

LEGISLATIVE ASSEMBLY



WESTERN AUSTRALIA

1999

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**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND
INTERGOVERNMENTAL AGREEMENTS**

**COMPETITION POLICY
AND REFORMS IN THE
PUBLIC UTILITY SECTOR**

Twenty-Fourth Report

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PUBLIC UTILITY SECTOR**

Twenty-Fourth Report

Presented by:

Hon. K.J. Minson, MLA

Laid on the Table of the Legislative Assembly
on 1 July 1999

ORDERED TO BE PRINTED

Uniform Legislation and Intergovernmental Agreements

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Terms of Reference

On Wednesday, 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

On Tuesday, 18 March 1997 the Legislative Assembly re-established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference-

- (1) That a Standing Committee be established for the duration of the 35th Parliament 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.
- (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

This is the twenty-fourth report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements.

The Terms of Reference of the Standing Committee allow the Committee to inquire into, consider and report to the Legislative Assembly on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes.

This report considers the process and the implications of the implementation of National Competition Policy, particularly how reforms of public utilities have impacted on the Western Australian economy. In preparing this report the Standing Committee sought submissions and conducted hearings and briefings with a wide variety of interested groups and individuals. In preparing this report the Standing Committee carefully considered the views it received and sought expert advice.

The Standing Committee met with the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy. The Senate Committee is inquiring into the broad socio-economic consequences of the implementation of National Competition Policy. The Standing Committee, while considering matters which are also part of the Senate Committee's inquiry, is generally concerned with matters directly affecting Western Australia. The Standing Committee found discussions with the Senate Committee most beneficial.

The Standing Committee had discussions with Assistant Commissioners of the Productivity Commission who are conducting an inquiry into the impact of competition policy reforms on rural and regional Australia and who are also responsible for monitoring regulatory reform developments in the States and Territories. The Standing Committee found their assistance of great value in considering similar issues raised as part of this report.

The Standing Committee also met with the Deputy Chairman and General Manager of the Australian Competition and Consumer Commission (ACCC) who provided the Standing Committee with an enlightening briefing on the operation of the ACCC and the ACCC's role in energy, communications and transport.

The Standing Committee received submissions and conducted hearings and briefings. Chief Executives of Western Australian public utilities, including water, energy and transport appeared before the Committee or provided written submissions. The Standing Committee thanks all the persons and organisations who met with the Committee and provided written material. This has greatly assisted the Committee in considering the many issues raised in this report.

The Standing Committee found that there was some confusion about what National Competition Policy represents because it has been complicated by a raft of other reforms, such as competitive tendering, benchmarks, contracting out, commercialisation, corporatisation and privatisation of a number of public utilities and services.

The impact of National Competition Policy on public utilities in Western Australia has been

substantial. Public utilities have undergone significant changes in structure and operational procedure. The implementation of National Competition Policy with respect to public utilities in Western Australia must accommodate the special circumstances that prevail in the State, most notably low population densities and remoteness of some areas which affects the cost of supplying services to many regional and remote areas.

The changing nature of the delivery of public services has raised questions of the need for processes to ensure proper accountability and the need to ensure Parliamentary scrutiny of the functions of the executive. This is especially so as more and more services which were provided by the public sector are now provided by the private sector.

I thank my fellow Committee members for their individual and collective contributions to this report and commend the Legal/Research Officer, Melina Newnan, the Clerk to the Committee, Peter Frantom and the word processing operator, Pat Roach, for their hard work.

I commend the report to Members.

HON. K.J. MINSON, MLA
CHAIRMAN

Executive Summary

This, the twenty-fourth report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements, considers the impact of National Competition Policy. The Committee's twelfth report which was tabled in 1996 considered the implementation of a National Competition Policy.

Since that time there has been progress on restructuring of State public enterprises, with either the commercialisation, outsourcing or privatisation of many State public services. The progress and the impact of such major changes to the provision of community services is considered in this report.

The Standing Committee in preparing this report consulted widely with many individuals, community service providers, experts, organisations from intrastate, interstate and overseas, as well as considering the forces of globalisation and the drive towards competition policy from a global perspective. The report considers trends in other countries including the European Union, North America and New Zealand.

