

The Hilmer Report concluded that the general conduct rules should apply to all business activity in Australia with exemptions only when public benefit has been demonstrated in an appropriate

---

41 Section 47 of the *Trade Practices Act 1974*.

42 Section 48 of the *Trade Practices Act 1974*.

43 Section 49 of the *Trade Practices Act 1974*.

44 Section 46 of the *Trade Practices Act 1974*.

45 The High Court has recently questioned the relevance of the doctrine to contemporary circumstances and there are uncertainties for government businesses. The Act should apply to State and Territory businesses to the same extent it applies to Commonwealth businesses.

transparent process. This conclusion has been agreed to by all Governments in Australia. The report concluded that -

- the Shield of the Crown should be removed from public agencies which compete with private business;
- exemptions from the *Trade Practices Act 1974* should only be allowed on public interest grounds;
- limitations on the application of the conduct rules to government business enterprises, the professions and unincorporated businesses should be discontinued; and
- repeal of exemptions from the *Trade Practices Act 1974* by State/Territory Statute or Regulation and public interest exception procedures by Commonwealth Statute or Regulation be amended to improve transparency with provision for review.

6.11 Additional Policy Elements

The *Trade Practices Act 1974* does not address the full range of issues associated with building a more competitive economy especially where the impedients arise from government regulation or government ownership. Addressing some of these impediments impinges on the prerogatives of governments and the potential impact on profits from government monopolies, and on the delivery of certain non-commercial functions by government businesses.

The Hilmer Report focussed on a co-operative approach, based on principles and processes implemented by individual governments rather than proposing national laws. Where national laws were considered essential, the Hilmer Committee recommended that the interest of the States and Territories be protected through various safeguards, the most important of which was the establishment of a National Competition Council jointly between Commonwealth, State and Territory Governments.

6.12 Regulatory Restrictions on Competition

Restrictions imposed through government regulation whether in the form of statutes or subordinate legislation, or Government ownership represents the greatest impediment to enhanced competition in many key sectors of the economy. Examples include, legislated monopolies for public utilities, statutory marketing arrangements for many agricultural products and licensing arrangements for various occupations, businesses and professions.

Anti-competitive legislation will not overcome anti-competitive consequences of regulatory arrangements that establish monopolies, provide for the compulsory acquisition of crops, regulate prices, restrict the performance of certain activities to licensed occupations or a host of other regulatory restrictions on competition.

Regulatory restrictions on competition should not exceed what is justified in the public interest. The Hilmer Report recommended that all Australian Governments adopt a set of principles aimed at ensuring that statutes or regulations should not restrict competition unless the restriction is justified in the public interest. The Hilmer inquiry recommended the following principles -

- acceptance of the principle that any restriction on competition must be clearly demonstrated to be in the public interest;

- new regulatory proposals should be subject to increased scrutiny, with a requirement that any significant restrictions on competition lapse within a period of no more than five years unless re-enacted after further scrutiny through a public review process;

- existing regulations which impose a significant restriction on competition should be subject to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than five years unless re-enacted after scrutiny through a further review process; and

- reviews of regulations which take an economy-wide perspective to the extent practicable.[46]

Individual governments should implement the above principles. The National Competition Council could undertake and/or co-ordinate reviews referred by governments.

6.13 Reform of Public Monopolies

Removal of regulatory restriction on competition may not be sufficient to foster effective competition in sectors dominated by public monopolies. Structural reform of these public monopolies may be required.[47]

The Hilmer Committee recommended that Australian Governments adopt principles to ensure their reforms introduce competition to markets dominated by public monopolies. The principles are -

- the separation of regulatory and commercial functions of public monopolies;

- the separation of natural monopoly and potentially competitive activities; and

- the separation of potentially competitive activities into a number of smaller, independent business units.[48]

Individual governments should implement these principles. However, the Hilmer Committee recommended the National Competition Council could be given references to advise governments.

Structural reforms are more important if a substantial monopoly is to be privatised.

6.14 Access to Essential Facilities

The policy underlying the access regime was emphasised in the Hilmer Report which stated that effective competition in some markets would not be possible unless competitors could gain access to particular essential facilities. This is an important element of competition policy with the expansion and interconnection of such facilities across borders and with the corporatisation and privatisation of many State and Territory Government facilities.

---

46 Independent Committee of Inquiry, *Op Cit*, 1993, p xxx.

47 The OECD has highlighted the importance of creating competitive market and industry structures for effective competition to emerge. OECD, *Regulatory Reform, Privatisation & Competition Policy*, (1992) p 43.

48 Independent Committee of Inquiry, *Op Cit*, 1993, p xxxi.

Competitors in certain markets must be assured of access to essential facilities. For example, effective competition in electricity generation and rail services requires that firms have access to electricity transmission grids and rail tracks.

An essential facility is a system which has a high degree of natural monopoly, that is, a competitor could not duplicate it economically. A natural monopoly is an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream from the facility.[49] An essential facility can be owned by private or public sector organisations.

An owner of an essential facility, who also competes in upstream or downstream markets, may inhibit access to competitors in those markets, particularly where the owner can discriminate in prices between customers in those markets. An example of this would be the owner of electricity transmission lines who also competes in the electricity generation market restricting access to transmission lines to prevent or limit competition in the generation market. An owner who also competes in the retail electricity market would also restrict competition in, and deter entry into, markets both upstream and downstream from the transmission facility.

Part IV of the *Trade Practices Act 1974* prohibits a range of anti-competitive conduct by corporations but does not provide the means to facilitate access. Section 46 of the *Trade Practices Act 1974* which prohibits a corporation deliberately misusing its substantial market power to prevent a potential competitor entering a market or pushing a competitor out, would not totally accommodate an essential facilities doctrine. The difficulty would be to prove that the conduct was engaged in for a purpose proscribed by section 46 and the court would have difficulty determining the appropriate terms and conditions on which supply should be made available. For these reasons the Hilmer Committee favoured an administrative solution rather than relying on section 46.

The Hilmer Committee recommended establishing a new legal regime giving firms, in certain circumstances, the right of access to specified essential facilities on fair and reasonable terms. The National Competition Council (NCC) could advise on whether access rights should be created and, if so, on what terms and conditions. An access right under the proposed regime could be created without the recommendation of the NCC, although the designated Minister would have the discretion to decline to declare access notwithstanding the recommendation of the NCC.

Regardless of whether a facility which is a natural monopoly is publicly or privately owned, it should operate as an open access facility. For example, in the case of the Pilbara to the Eastern Goldfields pipeline, the Western Australian Government made it clear that the pipeline would have to meet the requirements of an open access facility even though it was privately owned. The open access condition in principle is one that applies to both public and private sector facilities.

The Hilmer report made certain recommendations about the processes that need to be followed through before a Minister could declare a facility an open access facility. A summary of the key elements of the Hilmer Committee access regime is set out in Table 3 following -

---

49 Examples of such facilities are electricity transmission lines, gas pipelines, water pipelines, railways, airports, telecommunication channels and sea ports.

Table 3[50]

ACCESS REGIME	
ACCESS	The designated Commonwealth Minister could only declare access to particular facility if - (a) the owner agrees; or (b) the Minister is satisfied that - (i) access to the facility in question is essential to permit effective competition in a downstream or upstream activity; (ii) such a declaration is in the public interest, having regard to: (1) the significance of the industry to the national economy; and (2) the expected impact of effective competition in that industry on national competitiveness; and (iii) the legitimate interests of the owner of the facility will be protected by the imposition of an access fee and other terms and conditions that are fair and reasonable. Where the owner of a facility has not consented to a declaration, the Minister may only make such a declaration if recommended by the independent advisory body and only on terms and conditions recommended by that body or on such other terms and conditions as agreed by the owner of the facility.
ACCESS PRICE	Each access declaration would specify pricing principles that provide for a "fair and reasonable" access fee. The principles would be determined by the NCC, but declared by the Minister. They could be altered by agreement with the owner of the facility. The parties are then free to negotiate their own agreements, subject to a requirement to place them on a public register. If the parties cannot agree, either party may seek binding arbitration by or under the auspices of the Australian Competition Commission.
OTHER TERMS & CONDITIONS	Each access declaration would specify any other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility and which were "fair and reasonable". The terms would be declared by the Minister and be based on the recommendations of the NCC.
ADDITIONAL SAFEGUARDS	As a general rule, the requirement to place access agreements on a public register should suffice to protect the competitive process. Where recommended by the independent body, the Minister may also declare that other safeguards should apply aimed at protecting the competitive process.

6.15 Access and Pricing Arrangements

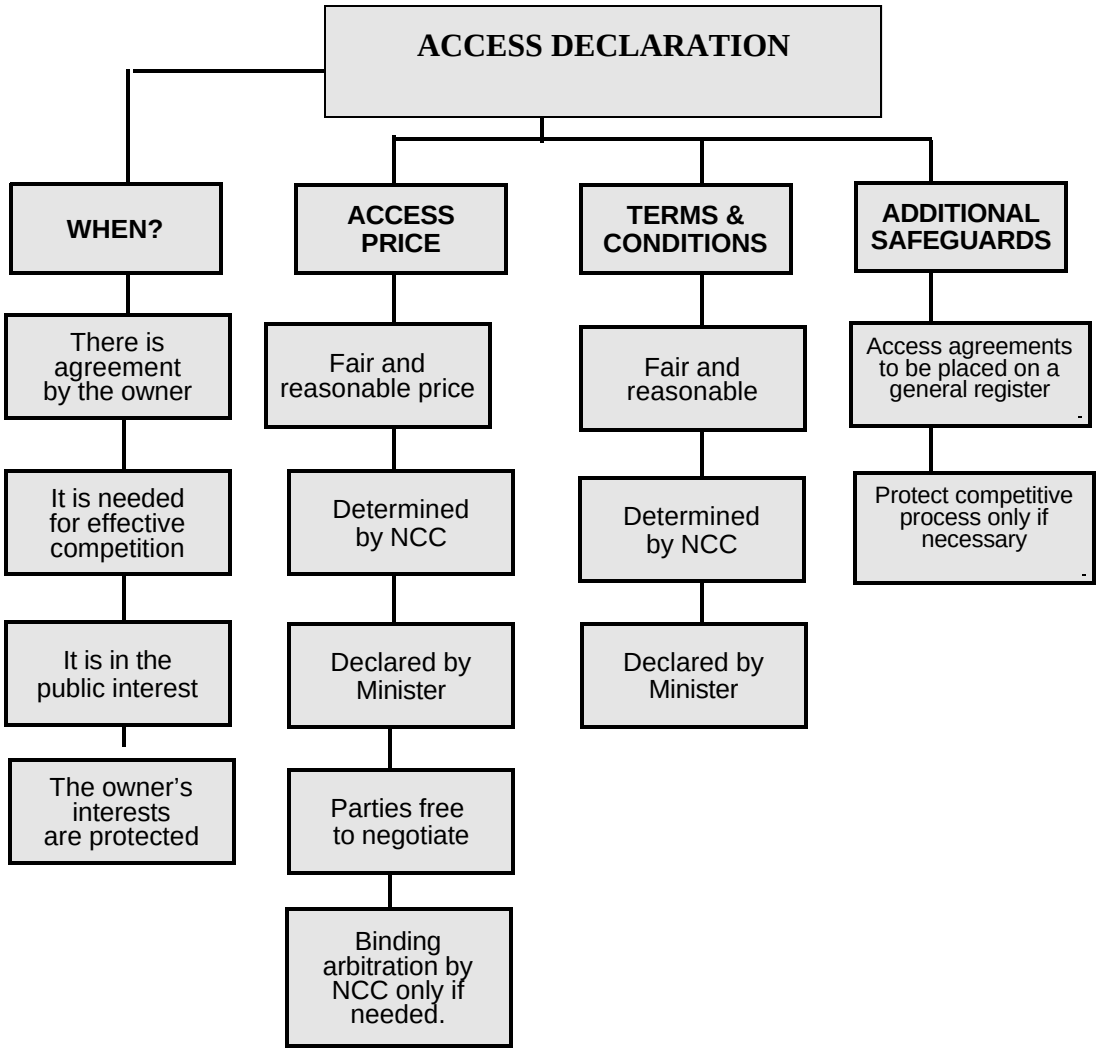
To develop effective competition, agreement must be reached on access arrangements, pricing and appropriate regulations. Access must be non-discriminatory and provided at appropriate prices. If the access price is too high, it acts as a barrier to entry, reducing effective competition. If the access price is too low, an artificially high level of new entrants will be subsidised by the incumbent firms.

50 Independent Committee of Inquiry, *Op Cit*, 1993, p 261.

Chart 2 sets out the key elements of an access regime.

Chart 2[51]

ACCESS REGIME
SUMMARY OF KEY ELEMENTS



51 Source: Burton, Tom, "Pressure on the regulators", *Australian Financial Review*, Friday, September 9, 1994, p 24.

6.16 Natural Monopoly

In the past many public utilities, generally publicly owned but also when privately owned, were given monopoly status. It was believed that the monopoly status of such public utilities should be preserved and only its operation should be regulated. Natural monopolies were associated with the idea that larger enterprises generated economies of scale and the industry could only support one firm. That was good for the economy because the firm was producing at the lowest possible cost. Later studies looking at so called natural monopolies, found that certain components were not natural monopolies and could be separated from the operation of the natural monopoly. For example, in the gas industry, gas production is a competitive process, and gas selling can be a competitive process but the transport of gas has to be carried out through a natural monopoly pipeline. That is the most efficient way of transporting the gas.

Another example, in the area of telecommunications is the telephone switching system. It would be inefficient to have two switching systems, therefore new entrants have access to the existing system, but there is competition in other areas. Competition takes place in intercity and international communications because firms can build their own networks.

In many instances, technology has now changed the operation of public utilities and they are no longer regarded as natural monopolies.

6.17 Monopoly Pricing

Where there is a legislated or natural monopoly or the market is poorly *contestable*, firms may be able to charge prices above efficient levels for periods beyond when a competitive response might reasonably be expected. Such monopoly pricing is detrimental to consumers and the community as a whole.

The Hilmer Committee considered competition in these markets would increase by removing regulatory restrictions, restructuring public monopolies and, if need be, providing third party access rights and a prices monitoring and surveillance process.

Pricing issues affecting State and Territory Government businesses should be subject to the following principles -

- pricing reform through co-operative processes aimed at improving transparency and fostering appropriate and consistent approaches; [52]

- businesses with substantial market power should be subject to the national prices oversight mechanism; and

- application of the national prices oversight mechanism to State and Territory Government business should be by consent. However, consent may be waived if there is no progress on reform in an area with significant impact on interstate or international trade.[53]

---

[52] Governments might consider the establishment of expert pricing bodies like the NSW Government Pricing Tribunal.

[53] Independent Committee of Inquiry, *Op Cit*, 1993, p xxxiv.

Table 4 below outlines the main features of the prices oversight process.

Table 4 [54]

MAIN FEATURES OF PROPOSED PRICES OVERSIGHT PROCESS	
WHEN APPLIED:	• Concerns over possible monopoly pricing should be addressed primarily through reforms aimed at improving the contestability of the market. • Prices oversight should be declared by the designated Commonwealth Minister only where satisfied that it is in the public interest and the firm - (a) agrees; or (b) has substantial market power in a substantial market in Australia and application of prices oversight has been recommended by an independent body (NCC) after a public inquiry.
INTENSITY OF OVERSIGHT:	• Prices oversight powers should be limited to: monitoring, which requires a firm to provide specified cost and price data to the pricing body at regular intervals; or surveillance, which requires a firm to provide specified cost and price data and seek the pricing body's non-binding recommendation as to prices; current administrative arrangements should be reviewed to ensure they are cost-effective.
ASSESSMENT OF PRICES:	• Pricing principles should be limited to efficiency and competition concerns. • Price bases could be determined according to the characteristics of individual markets.

6.18 Competitive Neutrality

The Hilmer Report recommended that Commonwealth, State and Territory Governments adopt a set of principles aimed at ensuring government-owned businesses comply with certain competitive neutrality requirements when competing with private firms.

6.19 Implementation

The Hilmer Committee's views on the appropriate institutional structure was shaped by its judgements on two key issues -

(1) **Industry-specific versus more general regulators.** The Hilmer Committee did not favour separate regulators for individual industries. Apart from the risk of capture by the regulated industry, this approach fragmented the application of competition policy and raised issues of consistency between industries. There was also a fragmentation of regulatory and analytical skills and greater administrative costs.

---

54 *Ibid,* p 281.

(2) **Roles of the Commonwealth, State and Territory Governments.** The Hilmer Committee supported a co-operative approach. This was tempered by the need to provide streamlined decision-making processes where important national interests were at stake and ensuring competition regulators could operate independently. The Hilmer inquiry recognised that some policies may impinge on individual government prerogatives, although the Commonwealth could implement most recommendations unilaterally. The Hilmer Committee distinguished between administrative and policy roles and general conduct rules which already apply to most of the economy and other policy elements where there is potential impact of the prerogatives of the States and Territory Governments.

6.20 National Competition Council

The Hilmer Report recommended that Commonwealth, State and Territory Governments jointly establish a National Competition Council (NCC) to provide high level and independent analysis and advice on significant policy matters. All governments should participate in the composition of this body and give references to it either individually or collectively on regulation review, structural reform of public monopolies, access regimes, monopoly pricing and competitive neutrality.

A recommendation of the Council is a necessary pre-condition for a Commonwealth Minister to act unilaterally in certain limited circumstances.

The Hilmer Committee proposed the composition of the NCC should be a full-time chairperson and up to four other members, some of whom may be part-time, with a Secretariat of about 20 persons. Work might be contracted out to other bodies such as the Industry Commission, the Australian Bureau of Agricultural and Research Economics (ABARE) or State or private bodies. The NCC could also draw on consultants or relevant experts from member governments on secondment.[55]

[55] The Industry Commission may provide analysis on structural reform, while ABARE may provide analyses on the impact of regulatory restrictions in the agricultural marketing area.

Table 5 below outlines the key functions of the National Competition Council.

Table 5 [56]

NATIONAL COMPETITION COUNCIL — KEY FUNCTIONS

- **Regulatory Restrictions on Competition**
  - — provide advice to governments on the development and implementation of agreed principles governing the review of regulatory restrictions;
  - — at the request of governments, undertake or co-ordinate economy-wide reviews of particular regulatory restrictions.
- **Structural Reform of Public Monopolies**
  - — provide advice to governments on the development and implementation of agreed principles governing the structural reform of public monopolies;
  - — at the request of governments, undertake economy-wide reviews of structural reform issues associated with enhancing competition in the public monopoly sector;
  - — at the request of any government, investigate proposed privatisations that may involve the transfer of a significant public monopoly to the private sector.
- **Declarations of Access Rights**
  - — provide advice to the Commonwealth Minister on whether a legislated right of access should be created in particular circumstances, and if so what pricing principles and other terms and conditions should apply.
- **Pricing Matters**
  - — provide support for the development of agreed pricing approaches for public monopolies;
  - — provide advice to the Commonwealth Minister on whether a particular firm or market should be subject to the national prices oversight mechanism.
- **Competitive Neutrality**
  - — provide advice to governments on the development and implementation of agreed principles governing competitive neutrality issues.
- **Transitional**
  - — provide advice to governments on issues associated with transition towards a more competitive environment for public monopolies and regulated industries.
- **Other Matters**
  - — at the request of governments, provide advice on the development and implementation of the national competition policy.

6.21 Australian Competition Commission[57]

The Australian Competition Commission (ACC) is to administer aspects of competition policy, including -

- enforcement of the general conduct rules;
- administration of the authorisation process;
- oversight of declaration under the access regime and administration of any associated pro-competitive safeguards; and
- administration of the prices oversight mechanism.

---

56 Independent Committee of Inquiry, *Op Cit*, 1993, p 325.

57 The body would be formed from the existing Trade Practices Commission and Prices Surveillance Authority.

In consultation with the National Competition Council the ACC would play a complementary role in regulation review. Support roles include -

- reporting to governments on alleged instances of non-compliance with agreed competitive neutrality principles;
- reporting on legislated exemptions from the *Trade Practices Act 1974*; and
- promoting public education on competition matters, and other functions under the *Trade Practices Act 1974*.

Table 6 outlines the key functions of an Australian Competition Commission.

Table 6 [58]

AUSTRALIAN COMPETITION COMMISSION — KEY FUNCTIONS
□ **Competitive Conduct Rules** — enforce and monitor compliance with the conduct rules — administer the authorisation process — monitor and report annually on legislated and regulatory exemptions. □ **Regulation Review** — undertake reviews of regulatory restrictions on competition. □ **Access Regime** — oversee the general administration of the national access regime — provide arbitration facilities to parties subject to an access declaration — oversee the implementation of any pro-competitive safeguards. □ **Prices Oversight** — administer the prices oversight function of the national policy. □ **Competitive Neutrality** — report on allegations of non-compliance with agreed principles to owning government and the NCC. □ **Public Education** — provide public education on the conduct rules and the role of competition in the community. □ **Other** — administer other specified Parts of the Act.

6.22 Australian Competition Tribunal

The Trade Practices Tribunal, re-named the Australian Competition Tribunal, would continue to provide an appellate jurisdiction for authorisations under the competitive conduct rules.

6.23 Legal Form

Although the Commonwealth could implement most of its recommendations through greater use of its existing heads of constitutional power, the Hilmer Committee favoured a co-operative approach to extending coverage in the interests of comity, simplicity of legal drafting and certainty. The Hilmer Committee preferred referral of power from the States to the Commonwealth, although it did not rule out an applications model. The Hilmer Committee did not favour mirror legislation as a model because experience with such a model suggested that

[58] Independent Committee of Inquiry, *Op Cit*, 1993, p 322.

delays or failures to make corresponding amendments created an unacceptable source of uncertainty for business and thus an unsatisfactory basis for a national competition regime.

CHAPTER SEVEN

7. INDUSTRY COMMISSION - ECONOMIC IMPACT OF HILMER AND RELATED REFORMS

7.1 Introduction

Discussions on the implementation of the Hilmer reforms on competition policy stalled when the States claimed compensation for the extra revenue they assessed would ultimately flow to the Commonwealth through tax receipts. The States were offered $700 million compensation at the Council of Australian Governments (COAG) meeting in Darwin in August 1994. However, the States rejected the offer because it was below the States' claim of $5 billion.

As a result COAG commissioned an Industry Commission investigation to assess the benefits of implementing Hilmer and related reforms. This followed agreement at the meeting that *all Governments should share the benefits of economic growth and revenue from Hilmer and related reforms to which they had contributed*.[59]

This chapter summarises the results of the Industry Commission inquiry.

7.2 Projected Economic Impact of Reforms

The Industry Commission's report released in March 1995 estimated that real GDP[60] would grow by 5.5 per cent, or $23 billion a year, as a result of implementing Hilmer and related reforms. (See Table 7). Commonwealth reforms were projected to contribute $4 billion. Reforms at the State, Territory and local government level were estimated to contribute $19 billion. (See Table 8). The report also estimated that consumers would gain by $9 billion, equivalent to $1500 expenditure a year for each household. Real after-tax wages were projected to be three per cent higher and 30,000 extra jobs were likely to result.[61] (See Table 7).

The report indicated that both Commonwealth and State Governments would accrue substantial revenue gains. For example, Commonwealth revenues would increase by $5.9 billion and State revenues would rise by $3 billion.[62] (See Table 8).

7.3 Productivity Estimates

The Industry Commission's Report indicated that most of the reforms would lead to improved productivity. This would be achieved through greater domestic competition which would provide the incentive to adopt better work and management practices. Examples of productivity improvements included -

- reforms in the unincorporated sector;

---

59 Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A Report to the Council of Australian Governments*, March 1995, AGPS, Canberra, p 1.

60 GDP means gross domestic product.

61 Industry Commission, *Op Cit*, 1995, p 53.

62 *Ibid*, p 68.

- reforms in building regulations and approvals processes;
- the removal of newsagents' monopoly position;
- the move to a self regulatory approach to quality assurance;
- the move to uniformity of road transport regulation;
- greater competitive tendering by State and Commonwealth Governments; and
- reform of port authorities, the Federal Airport Corporation (FAC) and the Civil Aviation Authority (CAA).

Tables 7 and 8 reflect a summary of the findings of the Industry Commission Report of Hilmer and related reforms.

Table 7 [63]

INDUSTRY COMMISSION ESTIMATES OF THE IMPACT OF THE HILMER REPORT AND RELATED RECOMMENDATIONS		
National Growth and Revenue		
Growth	Real GDP Real Consumption Real Wages Employment	+$23 billion p.a. (5.5%) +$9 billion p.a. ($1500 per household p.a.) +3% (once off) +30,000 jobs (once off)
Revenue		+$8.9 billion p.a. (5.4%)

63 Industry Commission, *Op Cit*, p 81.

Table 8 [64]

CONTRIBUTIONS AND BENEFITS BY GOVERNMENTS						
	Commonwealth Reforms		**States, Territories and Local Government Reforms**		**TOTAL**	
	$billion	**%**	**$billion**	**%**	**$billion**	**%**
Growth Real GDP	+4.0	1.0	+19.0	4.5	+23.0	5.5
Commonwealth	+1.2	1.2	+4.7	4.8	+5.9	6.0
States, Territories and Local Government	+0.4	0.6	+2.6	3.8	+3.0	4.4
Revenue **TOTAL**	+1.6	1.0	+7.3	4.4	+8.9	5.4

7.4 Pricing

Other reforms discussed by the Commission involved changes in domestic pricing. Examples of this included -

- the reform of statutory marketing arrangements by State and Commonwealth Governments;
- the move to uniform registration charges for heavy vehicles; and
- the elimination of the monopoly position created by taxi licensing.

The Commission identified a pricing element to the reforms in rail, electricity and gas, water, post and telecommunication. However, the Commission believed reforms would deliver sufficient productivity improvements to generate a matching reduction in costs.

At the Commonwealth level, major reforms centred on telecommunications, where Hilmer advocated an end to the current duopoly in 1997. The result according to the Industry Commission would be a 20 per cent drop in prices in real terms after six years. The ending of Australia Post's mail monopoly as another example, would result in lower prices of 9 per cent in real terms by 1997. (See Table 9).

---

64 *Ibid*, p 81.

Furthermore, the Commission concluded that the application of the Hilmer reforms would radically alter price levels for essential services such as power, water, electricity and telephones. Reform of State government business enterprises would yield positive benefits for the national economy and the States through greater efficiencies.

The Hilmer reforms which included better separation of generation and distribution in power would lead to competition, cost reductions and productivity gains. The Commission's analysis pointed to a potential 50 per cent labour productivity gain and a 4 per cent improvement in capital productivity. Increased competition between States would also mean cheaper costs, by up to one-fifth, for authorities replacing equipment. Large consumers of power would benefit with reduced prices of over 26 per cent. The mining sector would receive the greatest benefit. Similarly, the removal of barriers to interstate trade and restrictions on the use of gas in power generation would reduce gas prices by 4 per cent by the year 2005. (See Table 9).

The Commission identified another major revenue source for the States in the area of water, sewerage and drainage. Hilmer advocated a greater reliance on user pays. The Industry Commission projected a reduction in prices for industrial users of up to 18.1 per cent, while residential users would suffer price increases of 7.5 per cent. (See Table 9).

7.5 Transport Reforms

The implications of Hilmer reforms to road, port and rail would also provide significant benefits to the economy with the Industry Commission forecasting price reductions. The one exception is the agriculture sector, with wool and wheat producers expected to pay slightly more for rail transport.

7.6 Professions

The Industry Commission's report indicated that opening the professions to competition would deliver a more efficient economy. Government restrictions on professional conduct, as well as rules enforced by professional bodies, were seen as creating anti-competitive behaviour. The Industry Commission found that lawyers, dentists and chemists would be able to reduce their fees if the States removed anti-competitive licensing and advertising restrictions on professions. For example, the Commission estimated consumers would save 13 per cent on legal fees if restrictions on advertising were removed. (See Table 9).

Table 9 sets out examples of impact of the Hilmer and related reforms in various sectors of the economy both at the State and Federal level.

Table 9 [65]

DIRECT IMPACTS OF HILMER AND RELATED REFORMS	
FEDERAL	
Statutory Marketing Arrangements	
Reform: Remove the all milk levy used to subsidise exports of milk products.	**Impact:** Eliminate subsidy on milk products exported. Raise export prices by 11.5%. Raise returns to whole milk producers by equivalent dollar amount.
Reform: Remove the implicit levy associated with local content requirement on tobacco product.	**Impact:** Lower import prices by 38.3%.
Telecommunications	
Reform: End legislated duopoly by 1997.	**Impact:** Reduce prices by 20% in real terms after 6 years.
Postal Services	
Reform: Remove Australia Post's monopoly over letters delivered within Australia and overseas.	**Impact:** Price restraint as under current PSA ruling, leading to prices being 9% lower in real terms by 1997.
FAC and CAA	
Reform: Competitive neutrality requires a commercial return on non-regulatory services.	**Impact:** Improve productivity sufficiently to reduce total costs by an average 15.1%.
THE STATES	
Statutory Marketing Arrangements	
Reform: Remove the quantitative restrictions on potatoes in WA, on rice, sugar cane and market milk.	**Impact:** Prices fall by 22.0%, 11.5%, 13.0% and 30.5% respectively.

65 Industry Commission, *Op Cit*, 1995, pp 18-21.

Dentists	
Reform: Remove employment restrictions	**Impact:** Reduce labour costs in dentistry by 4.35%.
Legal Profession	
Reform: Remove monopoly on conveyancing in Vic., Qld, Tas., and ACT.	**Impact:** Reduce conveyancing costs in these States by 50%.
Reform: Remove restrictions on barrister contact with clients in Vic, NSW and Qld.	**Impact:** Reduce costs of barrister services by 50%.
Reform: Remove advertising restrictions on barristers.	**Impact:** Reduce costs of barrister services by 13%.
Total for Legal Profession: Raise productivity of legal services industry by 12.0%.	
Medical Profession	
Reform: Remove restrictions on entry to specialist professions.	**Impact:** Reduce earnings of medical specialists by 1.25%.
Optometrists	
Reform: Remove restrictions on consulting services for optical dispensers	**Impact:** Allow one-stop-shop in optometry and optical dispensing industry, reducing operating costs by 10% and replacement cost of capital facilities by 20% (reducing operating costs by 0.14% and capital replacement costs by 0.29% in health industry).
Pharmacists	
Reform: Remove geographic monopoly enjoyed by existing pharmacies.	**Impact:** Reduce retail margin on pharmaceuticals sold to households by 15% (modelled as productivity improvement.)
Building Industry	
Reform: Remove unnecessary building regulations and standards.	**Impact:** Reduce costs by $100 million or 0.8% in residential building construction and $250 million or 2% in non-residential building construction.
Reform: Remove unnecessary delays in building approvals.	**Impact:** Reduce costs by 3% for residential and non-residential construction.

Taxis	
Reform: Remove private sector monopolies.	**Impact:** Reduce rate of return on physical capital in the road passenger transport industry so total costs fall by $320 million.
Newsagents	
Reform: Remove private sector monopolies.	**Impact:** Reduce retail margin on newspapers sold to households by 30%. Reduce retail margin on publishing and printing sold to households by 8%.
Rail	
Reform: Continue corporatisation and moves to best practice.	**Impact:** Improve capital, labour and materials productivity by around 15% by moving to best practice.
Reform: Prices surveillance, recognition of CSOs and competitive neutrality in pricing.	**Impact:** 9% price reduction for grain freight, 39% price reduction for other bulk, 15% price increase for non-bulk freight and 20% price increase for passenger rail.
Electricity	
Reform: Establish an interstate electricity transmission network, allow free trade in bulk electricity for private generating companies, public utilities and consumers, allow competitive sourcing of generation capacity.	**Impact:** Competitive pressures improve labour productivity by 50% and capital productivity by 4% as all States move to best practice. Competitive pressures reduce replacement cost of new generating capacity by 20% e.g., as States move towards gas-fired power stations, (this impact dependent on gas reform).
Reform: Prices surveillance, cost-reflective pricing.	**Impact:** Reduce bulk supply tariff as under NSW proposal, with tariff being 26% lower in real terms by 2000. Reduce prices to large users by 26% in line with bulk supply tariff. No change in prices to domestic and rural customers. Reduce prices to other industries by 29%.
Gas	
Reform: Remove barriers to inter-state trade in gas.	**Impact:** Interconnection makes gas prices 4% lower than otherwise by 2005.
Reform: Remove restrictions on use of gas.	**Impact:** Reduce unit requirements of black coal by 1%, brown coal by 36% and increase unit gas requirements by 95% in electricity supply industry.
Reform: Prices surveillance as under Hilmer proper.	**Impact:** Reduce rate of return in gas industry by 3%.

Water	
Reform: Eliminate cross-subsidies, achieve positive rates of return and adopt best practice in urban water. Recoup operating and maintenance costs in rural water.	**Impact:** Reduce purchase prices to commercial and industrial users relative to supply price by 18.1% and 2.1% respectively. Increase purchase price to residential and other users relative to supply price by 7.5% and 31.5% respectively.
Road Transport	
Reform: Adopt National Road Transport Commission proposed uniform registration charges for heavy vehicles (charges to fall in NSW and ACT and rise in other States).	**Impact:** Cost of transporting commodities by road to rise by 0.05% for sheep and 0.37% for wheat, to fall by up to 0.65% for other commodities. Reduce costs of own-use road freight transport by 0.48%. Reduce costs of road passenger transport by 0.15%.
Ports	
Reform: Corporatise port authorities, separate regulatory and commercial activities, contract out or privatise berthing and other facilities.	**Impact:** Improve productivity sufficiently to reduce total costs by an average 13.5%.

7.7 Conclusion

As a result of the Industry Commission's Report, further negotiations between the States and the Commonwealth resulted in agreement on a compensation package for the implementation of the Hilmer reforms by the States. The Third intergovernmental Agreement, the Agreement to Implement the National Competition Policy and Related Reforms provides that the Commonwealth maintain real *per capita* guarantee of financial assistance grants to the States, the Territories and local government on a rolling three year basis. The Commonwealth will also provide further financial assistance as States and Territories make satisfactory progress in implementing national competition and related reforms. (See Annexure D)

Some analysts were critical of the Industry Commission calculations arguing that many of the efficiencies will only be achieved by the social cost of squeezing or eliminating employees and including savings from other initiatives such as contracting out.

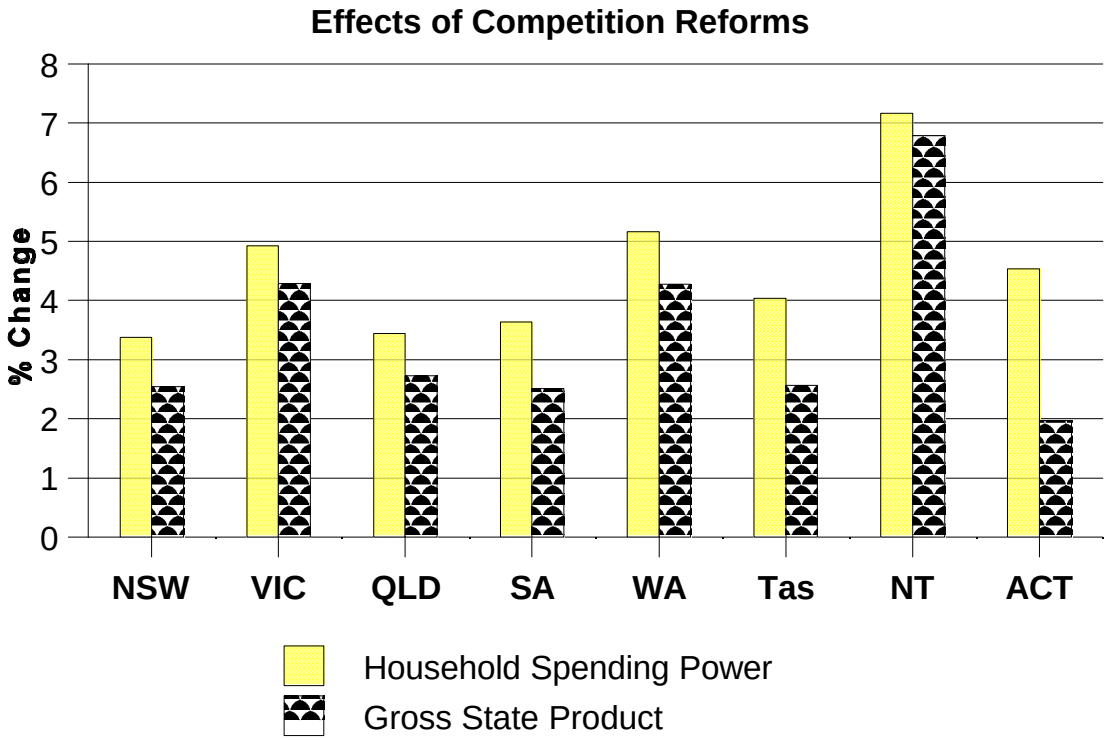
Public interest groups put forward concerns and drew attention to standards and community service obligations. It was argued that consumers depend heavily on enforcement and regulatory authorities to ensure the maintenance of standards, service and acceptable prices. As a result consumer objectives were included in the legislative package.