The report is not a comprehensive review of all reforms in the public utility sector, nor does it purport to cover all reforms and agreements, but provides an overview and raises issues, some of which are the subject of individual review by other bodies and committees.

In Chapter 1, the report outlines the concept of competition policy and the interconnection of competition policy with trade regulation. Competition is considered in light of the changing nature of the worldwide marketplace, globalisation, the harmonisation of competition rules, and the impact of the restructuring of the natural monopoly of essential services. The report looks at global competition and the interface between internal trade practices and competition policies. Competition policy is a feature of global trade negotiations and globalisation of markets and technological change have created global natural monopolies.

Chapter 2 of the report outlines the objectives of National Competition Policy in Australia and the structuring of markets in such a way as to promote competition and ensure that the community as a whole receives the greatest benefits. The report provides an overview of National Competition Policy and other microeconomic and other reforms, some of which have been agreed to by Australian governments under intergovernmental agreements. Outlined also are the provisions of the *Trade Practices Act 1974*.

In Chapter 3, the report considers National Competition Policy and other microeconomic reforms undertaken in the public utility and other government sectors. It looks at the Australian experience and outlines the impact of microeconomic reforms and National Competition Policy on the public sector with emphasis on the reforms in Western Australia.

The report in Chapters 4 to 7 looks at increasing globalisation of markets and the thrust of competition policy in Europe, North American and New Zealand. These chapters emphasise the international dimension to competition policy. Competition law, trends and cycles of enforcement as well as deregulation, international competition and reform of public utilities are examined.

The report concludes that governments at all levels throughout Australia and overseas have for years undertaken reforms such as deregulation, reform of government business enterprises, and measures to prevent anti-competitive behaviour with explicit intention of improving economic performance by enhancing competition.

The report also exposes that while much of the commentary on globalisation concentrates on economic issues and the benefits of free trade and deregulation, a more integrated approach is required, taking into account the social, cultural, environmental and political consequences.

There has been confusion about what National Competition Policy represents because it has been complicated by a raft of other reforms, such as competitive tendering, benchmarks and various other government measures. The impact of National Competition Policy and other reforms on public utilities in Western Australia has been substantial. Public utilities have undergone significant changes structurally and in their operations.

While there is support for the philosophy of National Competition Policy and the need to ensure a competitive economy, there should be safeguards to ensure that essential public services continue to be delivered to the whole community at a standard and price that the community expects.

It is sometimes difficult to distinguish between measures which flow from National Competition Policy and related but separate measures such as tariff reductions and privatisation, and other issues which have implications for the Australian economy, such as globalisation. National Competition Policy does not require the privatisation of any government businesses or services, but rather requires such enterprises expose themselves to competition.

The report concludes that the pace of economic change across the Australian economy has in some cases created uncertainty and distress. These concerns are most evident in regional and rural areas.

The potential benefits of competition policy are often poorly understood and potential disadvantages of competition policy are often exaggerated. Competition policy and related reforms are often mistakenly blamed for developments which have little or nothing to do with competition policy.

The report makes a number of finding and recommendations which the Standing Committee believes would address some of the concerns raised about the implementation of reforms and would assist in ensuring that the benefits of an efficient economy are reflected in public benefits.

Findings

The Standing Committee after considering the evidence on the impact of National Competition Policy on Western Australian public utilities has made the following findings which are outlined below -

Finding 1

The Standing Committee found that the delivery of community service obligations should not be compromised by National Competition Policy. It is a matter for governments to decide the nature of community service obligations, which sections of the community they should target and the level of service to be provided from public funds. National Competition Policy does not require reductions in subsidised community services.

Finding 2

The Standing Committee found that there was a misapprehension that National Competition Policy prevented the provision of community service obligations. This is not the case. There is nothing within the National Competition Policy principles that prevents the continued provision of community service obligations. It is a matter of openness and transparency for governments to reveal how much the service is being subsidised and to allow them to make considered decisions on such information.

Finding 3

The Standing Committee found that National Competition Policy does not necessarily require privatisation, the contracting out of services provided by the public sector to outside businesses or the need to make cuts in subsidised services.

Finding 4

The Standing Committee found that there were concerns by some sectors regarding the maintenance of uniform tariffs in a fully deregulated market. However, in some limited circumstances they can be justified.