Concerns were also raised by major public sector unions and the Australian Council of Trade Unions (ACTU) regarding the protection of public utility employees' conditions of employment when any public enterprises was privatised.

The Business Council of Australia and nine other national and State industry bodies commissioned independent work on the impact of Hilmer reforms on the economy. The University of Tasmania's Centre for Regional Economic Analysis endorsed the Industry Commission's Report. The Centre's financial analysis indicated that the benefits of competition policy could be substantially diluted if a State or utility sector did not participate in the competition reforms. [66]

Chart 3 demonstrates the effects of Competition reforms.

Chart 3[67]



66 Donald, Bruce, "Big change is the national management of competition", *Australian Financial Review*, Tuesday, 18 April 1995.

67 Source: Study Dr John Madden, University of Tasmania, reported in *The Australian*, Wednesday, 22 March, 1995, p 5.

The Business Council of Australia embraced the Industry Commission's findings as proof that the Hilmer blueprint represents the most significant micro-economic reform task of the decade. The Business Council of Australia's economic adviser, Mr Roman Domanski said it was important that the reforms drawn up by Professor Hilmer's committee in 1993 be implemented quickly.

> The benefits are so obvious that there is no excuse for the Commonwealth and the States not to implement the report. The longer the delay and the more they water down the detail, the more we forgo those gains. [68]

A competition forum held in March 1995 was attended by over 200 delegates, representing government, industry and community groups. A forum communique which was also endorsed by industry organisations called for the implementation of competition reforms.[69]

---

[68] Megalogenis G., and Chan G**.,** "States reject secret Hilmer Report finding", *The Australian*, Thursday, 6 April 1995.

[69] Park, Thomas, "Hilmer reforms should be implemented without delay", *The Australian*, Thursday, 6 April 1995.

CHAPTER EIGHT

8. COMPETITION POLICY - DEVELOPMENTS IN EUROPE AND THE UNITED STATES OF AMERICA

8.1 Introduction

At a time when Australia is implementing the Hilmer Report recommendations and at a time of increasing globalization of markets, it is useful to see the issue in light of developments and the thrust of competition policy in other countries, in particular Europe and North America. Accordingly, the following chapter examines how aspects of competition policy and the law have developed in the European Union and the United States of America.

8.2 Competition Policy and Law in the European Union

Competition policy in the European Union has developed over the past 30 years on the basis of Articles 85 and 86 of the Treaty of Rome. The function of these Articles is to allow the European Commission to challenge the existence or abuse of market power in the form of either restrictive practices between firms (Article 85) or the abuse of a dominant position (Article 86).[70] These Articles are part of the objectives of the Treaty of Rome, to remove all tariff and regulatory barriers and the free movement of goods, capital and labour.

The competition regime is part of the founding Treaties of the European Union and therefore has constitutional status. The scope of competition policy deals not only with the behaviour of enterprises but also the activities of Member States. State subsidies and State monopolies are subject to the control of the European Commission. The European Commission is empowered to regulate competition as well as limiting or prohibiting State subsidies and discriminatory tax practices.

European Union law comprises firstly, Regulations which are directly binding on Member States. Regulations substitute European law for national law. Secondly, Directives which are binding on Member States but allow Member States to enact their own legislation in line with the principles stipulated in the Directive, and thirdly, Decisions which are binding but are on matters relating to standards or certification.

Competition policy in the European Union comprises both Regulations and Directives. Competition matters of a transnational nature are dealt with by the European Commission.

The European Court of Justice ensures that implementation of the Treaties is in accordance with the rule of law. The Court can direct the implementation of Directives by Member States. Decisions of the Court of Justice take precedence over national law. Union law therefore cannot be invalidated by a Member State.

Unlike Australia, competition law in Europe applies to practically all sectors of the economy. The *Shield of the Crown* doctrine does not apply in the European Union and enterprises in Member States are subject to the same competition rules as privately-owned companies.

---

70 David Harbord and Tom Hoehan, "Barriers to Entry and Exit in European Competion Policy", *International Review of Law and Economics*, 14, No 4, December 1994, pp 411-435.

8.3 State Aid and Competition Policy

The European Commission monitors aid to industries and enterprises of Member States in accordance with strict criteria. The general policy for these criteria is set out in the Maastricht Treaty on European Union. Aid is prohibited as it distorts competition in the market.

> The aim of these regulations is to create a level playing field for all industries in the Union and to stop companies gaining unfair advantage due to government assistance.[71]

However, aid can be justified for policy reasons which may be social, regional or sectoral.

The legal framework for the granting of State aid is set out in Article 92 of the Treaty of Rome and Article 67 of the European Coal and Steel Community Treaty. These Articles prohibit aid with certain automatic and discretionary exceptions. Aid is defined by its effects on competition and not by the aims of the government granting the aid. Taxation benefits are considered aid as are guarantees and disposal of assets at below market rates. Benefits to encourage social change are also considered to be aid.

State aid is a constitutional matter based entirely on Treaty Articles and not on secondary legislation of the Council.

> State aid treaty law limits the freedoms of Member State governments to grant financial advantages to certain sectors of their economies, irrespective of the technique used and are thus by nature Treaty based.[72]

Over recent years, there has been increased focus on Member States' subsidies and there have been a number of major cases in the areas of steel, shipbuilding, automobile and airline industries. There has also been an emphasis on the restructuring of public companies.

8.4 Enforcement

The European Commission has, since September 1990, regulated mergers and acquisitions that have a European Community-wide dimension.[73] The Merger Regulation was adopted by the Council in 1989 with the objective -

> ... ensuring a single "one-stop-shop", and efficient control of important mergers, acquisitions, and certain joint ventures that are likely to have effects in more than one Member State.[74]

Merger control in the European Union is based exclusively on competition oriented criteria. The European Commission not only forbids mergers leading to single dominance, but also those establishing or strengthening joint dominance. While the Merger Regulation gives the Commission sole jurisdiction over mergers which fall under the Merger Regulation, it allows Member States to act separately to protect other legitimate interests. These legitimate interests include freedom of the press.

---

71 Delegation of the Commission of the European Communities to Australia and New Zealand, "State Aids", *Background*, April 1995, Ref: 5/95, p 1.

72 *Ibid*, p 2.

73 For example, concentrations of firms above certain thresholds expressed in terms of annual turnover.

74 European Commission, *European Community: Competition Policy, 1994*, Brussels, Luxembourg, 1995, p 39.

Enforcement of competition law has been a powerful tool in integrating separate European Union Member States markets into a single market.

The growing importance of enforcement of competition law against anti-competitive agreements among competitors is demonstrated by two recent decisions by the European Commission imposing fines of ECU 100 million ($A60 million) and ECU 130 million ($A77 million) in cases of price fixing, production limiting and market-sharing cartels. [75]

Monopolies are regulated by Article 90 which is based on the principle that a body which has been granted monopoly rights by a Member State, whether it be State-owned or in private hands, is subject to the competition rules in the same way as any other company. Monopoly companies hold a dominant position and must not engage in abusive activities. Monopoly companies must -

> ... be careful not to use revenue from their monopoly activities to subsidise sales in other markets, thereby artificially disadvantaging their competitors.[76]

There is an exception in Article 90 aimed at State monopolies who must perform some public service functions in the public interest and which are sometimes unprofitable. Actions to meet such public service obligations can be immune from the competition and other Treaty rules, provided that they are necessary to fulfil these legitimate aims. An example is -

> the national postal services are entrusted with the public service function of providing a basic collection and delivery service to all citizens at a uniform price. Using revenue generated from profitable local deliveries to finance more remote, loss-making, deliveries could be immune from the competition rules as a result of the Article 90 exception.[77]

Revenue generated from a monopoly to undercut competitors in other markets would not be immune.

The European Commission has successfully challenged and required the abolition of monopoly rights in telecommunications, postal services, ports and airports. However, the European Union is less advanced than Australia in the *process of demonopolisation*, which remains a high priority on the European Union's agenda.

The control of ex-monopolies and the prohibition of abuses of a dominant position in the market are seen as vital in recently liberalised sectors of the economy like telecommunications. The European Commission assumes a regulating function and applies the essential facilities doctrine. This is not unlike the regulators in Australia under existing trade practices law and proposals made by the Hilmer Inquiry.

8.5 Competition Law - Administration

Competition law in the European Union is not only a matter for the European Commission but also for Member States. Administrative authorities in Member States apply European Union competition rules which are also required of their courts. Member States may apply their own competition statutes, provided they do not jeopardise the principle of the primacy of European

---

75 Delegation of the European Commission to Australia and New Zealand, "Recent Developments in Competition Law and Policy in the European Union", *European Union News*, Vol 12, No 6, August/September 1994, pp 1-2.

76 European Commission, *Op Cit*, 1995, p 27.

77 *Ibid*

Union law. Union law has precedence over national law. The European Commission in 1994 sought the involvement of Enforcement Authorities of Member States in applying the European Communities' competition rules. The objective in introducing some decentralisation in the application of Community competition rules is -

> ...to make the rules more effective at national level without increasing monitoring costs or diminishing the benefits to industry of the existence of uniform competition rules within the common market.[78]

Decentralisation of enforcement procedures has helped establish a balance between the trend towards subsidiarily and the maintenance of uniform protection of competition for all firms within the common market (a level playing-field).

> The Commission believes that the application of the same rules of substance by 15 national authorities and itself will be a major factor in the integration of the common market which can increase the level of competition, and will thereby enhance the competitiveness of European industry.[79]

In Brussels the competition office of the European Union and Member States determine the most appropriate modes of co-operation and decision-making. Discussions focus on how European Union competition law can be applied effectively by authorities in Member States without jeopardising the European Commission's exclusive right to grant exemptions from restrictive agreements. Restrictive agreements are null and void unless exempted by the Commission. This is similar to the Authorisation process of the Trade Practices Commission, now the Australian Competition and Consumer Commission in Australia. Current discussions centre on whether the European Union should establish an independent competition authority in order to increase the transparency of its processes.

8.6 International Competition

The international dimension of competition policy is high on the European Commission's agenda of priorities. The European Commission's competition rules have been adopted by the European Free Trade Agreement (EFTA) countries[80], as well as the States of Central and Eastern Europe. [81] The have also been accepted by the European Union's neighbours on the southern shores of the Mediterranean Sea.

In 1991, the European Commission concluded a co-operation agreement in competition matters with the United States of America. However the European Court of Justice on 9 August 1994 declared the agreement *ultra vires* because of a procedural error in the agreement. Following the correction of the procedural mistake by the European Council of Ministers the agreement was adopted.

Bilateral co-operation agreements like the 1991 European Commission/United States Agreement and the recent Co-operation and Co-ordination Agreement 1994 between Australia and New Zealand are regarded as important laboratories and stepping stones for future multilateral agreements and international co-operation in competition policy matters.

---

78 *Ibid*, p 23.

79 *Ibid*

80 The Agreement on the European Economic Area, 1994.

81 The Europe and Interim Agreements, 1994.

The European Union Commission actively promotes discussions on competition policy which it considers necessary to establish a more level playing field among the world's main trading partners.

> During 1994, relations with Australia and New Zealand were further pursued and exchanges took place, in particular regarding the rich experience of these two countries in the area of deregulation.[82]

In a recent White Paper the Commission of the European Communities observed that -

> Competition policy has played a major role in fostering international trade and, in particular, the possibilities of our companies to export to other markets, hitherto closed by anti-competitive practices, State aid or public monopolies.
>
> Not all the Community's main trading partners have followed a similar approach of applying their competition policies to open their markets to imports, however. Such policies are lacking in particular in a number of counties in East and South-East Asia, whose markets are closed not so much by tariffs and non-tariff barriers, but mainly by anti-competitive practices. The "Keiretsu" in Japan and the closed distribution system in several countries are but two important examples of this phenomenon.
>
> ... The Multilateral Trade Organisation, created as part of the (GATT) Round's package, should ensure competition policy issues are part of its immediate agenda, focussing especially on restrictive business practices and cartels.[83]

8.7 Competition Policy in the United States of America

The United States anti-trust laws evolved through a series of statutes passed from 1890 to 1915, which were a Congressional response to the growth of large business trusts and monopolies.[84] American anti-trust laws were based on the belief that economic opportunity was the goal of the free market and that large corporations and trusts were contrary to the American economic ideal.[85] The policy aim was to protect small and mid-sized businesses. This policy aim changed in the 1980s and anti-trust laws are now focused on improving the efficient allocation of resources (allocative efficiency) and the equitable distribution of benefits and costs (distributive efficiency) in the market.

The view that concentrated power of any sort, either political or economic, is a danger to the stability of democratic institutions, in part, motivated the United States Congress to pass the *Sherman Act* in 1890 and was part of the 1930s thinking that led to the establishment of the Anti-trust Division of the Justice Department and is what supports anti-trust laws today.[86]

---

82 European Commission, *Op Cit*, 1995, p 46.

83 Commission of the European Communities, *Growth, Competitiveness, Employment - The Challenges and Ways Forward into the 21st Century*, (White Paper), Brussels, 1993.

84 *Sherman Act 1890* and *Clayton Act 1914.*

85 Overton, Todd R,. "Substantive Distinctions Between United States Anti-trust Law and the Competition Policy of the European Community: A Comparative Analysis of Divergent Policies", *Houston Journal of International Law*, Vol 13:281, Spring 1991, pp. 315-342.

86 Robert Pitofsky, "Remarks of Professor Robert Pitofsky: The future of anti-trust", *The Anti-trust Bulletin*, 39, No 4, Winter, 1994, pp 911-921.

8.8 International Co-operation and Competition Policy

The rapid growth in the volume of international trade, the emergence of multinational corporations and the increasing globalization of markets has had significant impact on competition policy. Many corporations have grown and their operations involve extensive cross-border investments and international joint ventures to such an extent that it can be difficult to know the national identity of the particular firms.

An increasing number of nations have anti-trust laws. International globalization of economies may lead to the development of an international anti-trust standard. Some collaboration has already occurred towards standardisation as nations share information and notify each other of enforcement initiatives.

The recent United States/European Community Executive Agreement provides that nations will consider requests by another nation to enforce its law against persons in its jurisdiction who are harming the interests of the requesting nation.

The United States passed through Congress the *International Anti-Trust Enforcement Assistance Act 1994* which authorises the United States Government and the Federal Trade Commission to enter into agreements with other jurisdictions for certain assistance in anti-trust investigations and information sharing.

The Canadian competition authorities have endorsed the co-operative exchange of information with their counterparts in the United States and have successfully prosecuted cases under their competition law.

8.9 International Dimension of Competition Policy

The importance of international co-operation in trade is underscored by Australia's involvement in the General Agreement on Trade and Tariffs (GATT). Australia is in the process of reconstructing its regulatory systems to comply with the requirements of the Uruguay Round of GATT. The Uruguay Round will lead to progressive reduction of state-imposed trade barriers.

However, there is a risk that these barriers will be replaced by other obstacles to international trade. For example, cartels can divide world markets by partitioning distribution networks of large global companies, along national borders. Another problem is the contradiction between the increasing internationalisation of economic activity and the limited territorial control exercised by national competition authorities. For example, anti-competitive behaviour may have effects on the market of a particular country, but the companies involved in such anti-competitive conduct are located within the territory of a neighbouring state. Often, the effects of anti-competitive practices of a certain company affects several national markets. Several competition authorities are competent to act, but co-ordination is required on the measures to be taken.

Co-operation already exists between competition authorities. This co-operation is based on bilateral relations which involves the exchange of information as well as consultation.

The Organisation for Economic Co-operation and Development (OECD) has a specialist committee, the Committee on Competition Law and Policy, devoted to the development of competition law internationally. That Committee is currently focusing on three major issues -

- the convergence or harmonisation of competition laws and enforcement methods;

- co-operation between competition law enforcement authorities; and
- an exploration of the interface between competition and trade policies.

Competition policy has become a mainstream economic policy issue and is being addressed by organisations and forums such as the Organisation for Economic Co-operation and Development (OECD) and the Asia Pacific Economic Co-operation Forum (APEC).

It is expected that in future there will be increasing co-operation between the anti-trust authorities in various countries. Increasing co-operation can take many forms from the exchange of information to bilateral or regional agreements between countries.[87]

The world's two most advanced and active anti-trust agencies have agreed to assist each other in anti-trust enforcement and to respond to anti-competitive conduct in one jurisdiction that affects the commerce of the other.[88] Developments in anti-trust laws of the United States and the European Community reflect the nature of the global economy. Effective implementation means that both can contribute to the common principles of competition policy and diffuse potential anti-trust and trade conflicts between trading partners. The harmonisation of American and European laws governing competition is being considered. Conflicting competition laws are considered a source of discord in international relations. Efforts to find ways to co-operate in anti-trust enforcement assists in dealing with increasingly international markets.

The liberalisation of capital-flow regulations has made it easier for multinational companies to increase their global market share by purchasing foreign businesses. The move towards world convergence of competition policy is aligned to the necessity for open global commerce.

There is an international dimension to competition law and policy. Competition rules in force in countries with whom Australia trades are important. With the increasingly global operations of firms, business transactions may span markets in many countries.

---

87 Such as the Australia/United States agreement on co-operation in anti-trust matters which dates from 1982, or the more recently concluded European Union/United States Agreement.

88 United States and European Commission Co-operation Agreement 1991.

CHAPTER NINE

9. LEGISLATIVE PACKAGE - COMPETITION LAWS

9.1 Introduction

The Council of Australian Governments (COAG), at a meeting in Darwin in August 1994, agreed that higher productivity levels were essential to Australia's growth and competitiveness and that competition was a key stimulus to productivity improvement. COAG agreed that an effective national competition and legal framework was essential to underpin enhanced economic performance.

9.2 Draft Legislative Package

In September 1994, COAG released for public comment a package comprising draft legislation and draft intergovernmental agreements which would implement a national competition policy.

The draft legislative package comprised -

- a draft Bill to amend Part IV of the *Trade Practices Act 1974* and apply it to all persons within State jurisdictions. The legislation also called for the establishment of an Australian Competition Commission, a National Competition Council and pricing and access arrangements;

- a draft Intergovernmental Conduct Code Agreement which included procedures for extension of the *Trade Practices Act 1974* and appointments to an Australian Competition Commission; and

- a draft Intergovernmental Competition Principles Agreement which included procedures and principles relating to structural reform of public monopolies, legislation review, competitive neutrality, prices oversight and access to essential facilities. It also included procedures for appointments to a National Competition Council.

The package attracted more than sixty substantive submissions from the public. The broad thrust of the package met with general community approval.

As a result of public comments received, various changes were made to the draft Bill to clarify matters of detail and streamline and increase the flexibility of processes established by the reforms. The package was also amended to better reflect the fact that competition policy occurs in the context of broader policy concerns of government and the community.

At the COAG meeting on 11 April 1995 all Governments agreed to implement a cohesive national competition policy based on the draft package. The legislative package agreed to by COAG consisted of -

- the Competition Policy Reform Bill;

- State and Territory Application Legislation; and

- the three Intergovernmental Agreements -
  - the Conduct Code Agreement;
  - the Competition Principles Agreement; and
  - the Agreement to Implement the National Competition Policy and Related Reforms.

9.3 Competition Policy Reform Act

The *Competition Policy Reform Bill 1995* was introduced into the Senate on 29 March 1995 and was passed by that House on 29 June 1995. The House of Representatives passed the legislation on 30 June 1995 and it received Royal Assent on 20 July 1995. The *Competition Policy Reform Act 1995* is complemented by three intergovernmental agreements. The Intergovernmental Agreements were signed by all the governments at COAG on 11 April 1995.

The first of these agreements, the Conduct Code Agreement is an agreement by the States and Territories that the Competition Code[89] should apply to persons in their respective jurisdictions. The agreement sets out processes for amendments to the competition laws of the Commonwealth, the States and the Territories, and for appointments to the Australian Competition and Consumer Commission (ACCC).

The second agreement, the Competition Principles Agreement sets out the arrangements and work program of the National Competition Council (NCC) and the principles governments agree to follow in relation to structural reform of public monopolies and review of anti-competitive procedures.

The third intergovernmental agreement, the Agreement to Implement the National Competition Policy and Related Reforms, provides for the Commonwealth to maintain the real *per capita* guarantee of financial assistance grants to the States, the Territories and local government on a rolling three year basis. The Commonwealth also agrees to provide, in three instalments, further financial assistance. These payments are dependant on the States and Territories making satisfactory progress in implementing the National Competition Policy and related reforms. The NCC will confirm that the conditions for payment have been met.

89 The Competition Code is a modified version of Part IV of the *Trade Practices Act 1974.*

Table 10 outlines the implementation of the *Competition Policy Reform Act 1995*.

Table 10

COMMONWEALTH LEGISLATION

Competition Policy Reform Act 1995

Action	completed by									
	Aug 94	Sept 94	11 Apr 95	29 Mar 95	29 Jun 95	30 Jun 95	20 Jul 95	17 Aug 95	6 Nov 1995	21 Jul 1996
COAG Bill Drafted	■									
Draft Bill Public Comment	■	■								
Draft Bill Endorsed by COAG	■	■	■							
Bill Introduced into Senate	■	■	■	■						
Bill Passed by Senate	■	■	■	■	■					
Bill Introduced to Hs./Repres.	■	■	■	■	■	■				
Bill Passed by Hs./Repres.	■	■	■	■	■	■				
Royal Assent	■	■	■	■	■	■	■			
Date of Effect of Act	■	■	■	■	■	■	■	■		
TPC & PSA form *ACCC*	■	■	■	■	■	■	■	■	■	
Establish NCC	■	■	■	■	■	■	■	■	■	
Crown immunity terminates										

9.4 Outline of the Legislation

The main elements of the *Competition Policy Reform Act 1995* are to -

- make amendments to the *Trade Practices Act 1974* and the *Prices Surveillance Act 1983*; and

- create a mechanism for the application by the States and Territories of the provisions of Part IV and other provisions of the *Trade Practices Act 1974* which relate to business activities currently not subject to Part IV of the Act.

The *Trade Practices Act 1974* has been amended so that, with State and Territory application legislation, the prohibitions against anti-competitive conduct can be applied to all businesses in Australia. A new legal regime will be created which facilitates businesses obtaining access to the services of certain essential infrastructure facilities. The Trade Practices Commission and the Prices Surveillance Authority have been merged to form the Australian Competition and Consumer Commission, and a new advisory body, the National Competition Council, has been established. Prices surveillance processes have been streamlined, and their jurisdiction extended to State and Territory Government businesses.

Australian competition law comprises the Principal Act[90], and application laws of each of the States and Territories.

The *Competition Policy Reform Act 1995* amends the competitive conduct rules of Part IV of the *Trade Practices Act 1974*, and other provisions that relate to those rules. The *Competition Policy Reform Act 1995* creates a Competition Code by enacting the Schedule version of Part IV. Application legislation by each State and Territory in line with the Conduct Code Agreement will apply the Competition Code as a law of the States or Territories to be effective by July 1996. The Schedule version of Part IV is, in effect, a re-enactment of Part IV of the *Trade Practices Act 1974*, redrafted to apply to persons generally rather than corporations.

Part IV of the *Trade Practices Act 1974* prohibits various forms of anti-competitive conduct, such as contracts which substantially lessen competition, misuse of market power and mergers and acquisitions which substantially lessen competition. The *Competition Policy Reform Act 1995* extends the operation of these competitive conduct rules to currently exempt businesses, and facilitates their further extension by State and Territory legislation.

9.5 Source of Power

The competitive conduct rules apply by virtue of the *Trade Practices Act 1974* and the State and Territory application laws. The reach of the *Trade Practices Act 1974* relies on the Commonwealth's constitutional powers. The principal constitutional basis for the *Trade Practices Act 1974* is the corporations' power, (section 51(xx)) and the trade and commerce power (section 51(i)), in relation to both interstate and overseas trade and commerce. Other constitutional powers relied on include the posts and telegraphs power, (section 51(v)), the executive power (section 61), the Territories power, (section 122) and the incidental power, (section 51(xxxix)).

Limitations on the Commonwealth's constitutional power has meant that some participants in goods and services markets and, in particular, professions (except where the professionals have incorporated) and other unincorporated businesses operating solely in intrastate trade are currently not covered by the competitive conduct rules in the *Trade Practices Act 1974*.

---

90 Principal Act means the *Trade Practices Act 1974*.

9.6 Co-operative Scheme

The *Competition Policy Reform Act 1995* is part of a co-operative legislative scheme, involving the Commonwealth, the States and Territories to achieve universal, uniform application of the competitive conduct rules to incorporated and unincorporated businesses. The *Competition Policy Reform Act 1995* creates a form of text known as the Competition Code. The Competition Code contains the rules set out in Part IV of the *Trade Practices Act 1974*, modified to refer to persons rather than corporations.

The State and Territory application laws apply the competitive conduct rules to persons within the legislative competence of their jurisdictions. The result of the operation of both the *Trade Practices Act 1974* and the State and Territory applications laws ensure coverage of both incorporated and unincorporated entities.

The State and Territory legislation will be required to commence within 12 months of the commencement of the Commonwealth Act.

Table 11 outlines the progress of the State and Territories in enacting application of laws legislation. It is to be noted that the New South Wales legislation was to be a model for the other jurisdictions.

Table 11

STATES AND TERRITORIES
APPLICATION OF LAWS LEGISLATION

State/ Territory	DRAFT Parliamentary Draftsman	Cabinet Approval	Introduced 2nd Reading	Parlty. Committee	Passed	Effect by July 1996
NSW	■	■	■	■	■	
VIC	■	■	■	■	■	
QLD	■	■	■	■		
WA	■					
SA	■					
TAS	■	■				
NT	■	■	■			
ACT	■	■	■	■		

9.7 Major Elements of the Legislation

Table 12 outlines the key elements of the *Competition Policy Reform Act 1995.*

Table 12

The Competition Policy Reform Act
The Commonwealth's ***Competition Policy Reform Act 1995*** is a key element of the competition policy package and has - • amended the competitive conduct rules of Part IV of the *Trade Practices Act 1974* and the provisions that exempt specific forms of conduct from these rules; • extended the coverage of the competitive conduct rules to the unincorporated sector and to State Government businesses; • established a new national regime for access to services provided by 'nationally significant' infrastructure facilities; • amended the *Prices Surveillance Act 1983* to extend prices oversight to State and Territory-owned enterprises; • established the ACCC; and • established the NCC.

There are six major components of the *Competition Policy Reform Act 1995* -

(1) Amendments to the Competitive Conduct Rules and their Application

The Competitive Conduct Rules contained in Part IV of the *Trade Practices Act 1974* provide for -

- the authorisation, on public benefit grounds, of price fixing for goods and of resale price maintenance for goods and services[91];
- the repeal of the specific provisions relating to price discrimination;[92]
- the extension of the competitive conduct rules to the resupply of things in the nature of services;
- the removal of the Shield of the Crown immunity for the States, the Northern Territory and the Australian Capital Territory in so far as the Crown in those capacities carries on a business.[93]
- recommended price exception removed from section 45A; and
- application of the notification provisions to third line forcing[94].

---

91 Section 48 of the *Trade Practices Act 1974*.

92 Section 49 of the *Trade Practices Act 1974.*

93 These largely follow the recommendations of the Hilmer Report.

94 Sections 47(6) and (7) of the *Trade Practices Act 1974*.

(2) The Extension of the Application of the Conduct Rules

Provisions are included to facilitate the application of the conduct rules and related provisions of the *Trade Practices Act 1974* to areas within State and Territory jurisdiction. The provisions will ensure that the ACCC and the Federal Court can exercise administrative and judicial powers respectively which are to be conferred by State and Territory legislation.

(3) Access Regime

The new access regime is intended to facilitate access to the services of certain essential infrastructure facilities. It provides for a declaration that certain services are of national significance. There is also a procedure to seek access to declared services. The role of the NCC in the declaration process will be to make recommendations. The ACCC will determine whether access should be given and on what terms and conditions where there is a dispute. There are also appeal and enforcement procedures of access determinations. (For a more detailed discussion of the access regime see paragraph 9.13).

(4) Prices Oversight

The monitoring powers of the ACCC are formalised and the coverage of prices surveillance and monitoring provisions of the *Prices Surveillance Act 1983* are extended to State and Territory-owned businesses. Under the prices surveillance regime, the price of a declared product will not be permitted to be increased above its highest endorsed price in the previous twelve months in the absence of notification to the ACCC.

The functions of the Prices Surveillance Authority have been taken over by the ACCC and prices monitoring has been added to the existing functions of prices surveillance and price inquiries. It is expected that States will generally set up their own prices oversight regimes.[95]

The system provides that the Commonwealth Minister will only make a declaration on a State or Territory government business enterprise with the relevant Government's agreement or where the NCC, on receipt of a complaint, decides that the State or Territory does not have an effective prices oversight mechanism.

Acceptable State or Territory prices oversight regimes are those which -

- are independent of the government business enterprise being monitored;
- look at efficient resource allocation - taking into account identified community service obligations;
- apply to all government business enterprises that are monopolies or near monopolies;
- permit submissions by interested parties; and
- publish their pricing recommendations and the reasons for them.

(5) Australian Competition and Consumer Commission

95 Some States already have pricing authorities such as the New South Wales Government Pricing Tribunal.

The Trade Practices Commission and the Prices Surveillance Authority are abolished and their powers and functions, and additional functions, are conferred on a new body, the **Australian Competition and Consumer Commission.** This body came into effect on 6 November 1995.[96] The functions of the new Commission include the existing functions of the old Trade Practices Commission and Prices Surveillance Authority as well as new functions with regard to the access regime and prices surveillance of State government business enterprises.

(6) National Competition Council

A new body, the National Competition Council (NCC) has been established with advisory and research functions. The advice and review functions of the NCC include legislation review, structural reform and competitive neutrality. The NCC will also make recommendations to the Commonwealth Minister on application of access to essential facilities and prices oversight.[97]

9.8 Commencement

The *Competition Policy Reform Act 1995* is structured upon different commencement dates for different Parts of the Act to enable the States and Territories to pass application laws. The amendments to the competitive conduct rules commenced in August 1995 and State application laws are expected to be operative within a further 12 months.

9.9 Transitional Arrangements

The *Competition Policy Reform Act 1995*, and the State and Territory application laws, will result in conduct that is now outside the scope of the *Trade Practices Act 1974* becoming subject to those rules. Therefore transitional arrangements are set out in the *Competition Policy Reform Act 1995*.

Contracts entered into before 19 August 1994 which were outside the scope of Part IV of the *Trade Practices Act 1974* will be grandfathered, so that any anti-competitive conduct in those contracts will not be subject to the new prohibitions. However, variations to the contract which increase or extend the anti-competitive effects of the contract will be subject to the *Competition Policy Reform Act 1995*.

Pecuniary penalties will not apply for an extra twelve months in respect of conduct which is being subjected to competition law for the first time, that is a total of two years after Royal Assent of the Commonwealth Act. Other remedies will, however, apply after the initial twelve months. Pecuniary penalties will not apply to the Crown at any stage, although *Crown Authorities* will be liable to them.

If a Commonwealth, State or Territory law made pursuant to old section 51(1) of the *Trade Practices Act 1974* does not meet the new transparency requirements in the amended section 51(1) of the *Trade Practices Act 1974* conduct exempted by the law will be protected for 3 years after the date of Royal Assent of the Commonwealth Act. This will give all jurisdictions the opportunity to review the existing exemptions within a reasonable time. Laws made pursuant to section 51(1) of the *Trade Practices Act 1974*, which do meet the new transparency requirements, will continue to be exempt conduct from Part IV.

---

96 Part 3 of the *Competition Policy Reform Act 1995* substitutes the Australian Competition and Consumer Commission for the Trade Practices Commission.

97 This body was an important element of the recommendations in the Hilmer Report.

9.10 Court Jurisdiction

The Federal Court will have exclusive jurisdiction conferred by State and Territory application laws and will be subject to the existing scheme for cross-vesting of jurisdiction between Commonwealth and State Courts.

9.11 Participating Jurisdictions

A participating jurisdiction means a State or Territory that -

(a) is a party to the Conduct Code Agreement; and

(b) applies the Competition Code as a law of that jurisdiction under an application law.

The concept of a fully-participating jurisdiction is important in determining which States and Territories can -

- participate in the appointment of members and associate members to the ACCC;
- be consulted on amendments to the competition laws; and
- have access to the provisions of the *Trade Practices Act 1974* which permit the Commonwealth, States and Territories to make laws exempting conduct from the competitive conduct rules.[98]

States and Territories which are parties to the Competition Principles Agreement can participate in appointments to the National Competition Council. The Governor-General, is required, when appointing a person as Chairperson or member of the ACCC, to be satisfied that a majority of fully-participating jurisdictions support a proposed appointment.

A State or Territory will only have access to the exempting mechanisms of the section 51(1) of the *Trade Practices Act 1974*, if it is a fully-participating jurisdiction and is also a party to the Competition Principles Agreement. This means that only these jurisdictions will be able to pass legislation which exempts conduct from Part IV of the *Trade Practices Act 1974*.

Fully-participating jurisdictions will be consulted on proposed amendments to the competition laws. States and Territories that are parties to the Competition Principles Agreement will also have a role in the access regime in relation to their own authorities and will have their pricing and access regimes deemed effective if they comply with the principles set out in the Agreement.

9.12 Competition Code

The *Competition Policy Reform Act 1995* inserts a new section to facilitate the application of the Competition Code text by the States and Territories participating in the national scheme.

The Competition Code text is a modified version of the competition provisions of the *Trade Practices Act 1974* (that is Part IV and provisions which relate to Part IV). The modified version reflects the different constitutional basis underpinning the State and Territory application laws. Whereas the prohibitions in Part IV of the *Trade Practices Act 1974* are expressed to apply to corporations, the prohibitions in the Competition Code are expressed to apply to persons.

---

98 Section 51(1) of the *Trade Practices Act 1974.*

The Competition Code consists of -

- the new schedule of Part IV of the *Trade Practices Act 1974*;[99]
- provisions of the *Trade Practices Act 1974* as they relate to the schedule version; and
- regulations that relate to any provision above.

9.13 Access[100] to Essential Facilities

The access regime contained in Part IIIA of the *Competition Policy Reform Act 1995* is a general regime applicable to a range of facilities. Under the national regime, a third party seeking access to an infrastructure facility would first try to reach private agreement with the facility owner. If a party seeking access is unable to negotiate suitable terms and conditions for access they may apply to the NCC for the service to be declared essential for access. The Commonwealth Minister, or the responsible State or Territory Minister, may also apply to the NCC for a declaration if it is felt that a particular service should be declared for access.

The NCC determines the application against a number of criteria which the service must meet before it can be declared for access. For example, these criteria include consideration of whether -

- access to the service is necessary to promote competition;
- the facility is of national significance;
- it would not be economically feasible to duplicate the facility; and
- safety can be ensured at an economically feasible cost.

If the NCC finds that any of the criteria are not satisfied it cannot recommend a declaration. If all criteria are satisfied the NCC may recommend a declaration of the service to the designated Minister. The Minister must decide whether or not to declare the service following a recommendation from the NCC and must publish the reasons. There are rights of review both of the decision of the NCC and the Minister.

Following declaration, if the party seeking access and the owner/operator of a facility providing a declared service are still unable to reach agreement on terms and conditions for access, then either party may notify the ACCC that a dispute exists.

Once the dispute is notified the ACCC arbitrates on the matter and makes a determination on the appropriate terms and conditions for access. The legislation specifies a number of matters which the ACCC must take into account in making its determination and there are constraints on the ACCC in making a determination. There are rights of review of a determination made by the ACCC. There is provision for a party to a determination by the ACCC to seek enforcement of the determination by the Federal Court.