Finding 5

The Standing Committee found that there may be a number of issues concerning the privatisation of AlintaGas that need to be addressed including the need to restructure AlintaGas. The Government should proceed with caution when transferring a public monopoly to a private monopoly.

Finding 6

The Standing Committee found that because of the infrastructure requirements and the range of subsidies that are required, overseas experience has demonstrated that it is better for the supply of water services to remain in public ownership, except in some isolated cases under special circumstances.

Finding 7

The Standing Committee found that the pace and direction of deregulation and privatisation was of concern to some export orientated sectors of industry but that given time they have the capacity to accommodate change.

Finding 8

The Standing Committee found that there is a strong perception that rural and regional economies have been adversely affected by the reduction of services and the privatisation and contracting out of essential services.

Finding 9

The Standing Committee found that market forces are global, but the social fallout that policy makers have to manage are local.

Finding 10

The Standing Committee found that although competition policy espouses production at the lowest cost, there are social costs which must be taken into account. There are also ramifications for professional standards in the future.

Finding 11

The Standing Committee found that with corporatisation, public utilities have been removed from the scrutiny of the Parliament and are now subject to corporate governance. They operate to increase profits and dividends without necessarily considering the public interest.

Finding 12

The Standing Committee found that there were doubts in the community about the economic and social benefits of outsourcing and privatising some services which are traditionally provided by the public sector.

Finding 13

The Standing Committee found that the pace of reforms has not been matched by a similar rate of change in the public's perception about the delivery of essential services.

Finding 14

The Standing Committee found that the privatisation of public utilities often raised questions of public welfare. The perception is often that even when precautions to ensure public benefit and the supply of essential services have been made a condition of sale, these may not, in some cases, be able to be maintained.

Finding 15

The Standing Committee found that National Competition Policy only requires that the operations of public utilities should be examined to ensure that services are provided to the public in the most effective and efficient manner and also that other providers can enter the market on fair and equitable terms.

Finding 16

The Standing Committee found that downsizing, contracting out and tendering has sometimes had dramatic effects in some rural communities. It has had an affect on the social fabric of communities. As people once employed by the local shire leave the town there are spill over effects in the schools, sporting clubs as well as the local businesses.

Finding 17

The Standing Committee found that there existed a public perception about the lack of accountability, as well as questions, about whether governments should outsource their community service obligations through contractual arrangements, thereby switching to private law accountability mechanisms.

Finding 18

The Standing Committee found that it was commonly believed that there has been a tendency towards restricting information to the public since the outsourcing of services, owing to the private sector's reliance on confidentiality.

Finding 19

The Standing Committee found that local authorities in regional and rural areas have with the implementation of contracting out and tendering initiatives been more adversely affected because the impact is much greater if jobs are lost in the local community.

Finding 20

The Standing Committee found that there was widespread misunderstanding about the National Competition Policy.

Recommendations

The Standing Committee in accordance with its brief to provide Parliament with an effective mechanism to scrutinise intergovernmental agreements and legislative schemes and after considering the impact of National Competition Policy on Western Australian public utilities has made the following recommendations -

Recommendation One

That the Government develops a strategy of public information and consultation before it proceeds with the privatisation of public utilities.

Recommendation Two

That where a substantial Government asset is to be sold that this be achieved, where possible, by public float with preference given to Western Australian investors.

Recommendation Three

That consideration be given to the establishment of an independent energy industry regulator.

Recommendation Four

That because of the infrastructure requirements and the range of subsidies that are required, for the most part, the government retain water services in public ownership.

Recommendation Five

That the accounting and funding of community service obligations be made open and subject to scrutiny.

Recommendation Six

That the Public Accounts and Expenditure Review Committee should examine community service obligations in Western Australian public service delivery.

Recommendation Seven

That private sector service providers who provide services on behalf of the Government be subject to the same administrative law provisions as the public sector.

Recommendation Eight

That the Government consider reforming public and private laws to ensure that a contractor's decisions and actions are reviewable as if they were performed by a government agency, if they are performed on behalf of the Government.

Recommendation Nine

That the Government introduce processes for contracts with contractors who provide services previously provided by the public sector, that require the contractors to provide sufficient information to allow proper Parliamentary scrutiny of the contract and its management.

Recommendation Ten

That when contractors provide services previously performed by the public sector, that the Government require those contractors to provide sufficient information to enable the Auditor General to carry out a performance audit of the contractors performance under the contract.