A State or Territory can set up an access regime to apply to a facility within its own jurisdiction.[101] Such an access regime must conform to principles outlined in the Competition Principles Agreement.[102]

---

99 The schedule version of Part IV of the *Trade Practices Act 1974* applies to persons, including corporations.

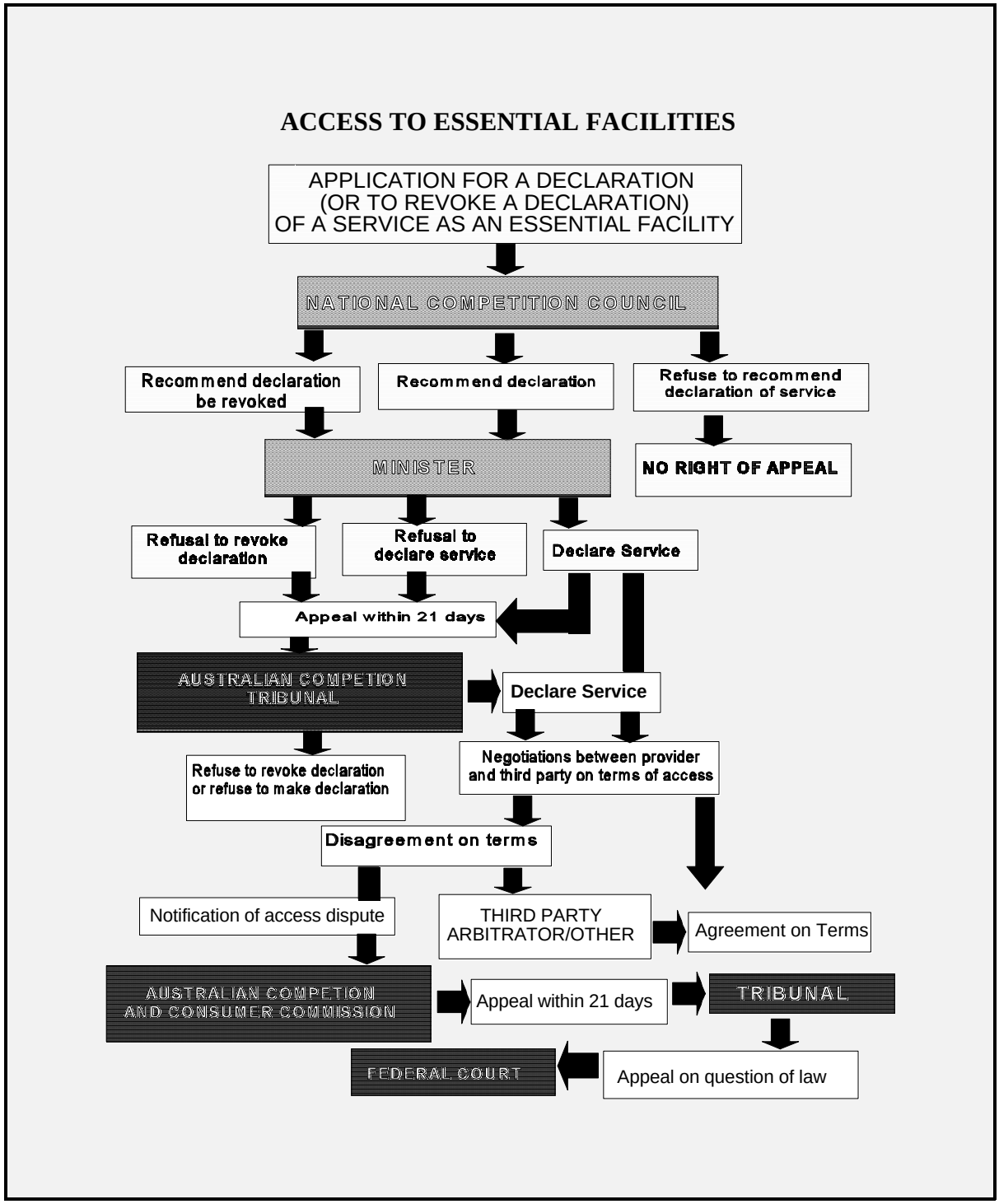
100 The term access means the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms.

101 Section 44M *Competition Policy Reform Act 1995*.

102 Clause 6.

Chart 4 below outlines how the new Access System for essential facilities will operate.

Chart 4



9.14 Conduct Code Agreement

The Conduct Code Agreement, sets out the basis for the extension of the competitive conduct rules of the *Trade Practices Act 1974* to the unincorporated sector and to State government business activities. It also establishes consultative processes for amendments to the competition law and for appointments to the ACCC.

Any amendments to the Competition Code must be ratified by a majority of participating jurisdictions, including the Commonwealth. Each State and Territory have one vote and the Commonwealth two votes plus a casting vote. Therefore, any amendments will require Commonwealth support plus the support of three other governments.

The Conduct Code Agreement provides for the States and Territories to give effect to the competitive conduct rules. All parties are obliged to notify the ACCC of any legislation they have enacted to exempt certain conduct from the Competition Laws which rely on section 51(1) of the *Trade Practices Act 1974* or the Competition Code.[103] The Agreement states that parties intend that Part IV and the schedule version of Part IV of the *Trade Practices Act 1974* will be kept in tandem. It also contains procedures which apply where the Commonwealth Minister is satisfied a State or Territory has made a significant modification to the application of the Competition Code in its jurisdiction. These involve the publication of the Minister's opinion in the *Commonwealth of Australia Gazette*.

The Conduct Code Agreement provides for the withdrawal of a party that is, any jurisdiction from the Agreement.

9.15 Competition Principles Agreement

Under the Competition Principles Agreement, the Commonwealth, States and Territories agree on the principles that are to apply to -

- the structural reform of public monopolies;
- the competitive neutrality between public and private sectors;
- the pricing oversight of utilities and other corporations with significant monopoly power;
- a regime to provide access to essential facilities;and
- the review of legislation that restricts competition.[104]

The Agreement contains arrangements and procedures for appointments to the NCC and for determination of the Council's work program. The work program is to be determined by COAG. The Commonwealth Minister will only refer matters to the NCC in accordance with this work program.

---

[103] Competition Laws.

[104] These principles address and refine the major additional policy elements recommended in the Hilmer Report.

By signing the Competition Principles Agreement, Governments have agreed to processes for further micro-economic reform. In general, individual Governments will be responsible for setting their own timetables and agendas for progressing these reforms.

The Agreement does not compel specific reforms by Governments. The Agreement provides a consistent requirement for public benefit tests to guide policy decisions. Many such decisions are taken currently by governments without the discipline of a public benefit test, other than through the normal parliamentary process. The Agreement sets out certain processes that should be followed where a government business enterprise is to be privatised or exposed to competition for the first time. The State or Territory Government is to undertake a review into -

(a) the appropriate commercial objectives for the public monopoly;

(b) the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;

(c) the merits of separating potentially competitive elements of the public monopoly;

(d) the most effective means of separating regulatory functions from commercial functions of the public monopoly;

(e) the most effective means of implementing the competitive neutrality principles set out in this Agreement;

(f) merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations;

(g) the price and service regulations to be applied to the industry; and

(h) the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including the rate of return targets, dividends and capital structure.[105]

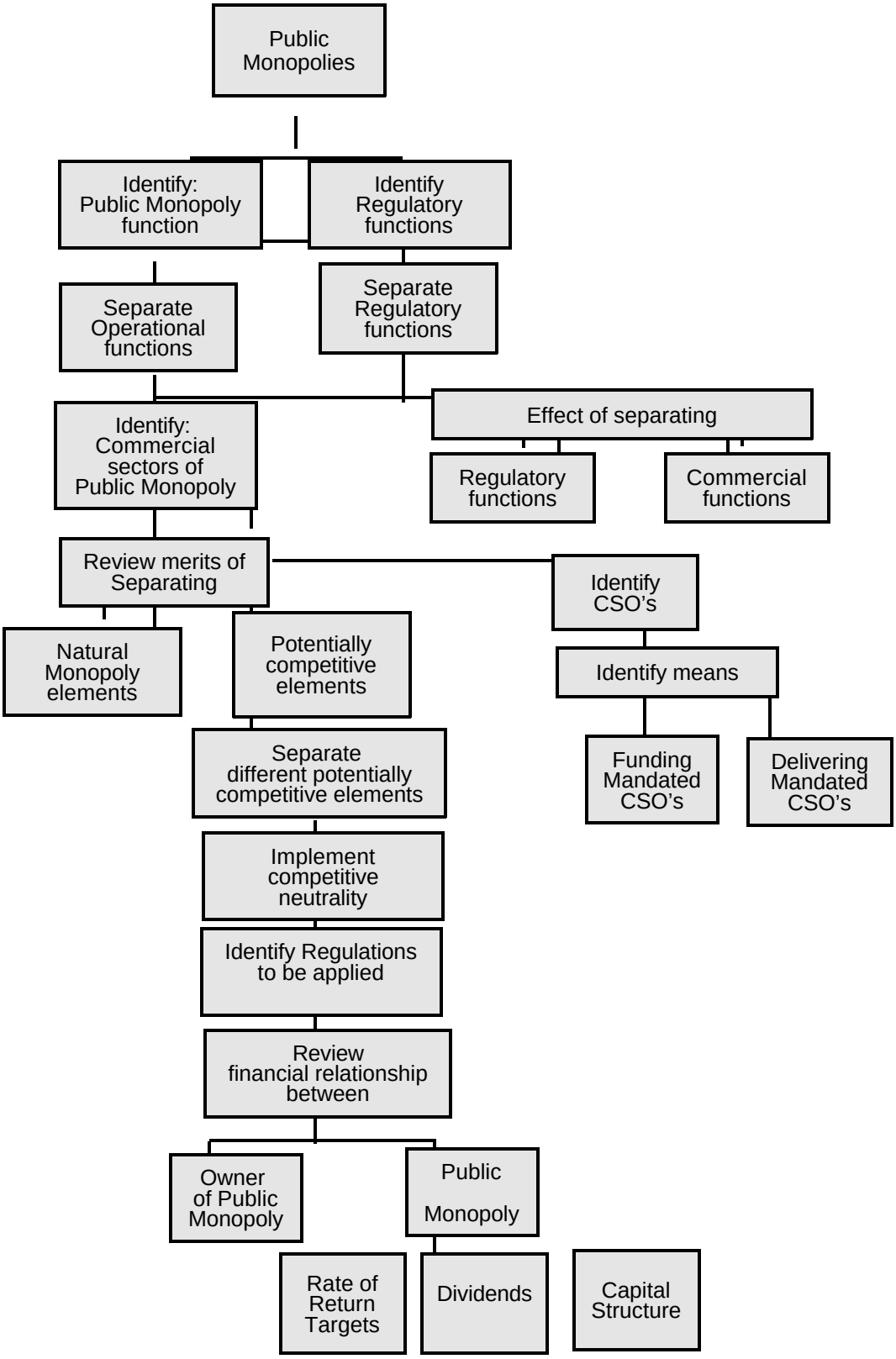
The decision as to whether, and when, a government business enterprise might be privatised remains the exclusive responsibility of the owning government.

The Competition Principles Agreement will facilitate a more careful and systematic consideration of the delivery of community service obligations by State and Territory Governments where they decide to undertake structural reform of their business enterprises.

105 Competition Principles Agreement, March 1995.

Chart 5 outlines the elements that may need to be considered by governments proceeding with structural reform of public monopolies.

Chart 5 **STRUCTURAL REFORM OF PUBLIC MONOPOLIES**



9.16 Agreement to Implement the National Competition Policy and Related Reforms

The Agreement to Implement the National Competition Policy Reforms provides for financial assistance to the States and Territories in return for their continued progress in implementing the agreed reforms. The Commonwealth will maintain the real *per capita* guarantee of financial assistance grants on a rolling three-year basis, and for further financial assistance to the States in the form of competition payments.

The Agreement incorporates the prospective grants to the States and Territories as follows - million *per annum* will be paid by the Commonwealth to the States and Territories on a *per capita* basis, if procedures required to be implemented with respect to competition a

- from 1997 to 1998 a total of $200 re put into effect;

- from 1999 to 2000, a further $400 million *per annum* will be paid to the States and Territories on a *per capita* basis conditional upon implementation of certain stated reforms;

- in the years 2000 and 2001, another $600 million *per annum* will be paid to the States and Territories on the same *per capita* basis conditional upon full implementation of all principles in the national competition reform package.

The payments are conditional on the States making satisfactory progress with the implementation of national competition policy reforms and a range of other reforms including electricity, gas, road transport and water. It will be the responsibility of the NCC to assess whether States have made satisfactory progress and are entitled to receive their share of the additional payments.

9.17 Legislation Review

The Competition Principles Agreement includes an agreement to review regulation restricting competition against a public benefit test. Many governments undertake this process at present, but the agreement formalises the process and enshrines the public interest test.

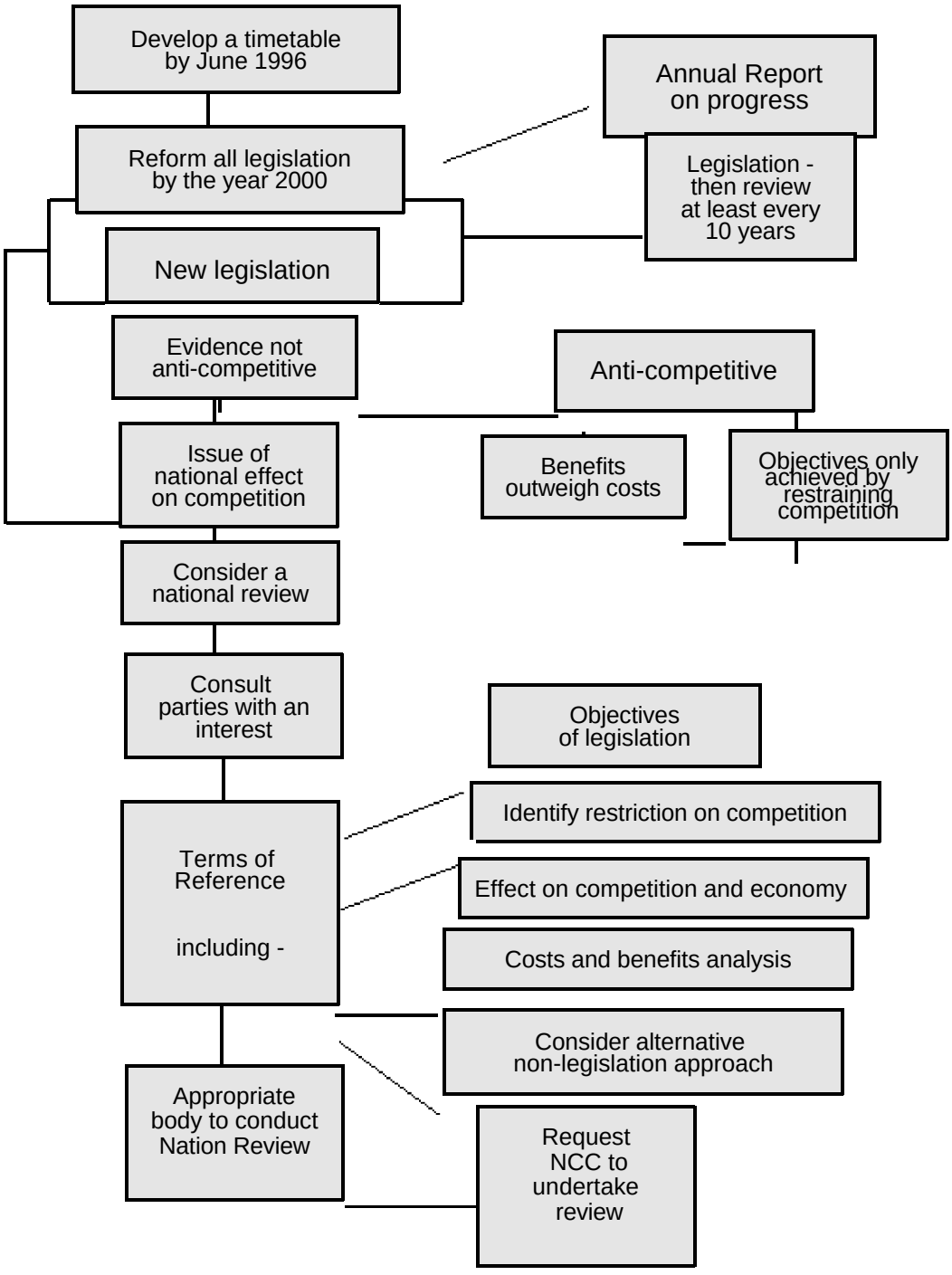
Principle: Legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition, unless -

- the benefits outweigh costs; and

- the objectives can only be achieved by restricting competition.

Chart 6 sets out the requirements for Regulation Review under the Competition Principles Agreement.

Chart 6 **LEGISLATION REVIEW**



CHAPTER TEN

10. COMMUNITY SERVICE OBLIGATIONS AND COMPETITION POLICY

10.1 Introduction

While there has been general consensus about the economic benefits of competition policy, concerns have been raised that neither the Hilmer Report nor the Competition Law addresses adequately the delivery of community service obligations and the promotion of non-commercial goals by government business enterprises.

Structural reform of monopoly government business enterprises is recommended by the Hilmer Report prior to corporatisation or privatisation. All Australian governments agree with the Hilmer Committee's recommendations that both State and Federal government business enterprises should be opened up to competition, if they engage in business including intergovernmental commercial transactions in competition with private firms.

It is accepted that the Hilmer reforms will promote economic efficiency resulting in community benefits such as increased productivity returns, higher wages and cheaper prices for consumers. However criticisms have been raised that neither the Hilmer Report nor the surrounding debate has fully addressed the issue of consumer welfare. Some of these issues have been discussed in this chapter.

10.2 Definition of Terms

All Australian Governments have been pursuing micro-economic reform and restructuring government agencies and the delivery of services. This has been pursued through a number of processes including deregulation, corporatisation and privatisation. It is therefore important to define those terms.

Deregulation involves the removal or minimisation of regulatory constraints with the aim of increasing competition in the market.

Corporatisation usually refers to the incorporation of a government business. The government becomes a shareholder in the new business enterprise which is run along the lines of a private company, subject to any legislation which may impose social or public duty on the corporation.

Privatisation refers to the transfer, usually by sale, of a business from public to private ownership and control.

Examples include the deregulation of telecommunications followed by the corporatisation of Telecom, and the privatisation of Qantas.[106]

---

[106] Nagarajan, V. "Reform of Public Utilities: What About Consumers?", *Competition & Consumer Law Journal*, (1994) 2, p 155.

10.3 Role of Government Business Enterprises

It has been maintained that many monopoly government business enterprises were created to ensure government ownership of essential goods and services. Many of these government enterprises promote non-commercial objectives. For example -

- provision of services to particular groups or geographical locations at subsidised rates;
- promotion of regional development;
- fostering certain industries; and
- ensuring other social objectives including environmental, employment, and affirmative action policies.

The Hilmer Committee recommended that government business enterprises should not be in a position to have a competitive advantage by virtue of their ownership when competing with other businesses. Any advantage they have when competing against private firms should be neutralised. Government business enterprises that provide services to the public directly should be corporatised. The Hilmer Report recommended that all government business enterprises should be subject to competition.

10.4 Hilmer and Community Services Obligations

The Hilmer Report acknowledges that many government businesses are required to perform community service obligations and that some of these community services are funded from cross subsidies between different classes of consumers. The Hilmer Report notes consumer concerns about the continued provision of such services and argues that alternative funding arrangements need to be found. Alternative funding to meet community service obligations could include -

- direct budget funding; and
- funding via levies imposed on competitors in the market, based on their respective market share.

The latter is being done in the telecommunications industry.

It has also been suggested that as a condition for access under the proposed access regime, the access right could be conditional on contributions to a fund to meet community service obligations.

The Hilmer Report recommended mechanisms for the oversight of prices charged by monopoly government business enterprises. There is, however, no in-depth analysis of the non-commercial activities of government business enterprises in the Hilmer Report.

Recommendation One

1. (a) That the Parliament be informed of all community service obligations delivered by government business enterprises; and

(b) the associated costs of these community service obligations.

2. That government business enterprises identify and cost community service obligations delivered by them and report those findings in their Annual Reports in cases where this is currently not done.

10.5 Accountability of Government Business Enterprises

Deregulation to ensure government business enterprises compete effectively and perform efficiently is generally welcomed. However, many believe that this should be accompanied by a comprehensive examination of the implications for accountability of such enterprises and for the delivery of community service obligations.

One of the issues raised is that corporatisation of government business enterprises will mean they will no longer be subject to administrative law mechanisms to ensure the enterprise is accountable for its decision making.[107] Current regulations provide a number of rights against decisions of government business enterprises. Administrative law remedies only regulate activities of the public sector and apply to many non-corporatised government business enterprises. Administrative laws at State level differ. In Western Australia the *Parliamentary Commissioners Act 1971* and *Freedom of Information Act 1992* currently apply to government business enterprises. Such legislation will no longer apply to government business enterprises which are incorporated under the *Corporations Law*.[108]

Upon corporatisation or privatisation both the *Corporations Law* and the *Trade Practices Act 1974* would apply to government business enterprises. These statutes do not provide assistance to consumers seeking redress against decisions made by corporatised or privatised government business enterprises.

In the United States of America public utilities have a common law duty to serve. This duty includes the exercise of judicial control over the prices charged by public utilities and natural monopolies.[109] In Australia the majority of the High Court rejected the American law on public utilities.[110]

In certain circumstances, administrative law could be made to apply to corporatised or privatised

---

107 *Administrative Decisions (Judicial Review) Act 1977 (Cth)* allows persons aggrieved by a decision of a government department to seek a remedy.

108 Came into effect 1 January 1991.

109 Nagarajan, Vijaya, *Op Cit*, 1994, p 167.

110 Bennett and Fischer Ltd v The Electricity Trust of South Australia (1961) 106 CLR 492.

government business enterprises. However, it is argued, where government is in control and there is no competition there is a need for some form of public accountability. Competitive pressures provide some form of substitute for regulatory review.

Another important issue raised is that with corporatisation and privatisation, traditional mechanisms of public accountability are significantly altered. Ministerial direction and parliamentary scrutiny of activities of public utilities are limited.

Neither the Hilmer Report nor the *Competition Policy Reform Act 1995* address the issue of consumer remedies and accountability after the process of corporatisation and privatisation of government business enterprises.

Legislation in New South Wales corporatising the Water Authority[111], provides for a Licence Regulator to monitor compliance of the corporation with certain licence conditions. The legislation also sets out enforcement rights. The corporation continues to be subject to administrative and regulatory laws including Freedom of Information, the Ombudsman, Auditor General, Government Pricing Tribunal, Independent Commission Against Corruption, annual reporting to Parliament, environmental protection and environmental planning. Accountability in this case, is effected by the Minister responsible for the licensing provisions being answerable to Parliament.[112]

Recommendation Two

That industry-specific Ombudsmen be established to investigate and resolve complaints involving a range of issues, including quality of service, billing, disconnection of services provided by the specific utility.

10.6 Scrutiny of Government Business Enterprises

Another issue brought to the attention of the Standing Committee is that privatisation and corporatisation of government business enterprises and commercial-in-confidence considerations arising from the out sourcing of public functions and services will constrain the role of the Auditor-General and Ombudsman informing the Parliament and public. The result would be a reduction in the accountability of organisations which provide services to the public.

The Hilmer Report states that where a government intends to privatise a publicly-owned monopoly, it should restructure the potentially competitive activities to ensure there is no abuse of monopoly power by the privatised entity. The Hilmer Report also states that where a business enterprise is to be kept in public ownership it too should be subject of structural reform to open the market to new entrants to ensure competition and reduce its capacity to dominate the market.

The Standing Committee is of the view that an analysis of the costs and benefits of a particular proposal to separate potentially competitive elements of public monopolies is required. There is also a need to encourage rigorous, open and independent analysis of the options, where competition is being introduced or a public monopoly is being privatised.

---

111 *Water Board (Corporatisation) Act 1994.*

112 Johnson, Craig F, "Sydney Water Inc.", *Alternative Law Journal*, Vol 20, No 2, April 1995, pp 67-70.

10.7 Privatisation

There has been a general move towards privatising government business enterprises in Australia. This move has occurred at the same time as negotiations towards a national competition policy have been in progress. It is therefore not surprising that there has been some confusion about the process of introducing competition into the public sector with the move towards privatisation.

The Hilmer Report states that ownership of a business is not of itself a matter of direct concern from a competition policy perspective. However, privatisation may increase the efficiency of some businesses. Privatisation will not bring significant public benefits if appropriate structural reforms are not undertaken before privatisation. The Hilmer Report acknowledges that privatisation may be driven by budgetary goals. Governments considering privatisation must consider the short term revenue gains and the long-term costs to the economy associated with transferring the ownership of a business which has not been properly restructured, to the private sector.

This view is supported by other analyses and this Standing Committee agrees that privatisation does impact on government finances. Any government intention to privatise should be openly debated and should be subject to prior Parliamentary and public scrutiny.

10.8 Social Policy

Over the years governments have, through their governments business enterprises, been able to achieve social objectives such as -

- providing services to the community at affordable prices;
- promoting regional development;
- encouraging growth in “strategic” industries; and
- assisting certain members of the community.

This type of social policy has been mainly in the form of subsidies which have not necessarily been subject to scrutiny by Cabinet, Parliament or the public.

The issue is now for governments to embrace a community service obligations policy to ensure that community service obligations can be identified and costed by government business enterprises and subjected to review by the Parliament and budget funding. This will ensure any community service obligations are subject to political, parliamentary and budget scrutiny as are other expenditure proposals.

It is accepted that direct budget funding of community service obligations will ensure transparency and accountability to Parliament and the public. It will separate the commercial and social objectives of the government business enterprise and ensure equity in the provision of such obligations by spreading the cost to all State taxpayers, rather than one group of customers subsidising another. Eliminating cross subsidies will enable government business enterprises to set prices on a commercial basis.

An issue that also needs to be addressed is that government business enterprises also have community service obligations which involve concerns for the integrity and safety of essential services.

10.9 Implications of the Removal of Cross Subsidies

Government business enterprises, when making the transition from public utilities to private (or public) competing corporations, need to adjust pricing structures to reflect the real cost of providing the service. That means reducing or eliminating cross subsidies. Cross subsidies have been used in Australia and have worked to the advantage of households at the expense of the business sector, and ultimately, affect the competitiveness of exports on the world market. The removal of cross subsidies may require some form of compensation or gradual phasing out.

10.10 Reporting and Monitoring

The Standing Committee accepts that community service obligations provided by government business enterprises should be monitored and reported in annual reports and should be subjected to scrutiny by the Auditor General. The strategies and policies for such community service obligations and the costs of delivery should be recorded to ensure accountability and assessment. The issue that has been raised is that both the regulator and service providers should be subject to mandatory and regular public reporting of performance and compliance with regulatory requirements.

10.11 Quality and Pricing

Public utilities provide essential services, such as the supply of electricity, gas, water and telecommunications. In the past, these services were primarily provided by monopoly businesses. These industries are now being opened up to competition. If effective competition is in place, consumers can respond to poor quality products or service by withdrawing their custom. However, where the essential service is provided by a local monopoly supplier there is no option of withdrawing custom.

Regulation of prices will be part of the regulatory regime. However, the new regime does not provide a mechanism to regulate quality. The Standing Committee, therefore, addresses this important issue in Recommendation Four, below. There may be incentives for retail businesses to increase profits by reducing service and product quality to their captive consumers. Quality issues include -

- the continuity of supply;
- product quality (electricity voltage, water purity, gas composition);
- emergency and safety procedures;
- security of supply;
- health and safety issues; and
- environmental sustainability.

Other quality issues include -

- debt and disconnection procedures;
- timing and keeping of appointments;
- billing/metering procedures;
- new supply procedures;
- quality;
- speed of repairs and maintenance of equipment;
- supply disruption procedures;
- ease of transactions,
- comprehensibility of documents;
- staff responsiveness;

- working order of equipment;
- communications with customers; and
- provision of advice/usage services.

If the various functions of an industry are carried out by a number of private firms, it is important to determine which one is responsible for a particular aspects of quality.

10.12 Conclusion

The Standing Committee agrees with the view that more detailed consideration needs to be given to the activities of government business enterprises and the provision by them of community service obligations, particularly in the area of energy and water utilities. The Standing Committee agrees that community service obligations should be explicitly costed and publicly stated.

Direct funding from consolidated revenue is regarded as the most accountable, efficient and equitable method of funding community services obligations.[113]

It is acknowledged that environmental damage is one of a number of non-pecuniary costs of national economic growth. The Standing Committee is of the view that the issues of social and environmental concerns need to be addressed.

The New South Wales and Victorian Governments have released policies for the identification and costing of community service obligations. However, there are still difficulties in defining and identifying community service obligations.[114]

Water and energy companies perform a number of community based activities to foster good public relations, for example, sponsorship programs and promotion of environmental awareness. It has been argued that such activities should not be considered as community service obligations.

The identification and funding of community service obligations involves an analysis of the public policy functions of companies who provide essential services. The Standing Committee endorses the view that there should be public participation in this process.

The issue raised in relation to price regulation is that a fair pricing structure should take into account social and environmental impacts of pricing, as well as economic factors. In Victoria, price regulation will be undertaken by the Office of the Regulator-General. There are a number of economic factors which the Regulator-General must take into account in making a price determination. For example, cost of production, return on assets, and financial implications of the determination. The Regulator-General is not specifically empowered to take into account public interest issues or required to hold public inquiries before making a price determination. Concerns have been raised that all pricing inquiries should be open hearings.[115]

While in theory the consumer benefits from competition, the issue is that in the area of gas, water and electricity, consumers will still be subject to monopolistic suppliers. While the Competition Principles Agreement provides for pricing oversight in monopoly markets, this alone may be insufficient. Regulation may be required to -

- establish minimum quality standards in such things as, quality of water, uninterrupted

---

113 Walker, Dieneke, "Competition Policy and Reform of Public Utilities", *Alternative Law Journal*, Vol 19, No 6, December 1994, p 283.

114 *Ibid*

115 *Ibid*, p 282.

supply of energy, minimum professional expertise, and energy and efficiency performance standards;

- minimum standards of information disclosure about the services provided and the terms upon which they are supplied;
- access to efficient and effective dispute resolution mechanisms; and
- prohibition of unfair business practices such as arbitrary disconnections, unfair debt collection practices etc.[116]

Recommendation Three

That participants in a public utility industry be required to be licensed or approved by an appropriate overseeing authority.

Recommendation Four

That a Code of Conduct incorporating quality standards be developed by the relevant industry.

Recommendation Five

That where minimum standards are necessary, legislation should specifically set out appropriate benchmarks for electricity voltage, water quality, safety and other related matters. Such standards should be consistent across the industry.

Recommendation Six

That a supply contract between the supplier and the consumer contain standards relating to quality.

116 Carver, Liza, "The Hilmer Report and competition policy: a consumer perspective", *Bulletin*, No 8, 1995, p 10.

Recommendation Seven

That a consumer charter be developed between the regulator, the utility and consumer representatives and incorporated into standard form contracts to ensure that unreasonable terms and conditions are not imposed.

Recommendation Eight

That as a last resort an implied threat of regulation should exist to ensure all businesses provide quality services to consumers.

CHAPTER ELEVEN

11. WESTERN AUSTRALIAN POSITION

11.1 Introduction

Western Australia commenced work on developing its approach to competition policy reforms in 1993, after the release of the Hilmer Report. Western Australia intended to develop its own legislation to deal with competition policy issues and had in fact drafted its own legislation.

It was originally intended that competition policy reform could be achieved by amendments to the *Fair Trading Act 1987*, by adding the competition code provisions, that is Part IV provisions of the *Trade Practices Act 1974* (Commonwealth). However, this technique would have required the creation of an entire supporting regime for those provisions, including the administration and Tribunal systems.

At subsequent meetings of COAG and the Leaders Forum all jurisdictions decided to enact State legislation to apply the Commonwealth's competition policy reform legislation.[117]

The Western Australian Applications of Laws Bill has been drafted in line with the Competition Principles Agreement and must be passed before July 1996. The *Competition Policy Reform (New South Wales) Act 1995* was developed as a model Applications Bill and all jurisdictions Applications legislation will substantially mirror the New South Wales model. (A copy of the New South Wales legislation is attached at Annexure E).

11.2 Competition Policy - Western Australia

Western Australia has embraced competition policy reforms and has already introduced competition into areas such as the energy sector. Western Australia is moving to ensure it meets its obligations under the national competition policy package and recognises the importance of competition as a means of maximising efficiency in the national and State economies.

The Independent Commission to Review Public Sector Finances, which reported to the State Government in 1993, commented that -

> Competition is the force that generates growth and sustains a vibrant, healthy economy. The public sector must be exposed to a greater degree of competition in the provision of services.[118]

The principles underpinning the national competition policy package are in line with Western Australian objectives.

The Competition Principles Agreement provides States and Territories with some flexibility to develop specific arrangements to meet their special requirements within the context of complying with the broad principles. This is especially so in the areas of structural reform of public monopolies and competitive neutrality.

The Standing Committee agrees with the view that the Hilmer reforms are necessary to impose

---

117 Bodycoat, Mark, *Commonwealth - State Interaction Under the New Legislation*, Paper to Conference on the New Era of Competition Policy Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth.

118 The Independent Commission to Review Public Sector Finances, 1993.

the discipline of increased competition on those sectors of the economy that do not face the discipline of competition from overseas imports.

11.3 Application of Competition Policy in Western Australia

The Standing Committee notes that the implications of adopting the competition policy reforms has significant ramifications for the operation of Government in Western Australia. The Government, in addition to its traditional provision of a range of community services, has also been involved in a number of activities which have commercial and trading characteristics. The application of competition policy reforms will require the Government to reassess and modify existing operations. There are substantial implications for the activities of statutory marketing authorities, the use and operation of port and other transport facilities and the production and distribution of electricity, water and gas.

11.4 Commonwealth/State Co-operation

The competition policy reforms are being implemented by a co-operative agreement between the Commonwealth, the States and Territories. The reforms will expose State electricity, gas and water utilities to national competition rules.[119] Reforms are a co-operative effort and are accompanied by some reform of Federal-State financial relations.

Negotiation between the States, Territories and the Commonwealth on competition policy reform raised the issue of the implications of competition policy for State and Territory revenues. The Commonwealth agreed to provide financial assistance to the States. The concern of the States and Territories to maintain their revenue share is legitimate, but that is a broader issue and should not be confused and linked to the issue of competition reform.

The loss of monopoly profits from State and Territory reform of statutory authorities would be offset by the increase in tax revenue and dividends resulting from the reforms.[120]

11.5 Administration of Competition Policy in Western Australia

Western Australia has a small population distributed unevenly over a large land area. The State's size and remoteness raised concerns that a centralised regulatory and administrative agency which did not have a large representation in Western Australia may not provide a sufficient regulatory regime in Western Australia. The number of officers in the former Trade Practices Commission located in Western Australia, was approximately 11 or 12 officers. This was considered inadequate to provide adequate regulatory and administrative services and advice to both business and consumers in Western Australia.

A Memorandum of Understanding between the Ministry of Fair Trading and the Trade Practices Commission (now the Australian Competition and Consumer Commission) is intended to be a guide for the two agencies to promote and administer competition policy in Western Australia through a co-operative and efficient use of the resources of both agencies. The Memorandum provides that parties will regularly, fully and frankly discuss priorities to identify areas, opportunities and methods of co-operation and for the referral of matters to the other.

---

119 Megalogenis, G.,"Warning on Hilmer reforms", *The Australian*, Wednesday, 8 February 1995.

120 "The Hilmer reforms' big pay off", *Australian Financial Review*, Tuesday, 7 February 1995.

11.6 Structural Reform

Western Australia has announced a number of structural reforms of public monopolies. They include the restructure of Transperth to separate its dual roles of public transport co-ordinator and public transport provider. Metro Bus is now responsible for the provision of public bus transport however it is intended that Metro Bus services will be put out to competitive tender with private bus operators. The Government intends to follow a similar tender process for all public rail transport.

Reforms have also resulted in the creation of separate gas and electricity utilities. The Government also intends to separate the activities of the Water Authority.

11.7 Access to Essential Facilities

In order to introduce competition in some markets, competitors need to be assured of access to essential facilities which cannot be duplicated economically. Western Australia has initiated reforms to ensure access to the Dampier to Bunbury gas pipeline. This will allow customers to contract for gas supplies with companies other than, but not excluding Alinta Gas. The Government has also signalled the introduction of open access to Western Power's high voltage transmission system by July 1997.

Mr Wood, Acting Chief Eexecutive at the Policy Office of the Ministry of Premier and Cabinet advised the Standing Committee -

> The essential difference would be that most of our access regimes are for projects as struck within the State agreements. To achieve effective access you abide by the terms of the agreements and ultimately are left with the decision of government, which could be said to be a political decision about enforcing that particular provision. The regime under the national package is much more of a procedural one, you could say mediated.[121]

Mr Wood also advised the Standing Committee that -

> The parties would mediate and would seek remedy under the package. The NCC may be party of that ... in some respects that access regime, being as it is quite complex procedurally, may in fact, be a barrier to gaining access rather than to promoter or access. I think it will also be incumbent on the NCC to, in fact, look quite closely at that and find out whether those regimes are, in fact being effective.[122]

11.8 Prices Oversight

Under the national competition policy package, prices oversight of government trading enterprises which are monopoly, or near monopoly suppliers of goods and services, are necessary to ensure there is no abuse of market power. All pricing proposals by government trading enterprises in Western Australia require approval by the Cabinet. However, the issue for the Government is the need to consider establishing a pricing tribunal to provide prices oversight advice.

Mr Wood advised the Standing Committee that there has been no decision about setting up a prices oversight mechanism, but it was important to avoid duplication between Federal and State processes.

---

[121] Transcript of Evidence by Mr Stephen Wood, Acting Chief Executive, Policy Office, Ministry of Premier and Cabinet taken at Perth, Wenesday, 27 September 1995, p 2.

[122] *Ibid*

11.9 Regulation Review

The Industry Commission classified regulation into three groups as set out below in Table 13.

Table 13[123]

Regulation Types	
1. Primary legislation	Acts of Parliament
2. Subordinate legislation	All rules or instruments which have force of law made by authority to which Parliament has delegated part of its legislative power - • statutory rules; • disallowable instruments; and • other subordinate legislation.
3. Administrative decisions and instruments	made by public officials and involve application of legislation to particular circumstances.

Significant work is required in the area of regulation review. However, there has been some reforms involving deregulation in certain areas including the gas supply market in the Pilbara which has been fully deregulated with the result that gas supply prices in the region have fallen by more than half. The gas market serviced by the Goldfields Gas Pipeline will also be deregulated. There is no longer a requirement that major bulk freight traffic must be carried by rail which allows competition between road and rail transport.

Mr Wood advised the Standing Committee that no structures had been put into place to begin work on regulation review, although two officers had been sent to Queensland to discuss the process of regulation review in that State. However, work has begun on a package designed to show agencies how to approach regulation review. He advised the Standing Committee that -

> It needs to be discussed with the ministerial group,[124] sent out to the departments, have information collected about regulation and then with that information we need to structure it in a way where we can tackle the priorities for regulation review.[125]

Currently there is no centralised mechanism in Western Australia to review legislation. However, there are a number of arrangements which contribute to the assessment of the need for regulation and examination of proposals which will have regulatory effect. For example, the Cabinet process involves the circulation of submissions to agencies for comment. As well a Regulation Review

---

123 Industry Commission, *Regulation and its Review: 1994-95*, September 1995, Panther Printers, Canberra, p 62.

124 The Western Australian Cabinet on Monday 25 September 1995 endorsed a ministerial group to handle the co-ordination of the implementation of the competition reform package. The Ministerial group includes, Ministers Foss, Barnett, Charlton, Cash, Cowan and House.

125 Transcript of Evidence by Mr Stephen Wood, Acting Chief Executive, Policy Office, Ministry of Premier and Cabinet taken at Perth, Wednesday, 27 September 1995, p 3.

Plan, drawn from the private sector which operates on a voluntary basis looks at red tape in small business. The Law Reform Commission generally reviews the impact of legislation in Western Australia. The Standing Committee is of the view that it would be clearly preferable to have an integrated regulation review process to consider regulatory impacts on the economy and the community.

The Industry Commission in its Report on Regulation Review stated that -

> The Commonwealth and most States and Territories have in place regulation review policies. While the commencement dates of such activities differ, as do the levels of activity and success, some regulatory review elements are common to most States and Territories. These include -
>
> - the existence of a regulatory review unit; and
> - a subordinate legislation Act which often prescribes a requirement for regulatory proposals to be accompanied by a Regulation Impact Statement (RIS) and/or for the staged repeal or review of regulation. [126]

Table 14 summarises the regulation review mechanism in place in each State and Territory -

Table 14[127]

State and Territory Regulation Review Mechanisms

State/Territory	*Regulation review Unit*	*Subordinate Legislation Act*	*RIS or cost benefit analysis*	*Staged repeal*
NSW	√	√	√	√
VIC	√	√	√	√
QLD	√	√	√	√
WA	√		√	√
SA	√	√	√	√
TAS	√	√	√	√
NT	√			
ACT	√		√	

√ Western Australia and the Northern Territory do not have formal regulation review units as exist in the other States and Territories. However, regulatory review functions are largely undertaken by the Ministry of Premier and Cabinet and the Small Business Development Corporation in WA, and the Department of Asian Relations, Trade and Industry in NT.

126 Industry Commission, *Regulation and its Review: 1994-95*, September 1995, Panther Printers, Canberra, p 62.

127 *Ibid*, p 63.

The Standing Committee has set out in Tables 15 to 21, the procedures required and the structures that may need to be adopted to enable an appropriate system of regulation review to be conducted.

Table 15 sets out the procedures required and the structures that need to be set in place to conduct a review of proposed regulation.

Table 15

TO REGULATE OR NOT TO REGULATE?
Phase 1: Key Issues
1. Identify the Regulatory Objective What is the problem? Why is regulation needed? What are the features? Is any regulation in place? If so, what is it? Is it to be enforced, and if so how? Are any penalties needed? If so, are they civil, criminal, corporate, personal liability? Who will it effect? What are the costs? **2. Is there an Alternative to the Regulation Proposed?** No action, rely on market and existing laws. Amend general liability law to be laws of strict liability or no fault. Devise information strategies, counselling, use media. Devise market based instruments to impose taxes, grant subsidies or permits. Impose standards, principles, performance based or prescriptive. Pre-market assessment such as, listing, certification, licensing. Post market reviews leading to exclusion, bans, recalls, licensing revocation, negative licensing. Community right to know, mandatory audits, quality assurance schemes, self regulation, co-regulation.

Before a cost/benefit analysis can be conducted the groups affected by the regulation must be identified. Table 16 sets out the procedure to identify such groups.

Table 16

IMPACT ASSESSMENT
Phase 2: What is the effect of the regulation:
Identify the groups affected by the regulation. Government - State Local Business - big business small business importers exporters suppliers to local government government business enterprises Consumers - groups have different levels of information and abilities to process information. geographic areas - urban, rural different characteristics: age, language, physical, cultural, family, income/wealth environmental groups

The following factors may be taken into consideration when conducting a cost/benefit analysis of the proposed regulation as outlines in Table 17 below.

Table 17

ASSESSMENT OF COST/BENEFITS
Phase 3: Factors to be considered in cost/benefit analysis
A Costs **1. Costs to Government** Number of staff, salaries Other costs: advertising, accommodation, travel Net revenue loss from fees, licences, related charges Enforcement costs **2. Costs to Business affected** Paper burden or administration costs of complying and reporting. Licence fees or charges. Changes to production, transport, marketing procedures. Alternative supply. Delays introducing goods to the market or restrictions on product availability. **3. Costs to the Community** Higher prices for goods or services. Reduced availability of goods and services. Delays introducing goods to the market or restriction on product availability. **B Benefits** Economies of scale. Reduced costs or prices from monopolies. Reduced workplace accidents and public health. Improved environmental outcomes and community amenities. Improved information to: business, the workforce, consumers or government.

Table 18 emphasises the need for consultation as part of the process in regulation review.

Table 18

Phase 4: Consultation
Parties to be consulted include - Ministers, departments and agencies. All levels of governments, particularly where the regulatory process arises from negotiation between different levels of government and/or involves overlapping responsibilities. Business, consumers, unions, environmental groups, and other interests groups affected. Other groups identified in Phase 1.

Table 19 addresses the need to consider the most appropriate method for administering the proposed regulation.

Table 19

Phase 5: Administration
Administrative proposal should consider - Reduction of administrative burden on business. Feasibility of “one stop” facilities for the regulation. Administration by existing staff in other departments or agencies. Authority to waive of modify regulation. Appeal process.

Table 20 sets out the enforcement options to be considered.

Table 20

Phase 6: Enforcement
Enforcement procedures - Sanctions: administrative, civil or criminal. Liability: corporate or directors personal liability. Risk based enforcement strategy. Enforcement pyramid: warnings, fines, licence suspension or revocation.

It is important that regulation is monitored for amendment or removal when or if the circumstances which led to its introduction change. Consideration of the following procedures may assist in the monitoring process as outlined in Table 21.

Table 21

Phase 7: Review of Regulation
Include a *Sunset* clause - Include ongoing arrangements for consultation with groups affected. Include provision for regular review. Include provision for regular reporting for example in the Annual Report.

Recommendation Nine

That a formalised system of regulatory review be established in Western Australia, which should report to the Parliament through the responsible Ministers and be referred to the appropriate Standing Committee for its reponse.

11.10 Submissions Received

The Standing Committee called for and received a number of submissions. The submissions supported a national competition policy. They raised a number of matters which the Committee believed are relevant and should be addressed in this report.

The Pastoralists and Graziers Association of Western Australia together with an industry wide coalition of private enterprise representatives from all grain marketing chain sectors raised its concern that statutory marketing authorities will attempt to seek exemption from the national competition policy. The Association stated that exemption of statutory marketing authorities from the Competition Code would be economically counterproductive and would result in sub-optimal market structures, conduct and performance of Western Australian agriculture. The submission, on behalf of a comprehensive industry group comprising farming, transport, storage, manufacturing and marketing sectors argued that Western Australian agriculture and associated value added industries will be disadvantaged and become increasingly uncompetitive if statutory marketing authorities are exempted.[128]

The Association also argued that -

> Past arrangements have been developed and assumed that Western Australia would always be an exporter of homogeneous raw commodities. Current statutory market arrangements continue that approach. The result has been immeasurable damage to industry in Western Australia. Investors are unwilling to invest capital resources in an economy in which major marketing organisations can arbitrarily permit or disallow exports, or value added process. [129]

---

[128] Submission: The Pastoralists & Graziers Association of Western Australia (Inc).

[129] *Ibid*

It further argued that -

> The result is that unlike the Eastern States, where markets are freer, the Western Australian grain sector has not developed a significant value added industry. Western Australia has all the ingredients - proximity to markets, raw materials and industry skills but Western Australia appears to be hampered by an uncertain investment environment which has deprived Western Australia of the investment and employment opportunities flowing from value added manufacture in Western Australia.[130]

The submission attempts to demonstrate the importance of agriculture in the economy, and the extent of unnecessary statutory marketing intervention in markets. The submission refers to the inefficiencies generated by State marketing authorities and the loss of competitiveness and industry to Western Australia.

This view was shared by the Pastoralists and Graziers Association of Western Australia, Meat and Livestock Committee. The Associations stated that -

> The current *Lamb Marketing Act* does not allow private enterprise to develop new export or interstate markets for lamb in Western Australia.[131]

The Association also believes that -

> ... an environment for competition needs to be created to determine whether our Statutory Marketing Authorities (SMA's) have the ability to market our lamb effectively for the export market. Competition would also determine if there are potential markets overseas or interstate to ensure a viable lamb industry for the future.[132]

They also stated -

> While the Australian meat industry is gradually becoming self regulated, Western Australia continues to be dominated by SMA's in agriculture.[133]

---

130 *Ibid*

131 Submission: The Pastoralists & Graziers Association of Western Australia (Inc.), Meat and Livestock Committee, p 5.

132 *Ibid*

133 *Ibid*

Recommendation Ten

That, as a matter of priority, the Government continues its review of any anti-competitive effects of Statutory Marketing Authorities.

The Western Australian Divisional Council of the Australian Institute of Valuers and Land Economists (Inc) submitted that it -

> ... acknowledges that Australia has become a single integrated market and philosophically supports the concept of economic reform to facilitate competition across Australia [134]

It also stated that -

> The disadvantages of lack of free trade have been illustrated in the valuation profession by the existence of state based legislation which has to a degree restricted the flow of employment across state boundaries. The standards of education and training also have carried across states. Therefore, the implementation of a policy and strategies to standardise these matters is welcomed.[135]

Professional groups such as the Australian Association of Social Workers do not oppose the application of uniform competitive conduct rules, but would like to see an assessment of the social costs and benefits of a national competition policy.[136]

The Australian Chamber of Shipping, Western Australian State Committee supports the implementation of a national competition policy.

> The Chamber supports initiatives which will enable transport infrastructure decisions to be made in a consistent and transparent manner across all transport modes, and allows charges to be set in an equitable way which encourages road, rail, marine and air transport to compete for freight.[137]

The Association of Mining and Exploration Companies (AMEC) supports in principle the implementation of a national competition policy along the lines of that proposed in the Hilmer Report. It states -

> This policy is consistent with AMEC's view that government, as a matter of principle, should not be the operator of services which can be undertaken by the private sector. However, where it chooses to do so, Government should abide by the same competitive rules as those which apply to the private sector. AMEC's view is that free and open competition should be the normal business environment for all organisations. It is only in exceptional circumstances, when the reasons are compelling, that this rule should be modified to take into account some form of market failure.[138]

The Pharmaceutical Council of Western Australia supports the principles of micro-economic reform and a national competition policy but is concerned that the stated purpose could be

---

134 Submission: Australian Institute of Valuers and Land Economists (Inc.) Western Australian Division, p 1.

135 *Ibid*

136 Submission: The Australian Association of Social Workers Ltd.

137 Submission: Australian Chamber of Shipping Ltd, Western Australian State Committee.

138 Submission: Association of Mining and Exploration Companies (Inc).

misinterpreted to precipitate change in the structure of the pharmacy profession.[139]

A submission was received from the Pharmacy Guild of Australia (Western Australian Branch) who addressed the issues of national competition policy and noted the possible impact on the ownership provisions of pharmacies. The Guild was concerned that should the ownership provisions change there could be resultant derogation of the quality of care to the community. The Guild also submitted that -

> the Pharmacy industry is similar to other industries, it is also very different because the supply of medicines is limited to suitably trained people in order to encompass the public health protection requirement.
>
> ... improvements in services and business efficiency produced by the work of the Pharmacy Restructuring Authority are consistent with the Hilmer Report. The Hilmer Report has been considered in negotiations on the new Pharmacy Agreement.[140]

[139] Submission: The Pharmaceutical Council of Western Australia.

[140] Submission: The Pharmacy Guild of Australia, Western Australian Branch.

CHAPTER TWELVE

12. CONCLUSION

12.1 Overview

The Hilmer Report was primarily a set of proposals for reforming and expanding competition policy in Australia and part of the micro-economic reform agenda. It entailed the extension of trade practices legislation to sectors of the economy previously sheltered from competition and the establishment of a new policy framework which recognises Australia as a single, integrated market, increasingly exposed to international competition.

The Hilmer reforms represented a significant test for co-operative federalism in Australia and has important implications for the role, structure and pricing strategies of public utilities. The Hilmer reforms also promote moves towards regulatory reform.

The Industry Commission's analysis of the growth and revenue benefits of Hilmer and related reforms demonstrates the benefits of such reforms for the Australian economy to produce gains in output, consumption and employment. However, while such benefits of reforms are widely shared in the community, it is recognised that the introduction of competition in previously protected sectors can affect the employment conditions of people in those sectors.

The *Competition Policy Reform Act 1995* and the Intergovernmental Agreements together with the State application laws implement the thrust of the Hilmer recommendations. Implementation of the national competition reforms involved co-operation of Federal, State and Territory jurisdictions to ensure the application of the national competition principles to all Australian businesses regardless of ownership or legal form and the implementation of structural reform of public utilities.

The Standing Committee is of the view that it is an important factor that governments recognise economic efficiency is one element of broader public policy which includes social considerations. An important issue is that governments must not only take into account competition and efficiency considerations, but also other policy objectives in making policy decisions.

For these reasons competition policy does not mean wholesale privatisation and dismantling of the public sector. The relevance of competition policy is significant to the more commercial functions of business activity of government functions and are not relevant for the non-commercial functions undertaken by governments.

Over the last century large publicly-owned corporations have emerged as a new form of economic institution and as a major force in domestic and international economic performance.

The revolution in transportation and communications technology is having a profound impact on society. There has been a shift in focus from national economies to a global economy. The global information economy requires every nation to participate. Australia is interconnected in the world's finance markets. Deregulation of financial sector in Australia has meant Australian Governments borrow in a highly competitive environment.

The growth of a global economy has meant that private corporations are no longer confined to the national state but have become transnational in scope. Australian governments have been co-operating and standardising regulatory regimes, to try and capture the benefits of international

trade. The consequences of globalization and internationalisation will be significant for state sovereignty and the future co-operation of the federal system in the Australian federation.

The information revolution and the new technology is transforming society and integrating organisations across the globe. Some new public sector organisations are now global in nature and involve foreign corporations and foreign governments.

Most government business enterprises are State owned but the globalization of public services has subjected them to competition and international involvement. Government agencies and privately owned public utilities from all over the world can now offer services once provided by State government agencies. This is an incentive for subjecting the provision of these services to competition. As more government business enterprises are privatised, there is a need to redefine the notion of state sovereignty and limit it to core government services.

Conducting business on a global scale means that corporations are subject to national laws, let alone numerous State based laws which add to the cost of conducting business. That is why the world finance sector has been involved in promoting the standardisation of regulatory systems through semi-governmental organisations.[141] Governments are increasingly bound through a number of memorandums of understanding which will help define the future direction of Australia's business law.[142] Such commitments have been entered into voluntarily with the consent of the States and the Commonwealth prior to ratification.

International standards have increasingly become the basis for regulation. The Standing Committee notes that Australian States have been able to adapt quickly to the internationalisation of law-making and have put in place legislative reforms providing for mutual recognition of regulations governing the sale of goods and services. States are thus able to retain control of regulation while at the same time achieving harmonisation of standards across Australia.

12.2 The Committee's Perspective

While the Standing Committee agrees with the sentiments of the Hilmer Report on the merits of a national competition policy, it believes that implementation of the Hilmer reforms has proceeded too hastily. The legislative package was released for public comment, but the Standing Committee believes that more time for consideration of the mechanism and proposed administration would have been useful.

The Standing Committee has reviewed the legislative package and has made a number of observations and recommendations. The Standing Committee believes that there is a need to ensure that the National Competition Council (NCC) is effective. To be effective it should be autonomous and have the scope to determine impediments to competition in areas of market structure, legislation (and regulation), access matters, exemptions and competitive neutrality. The NCC should provide independent advice to governments. All jurisdictions should have access to the NCC and have equal rights and responsibilities in respect of its function. The Standing Committee is of the view that the NCC should not be *another bureaucracy* but central to the effectiveness of national competition policy.

---

141 The International Organisation of Securities Commissions (IOSCO), was established in 1974 to bring together securities regulators and self-regulatory private sector organisations from around the world (including the Australian Stock Exchange). Agreements reached at such a forum resulted in the passing of the *Mutual Assistance in Business Regulation Act* by the Commonwealth Parliament in 1992 under which Australia agreed to use its sovereign power to help the business regulators of foreign governments, and vice versa.

142 Sturgess, Gary L., *Untidy Federations: The Impact of Internationalisation on the Australian Federal System*, Paper to "Australian Federalism", A Conference held by the Centre for Comparative Constitutional Studies, Melbourne, 14 July 1994.

The issue has been raised that the access regime is complex, cumbersome and uncertain and may be subject to potential disputation with inherent delays and expense. Another issue raised is that the ACCC should be provided with sufficient financial resources and technical skills to enable it to perform its functions effectively.

The Standing Committee agrees with the Business Council of Australia that certainty is required as to where the access regime applies. It should be limited to areas of genuine concerns about competition and the process should not be unduly lengthy or costly.

The Business Council of Australia was of the view that -

> The access regime be limited to certain types of infrastructure, that is electricity transmission lines, gas transmission pipelines, railway tracks, seaports, airports, telecommunication networks and postal services. [143]

The NCC could add to the list only after review. The Standing Committee sees the merit in the above sentiments and agrees that the appeal procedures should be streamlined. The Standing Committee is of the view that the access regime should be subject to review after five years' operation.

The Business Council of Australia believes that -

> The scope of exemptions needs to be reduced ... exemptions which breach to competition law should be subject to assessment by the National Competition Council.[144]

The Standing Committee agrees that an independent expert authority should assess exemptions from the access regime to ensure that all key areas are subject to competition policy.

The Standing Committee believes that clearly stated goals should be identified by both the NCC and the ACCC. Statutory policy goals will increase transparency and facilitate the development of a consistent and sensible approach.

The Standing Committee is firmly of the view that the goal of competition should be to promote economic efficiency which benefits the community. One of the goals of the access regime should be to promote consumer welfare and economy wide efficiency.

The Standing Committee is of the view that legislation review is not to override other Government policy objectives in the areas of social justice, environmental regulation, education, health, occupational health and safety, *et cetera,* but that legislation review will be useful in improving efficiency and equity in some areas.

The Standing Committee notes that Governments have agreed to undertake review processes before making decisions to privatise monopolies, and before competition is introduced into monopoly areas. Governments are not compelled to privatise government business enterprises.

The Standing Committee is of the view that there are important implications for federalism as the most significant reforms relate to State organisations. Examples include reforms to electricity, gas, water, ports, airports and other organisations. The effects of these changes will be felt within

---

143 "Submission on the National Competition Policy Draft Legislative Package", *Business Council Bulletin,* October 1994, p 33.

144 *Ibid*

the relevant States. Significant to the States is the extension of the *Trade Practices Act 1974* to cover all parts of the economy. Areas including agricultural marketing boards, the professions, unincorporated businesses and businesses trading within a State. However, the Standing Committee notes that the Industry Commission Report on the Hilmer recommendations reported that the States would gain from the adoption of the proposed reforms.

Finally, the Standing Committee observes that the COAG Agreements and the associated legislation are a balance between achieving national economic objectives, such as greater economic efficiency and genuine State level political considerations. The States are involved in reforms to the law and appointments to both the NCC and the ACCC and the State regulators have a role within certain criteria.

SCHEDULE 1

Witnesses

Date	Witness	Organisation
2 November 1994	Dr Frank Harman	Senior Lecturer in Economics, Murdoch University, Western Australia
2 November 1994	Mark Ian Bodycoat	Legal Officer, Ministry of Fair Trading, Western Australia
1 March 1995	Nicola Clare Cusworth	Economist, Chamber of Commerce and Industry Inc. (WA)
10 May 1995	Mr Tony Cooke	Acting Secretary, Trades and Labour Council of Western Australia
27 September 1995	Mr Stephen Wood	Acting Chief Executive, Policy Office, Ministry of Premier and Cabinet, Western Australia

SCHEDULE 2

Informal Meetings with the Committee

Date	Witness	Organisation
7 October 1994	Professor Bob Baxt	Professor of Law, Monash University, Victoria; Partner, Arthur Robinson and Hedderwicks, Melbourne, Victoria; and Former Chairman, Trade Practices Commission
10 October 1994	Mr Geoffrey Taperell	International Partner, Baker and McKenzie, Sydney, New South Wales; and Member, Independent Inquiry into National Competition Policy
21 June 1995	Mr Garry Banks	Executive Commissioner Industry Commission
21 June 1995	Mr Robert Kerr	First Assistant Commissioner Industry Commission
21 June 1995	Mr John Williams	Inquiry Director Industry Commission
21 June 1995	Mr Tom Nankivell	Director Office of Regulation Review Industry Commission
21 June 1995	Mr Andrew Wait	Industry Commission Research Officer
21 June 1995	Mr Phillip Noonan	Acting Executive Director Federal Bureau of Consumer Affairs
21 June 1995	Mr Peter Clarke	Director, Strategic Policy Directorate Federal Bureau of Consumer Affairs
21 June 1995	Mr Brian Cassidy	First Assistant Secretary Structural Policy Division The Treasury, Canberra
21 June 1995	Mr Michael Buckley	Director Market Structure Section The Treasury Canberra

21 June 1995	**Mr Mark Johannesen**	**Competition Policy Branch The Treasury Canberra**
21 June 1995	**Hon. George Gear, MP**	**Assistant Treasurer Canberra**

SCHEDULE 3

Submissions

The Committee received 19 responses to its request for submissions to this report. The following is a list of organisations who prepared a detailed submission for this inquiry.

Date	Name	Organisation
8 May 1995	**Gary McGill**	**Chairman, Pastoralists and Graziers Association of Western Australia (Inc)**
17 May 1995	**Yvette Buxton**	**Executive Officer, Australian Institute of Valuers and Land Economists (Inc)**
22 May 1995	**E.W. Brockman**	**Chairman, Meat and Livestock Committee, The Pastoralists and Graziers Association of Western Australia (Inc)**
25 May 1995	**R.J. Brennan**	**Register, The Pharmaceutical Council of Western Australia**
26 May 1995	**Nick Geronimos**	**Director, The Pharmacy Guild of Australia, Western Australian Branch**
31 May 1995	**Roger B. Wilkins**	**Director-General, The Cabinet Office, New South Wales**
21 June 1995	**Brian E. Wooller**	**Branch President, The Australian Association of Social Workers Ltd**
25 June 1995	**Adrienne Wright**	**Executive Officer, Association of Mining and Exploration Companies (Inc.)**
11 July 1995	**Graeme Wilson**	**Chairman, WA State Committees Australian Chamber of Shipping**

BIBLIOGRAPHY

Adelaide Steamship Co. Ltd *v* Amalgamated Society of Engineers (1920) 28 CLR 129.

Arbour, John, "The Great Australian Sell-Out", *Australian Business Monthly*, May 1995, pp 32-37.

Arbraw, John, "When in Doubt .... Who You Gonna Call?" *Australian Business Monthly*, April 1995, pp 45-48.

Attorney-General, *Ministerial Statement: Standing Committee on Legal and Constitutional Affairs Government Response*, House of Representatives, Canberra, 22 August 1991.

Baxt R, "Competition Policy - what price prices surveillance", *The Australian Law Journal*, Vol 69, No.2, Feb 1995, pp 86-89.

Beale, Roger, "National Competition Reform", *Commercial Law Association Journal*, December 1994, pp 26-27.

Beale, Roger, "A Commonwealth Perspective on Competition Policy", *Business Council Bulletin*, December 1994, pp 28-32.

Bodycoat, Mark, *Commonwealth - State Interaction Under the New Legislation*, Paper to Conference on the New Era of Competition Policy Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth.

Burton, Tom, "Pressure on the regulators", *Australian Financial Review*, Friday, September 9, 1994, p 24.

Carver, Liza, "The Hilmer Report and competition policy: a consumer perspective", *Bulletin*, No 80, 1995, pp 8-10.

Cassidy, Brian, *Commonwealth - State Interaction Under the New Legislation*, Paper to Conference on the New Era of Competition Policy Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth

Chamber of Commerce and Industry, Western Australia, *Economic Reform and the Hilmer Report: A Discussion Paper*, May 1994.

Commission of the European Communities, *Growth Competitiveness Employment - The Challenges and Ways Forward into the 21st Century* (White Paper), Brussels, 1993.

Competition Directorate of the European Commission, *Competition Policy Newsletter*, No 4, Vol 1, Spring 1995.

Competition Policy Reform Act 1995.

Competition Policy Reform Act (New South Wales) 1995.

Competition Policy Reform Bill 1995.

Competition Policy Reform Bill 1995, Explanatory Memorandum.

Competition Policy Reform Bill 1995, Intergovernmental Agreements, April, 1995.

Competition Policy Reform Bill 1995, Second Reading Speech.

Competition Policy Task Force, "Hilmer is Top Priority in Micro-economic Reform", *Business Council Bulletin*, June 1994, pp 10-11.

Competition Policy Task Force, "Position Paper on the Hilmer Report", *Business Council Bulletin*, July 1994, pp 6-15.

Coper, Michael, "Constitutional Aspects of Extending the Trade Practices Act", *Australian Federal Reporter*, No 16, December 1993, pp 3-4.

Corones, Stephen, "Restrictive Trade Practices, The Hilmer Report and its Potential Implementation", *Australian Business Law Review*, Vol 21, No 6, Dec.1993, pp 451-455.

Delegation of the European Commission to Australia and New Zealand, "Recent Developments in Competition Law and Policy in the European Union", *European Union News*, Vol 12, No 6, August/September 1994, pp 1-2.

Delegation of the European Communities to Australia and New Zealand, "State Aids", *Background*, April 1995, Ref: 5/95.

Dnes, Anthony, "How to Privatise National Monopolies", *Policy*, Summer, 1989, pp 13-16.

Donald, Bruce, "Big Change is the National Management of Competition", *Australian Financial Review*, Tuesday, 18 April 1995.

Ehlermann, Claus-Dieter, "The International Dimension of Competition Policy", *Fordham International Law Journal*, Vol 17:833, 1994, pp 833-845.

European Commission, *European Community: Competition Policy 1994*, Brussels.Luxembourg, 1995.

Fels, Alan, *Access to essential facilities under the new legislation*, Paper to Conference on the New Era of Competition Policy Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth.

Fels, Alan, *Competition Policy, COAG and the Future*, Paper to National Conference on Micro-economic Reform and Federalism, Federalism Research Centre, Australian National University, 22 June 1995.

Financial Institutions (Western Australia) Act 1992.

Gear, George, "Current developments in Competition Policy", *Bulletin* No. 80, 1995, pp 13-18.

Guille, Dr Howard, "Market Madness: The Hilmer Report", *Wiser*, Vol 1, No 2, March 1994, pp 37-40.

Harbord, David, or Hoehm, Tom, "Barriers to Entry and Exit in European Competition Policy", *International Review of Law and Economics*, 14, No. 4, Dec.1994, pp 411-435.

Harman, Frank Dr, *Access to Natural Gas Pipelines in Western Australia*, Paper prepared for the 23rd Conference of Economists at Surfers Paradise, Queensland, September 1994.

Healey, Deborah, *Australian Trade Practices Law*, 2nd Edition, CCH Australia Ltd., Sydney 1993.

Hilmer, Professor Fred, "Future Directions: National Competition Policy'" Second Annual Micro-economic Reform Conference, *Business Council Bulletin*, January/February 1994, pp 29-31.

Hilmer, Frederick G, "Implementing a long-term goal", *Australian Quarterly*, Vol 66 (2), Winter 1994, pp 64-84.

Hooper, Narelle, "How Competition Policy Will Work", *Business Review Weekly*, April 24, 1995, pp 32-24.

Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330.

Independent Committee of Inquiry, *National Competition Policy*, August 1993, AGPS, Canberra.

Industry Commission, *Annual Report*, 1993-94, AGPS, Canberra.

Industry Commission, *Energy Generation Distribution*, Report No. 11, 1991, AGPS, Canberra.

Industry Commission, *Impediments to Regional Industry Adjustments*, Report No. 35, 1993, AGPS, Canberra.

Industry Commission, *Rail Transport*, Report No 13, 1991, AGPS, Canberra.

Industry Commission, *Regulation and its Review: 1994-95*, September 1995, Panther Printers, Canberra.

Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms*: *Report to the Council of Australian Governments*, March 1995, AGPS, Canberra.

Johnson, Craig F., "Sydney Water Inc.", *Alternative Law Journal*, Vol 20, No 2 April, 1995, pp 67-70.

Kain, John, "National Competition Policy: Overview and Assessment", *Parliamentary Research Service*, Research Paper No 1, February 1994.

Kasper, Wolfgang, "High on the Performance Agenda: Competitive Federalism", *Policy*, Vol 10(3), Spring 1994, p 10-14.

Kewalram, Ravi P, "The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy", *Trade Practices Law Journal*, Vol 2, December 1994, pp 188-206.

King, Hugh, *How Initiatives in Transport at State and Federal Levels will be Affected by the National Competition Legislation*, Paper presented to the IBC Conference "Land Transport Infrastructure", 8 August 1995.

King, Stephen, "Competition: The Missing Link in Australia's Privatisation Program", *Policy*, Summer 1994-95, Vol 10, No 4, pp 12-16.

Langoulant, John, *Implications of National Competition Policy for the Western Australian Public Sector*, Paper to the Conference on the New Era of Competition Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth.

Matthews, Race, "Why not Parliamentary Commissioners?", *Directions in Government*, March 1995, Vol 9(2), p 4.

McHugh, Hon. Jeanette, "Consumers and the Reform of Australia's Utilities: Passing on the Benefits", *Consumer Affairs*, Spring 1994, pp 37-39.

Megalogenis, G., and Chan, G.,"States reject secret Hilmer Report finding", *The Australian*, Tuesday, 7 February 1995.

Megalogenis, G.,"Warning on Hilmer Reforms", *The Australian*, Wednesday, 8 February 1995.

Miller, Russell V., *Trade Practices Act*, Fifteenth Edition, 1994, The Law Book Company Limited, Sydney, 1994.

Moore, Des, "The Case for Privatisation", *IPA Backgrounder*, Vol 7, No. 3, March 1995.

Nagarajan, V, "Reform of Public Utilities: What About Consumers?", *Competition and Consumer Law Journal*, (1994) 2, p 155.

National Competition Policy Review, *Issues Under Consideration by the Independent Committee of Inquiry*, February 1993.

"National Competition Policy: Towards a New Order", *Business Council Bulletin*, September 1993, pp 6-20.

National Competition Policy, Draft Legislative Package, 1994.

Newby, Jan, "National Competition Policy Report by the Independent Committee of Inquiry (The Hilmer Report)", *Briefing Note*, No. 001/94, NSW Parliamentary Library, 1994.

Oakes, Laurie, "Competition will be hotly contested", *The Bulletin*, 9 August 1994, p 17.

Ornstein, Stanley I., "Exclusive Dealing and Antitrust", *The Antitrust Bulletin*, Spring 1989, pp 65-98.

Overton, Todd R., "Substantive Distinctions between United States Anti-trust Law and the Competition Policy of the European Community: A Comparative Analysis of Divergent Policies", *Houston Journal of International Law*, Vol 13:281, 1991, pp 315-342.

Park, Thomas, "Hilmer reforms should be implemented without delay", *The Australian*, Thursday, 6 April 1995.

Pengilley, Warren, "Hilmer and Essential Facilities", *UNSW Law Journal*, Vol 17 (1) 1994, pp 1-53.

Pitofsky, Prof. Robert, "Remarks of Professor Robert Pitofsky: The Future of Antitrust", *The Antitrust Bulletin*, Winter 1994, pp 913-921.

Redfern *v* Dunlop Rubber Australia (1964) 110 CLR 194.

Regulatory Reform, Privatisation and Competition Policy, OECD, 1992.

Rich, Maxine, "Sons of Uncle Same: Have They Grown Up in His Image?: A Comparative Analysis of the Merger Laws and Policies of Australia and the European Union in the Context of US Antitrust History", *UNSW Law Journal*, Vol 1791) 1994, pp 109-155.

Rill, James, F. "Remarks of James F Rill, Former Assistant Attorney General Antitrust Division", *The Antitrust Bulletin*, Winter, 1994, pp 901-909.

Shann, Ed, "Up to State to Chase Hilmer Gains", *Business Review Weekly*, May 1, 1995, p 37.

Simons, Margaret, "Drawing the Line", *Eureka Street*, May 1993, pp 18-20.

Smith, Rod, "The TPA, lawyers and business", *Law Institute Journal*, March 1995, pp 196-199.

Spier, Hank, *Commonwealth - State Interaction Under the New Legislation*, Paper to Conference on the New Era of Competition Policy Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth.

Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, Senate, Canberra, December 1991.

Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?*, House of Representatives, Canberra, May 1989.

Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Mutual Recognition: A Consideration of the Mutual Recognition Scheme*, Sixth Report, Western Australian Legislative Assembly, 1994.

Steinwall, Ray, "National Competition Policy: the Government's Response to the Hilmer Report", *Business Law Section Newsletter*, Vol 5 No 6, December 1994, pp 7-9

Steinwall, Ray, "The Liability of the Crown and its Instrumentalities Under the Trade *Practices Act 1974* (Clth)", *UNSW Law Journal*, Vol. 17 (1), 1994, pp 314-325.

Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468.

Sturgess, Gary L, *Untidy Federations: The Impact of Internationalisation of the Australian Federal System*, Paper to Australian Federalism Conference, Melbourne, Victoria, July 1994.

"Submission on the National Competition Policy Draft Legislative Package", *Business Council Bulletin*, No 113, October 1994, pp 32-38.

Taperell, G Q, Vermeesch, R B, Harland D J, *Trade Practices Act and Consumer Protection*, Butterworths, 1983.

"The Great Australian Sell-Out", *Australian Business Monthly*, May 1995, pp 32-37.

"The Hilmer reforms big pay off", *Australian Financial Review*, Tuesday, 7 February 1995.

Trade Practices Act 1974.

Trade Practices Act: Proposals for Change, February 1984, AGPS, Canberra.

Trade Practices Act Review Committee, *Report to the Minister of Business and Consumer Affairs,* August 1976, AGPS, Canberra.

Trade Practices Commission, *Safeguarding the Consumer Interest in Reformed Public Utilities and Complying with the Trade Practices Act*, March 1995, AGPS, Canberra.

Walker, Dieneke, "Competition Policy and Reform of Public Utilities", *Alternative Law Journal,* Vol 19(6), Dec 1994, pp 282-283.

Walker, R.G., "Privatisation: A Re-Assessment", *Journal of Australian Political Economy,* No 34, December 1994, pp 27-42.

Western Australian Municipal Association, *Review of National Competition Policy: Overview Report on Potential Implications for Local Authorities.*

Williams, Daryl, *Significant aspects to the amendments and the Constitutional basis of the new legislation*, Paper to Conference on the New Era of Competition Policy Law in Australia, Business Law Section, Law Council of Australia, 14 July 1995, Perth.

Williamson, Douglas G, QC, "National Competition Policy: Draft Legislative Package", *Competition & Consumer Law Journal,* No 2, (1994), pp 201-205.