Recommendation Eleven

That the Government provide a commitment to ensure a free flow of information where government services have been privatised and outsourced.

Recommendation Twelve

That the powers of the Auditor General be extended to ensure proper scrutiny of privatised and outsourced functions.

Recommendation Thirteen

That the Government consider the establishment of a Regulator General to investigate and resolve complaints about contractors who deliver services on behalf of the Government.

Recommendation Fourteen

That the Government consider whether it is practicable for recipients of services formerly provided by the Government and now provided by a private sector provider to obtain information under the Freedom of Information legislation.

Recommendation Fifteen

That the Public Accounts and Expenditure Review Committee undertake a review of the contracting out and outsourcing of services and functions previously undertaken by the public sector.

Recommendation Sixteen

That the Government constantly review the implementation of National Competition Policy reforms and address any adverse affects in Western Australia particularly in rural and regional areas.

Recommendation Seventeen

That the Government implement measures to ensure that the export sector of the Western Australian economy benefits from the implementation of National Competition Policy.

Recommendation Eighteen

That the Government as part of the National Competition Policy, reform government business enterprises, by restructuring them and making them compete with private businesses as well as monitoring prices where the government business retains a monopoly.

Recommendation Nineteen

That the Government undertake an educative role on the nature of National Competition Policy, specifically the nature of the reforms relating to the extension of the *Trade Practices Act 1974*, review of anti-competitive legislation, the restructure of public monopolies, the introduction of competitive neutrality, third party access to essential facilities and prices surveillance of government businesses.

Recommendation Twenty

That any commercial enterprise of Government be subject to the scrutiny of the Auditor General to ensure that the balance sheets of the business reflect the true costs of operations.

Ministerial Response

Pursuant to Standing Order 378(c) of the Legislative Assembly of Western Australia, this Standing Committee directs that the Leader of the House, within three months, or at the earliest opportunity after that time, if Parliament is in adjournment or recess, report to the House as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Chapter 1. Introduction

1.1 Background

This report, is the second by the Standing Committee on Uniform Legislation and Intergovernmental Agreements on the subject matter of competition policy¹ and considers the development and implementation of competition policy with special emphasis on the restructure, corporatisation and in some instances, the privatisation of public utilities in so far as these were done in the spirit of competition policy. It should be noted that there are many reasons for Governments deciding to sell or privatise government agencies and that competition policy is often unrelated to the final decision to corporatise and subsequently sell and outsource.

The Standing Committee on Uniform Legislation and Intergovernmental Agreements under the Committee's charter is to consider and report on matters relating to proposed or current intergovernment agreements and uniform legislation.

1.2 Competition Policy

Competition policy can be defined as policy which is aimed at promoting competition. It includes competition law but also deregulation, foreign direct investment and other policies which are intended to promote competition.²

Competition is an issue within and between countries. Governments represent only their domestic constituents, whereas economic markets concern companies and customers across national borders. Competition policies are modified and influenced by broader social objectives.

There is potential for tension between trade regulation and competition policy within and across national boundaries. Competition policy therefore requires both a comparative study of the world's major competition regimes and an analysis of the difficulties which may arise from unilateral, bilateral or multilateral attempts to project domestic rules onto a wide global stage.

Competition policy exerts influence via the treatment of mergers. Anti-trust standards differ and social and political considerations influence competition policy and can block takeovers involving foreign enterprises. The "public interest" can be defined very broadly. For example, the Monopolies and Mergers Commission of the United Kingdom can prevent a merger on public interest grounds and can reject a merger not on competition grounds but because of the strategic nature of the industry.³

¹ See also Western Australian Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Competition Policy: Consideration of the Implementation of a National Competition Policy*, Twelfth Report tabled in the Legislative Assembly on 29 January, 1996.

² Vautier K.M. & Lloyd P.J., *International Trade and Competition Policy: CER, APEC and the WTO*, Institute of Policy Studies, Victoria University of Wellington, Wellington, 1997, p 3.

³ Sauve & Schwanen, eds., *Investment Rules for the Global Economy*, 1996, p 209.

Regulations in the United States of America (US) define national security very broadly. They state that “generally speaking, transactions that involve product services, and technologies that are important to US national defence requirements will usually be deemed significant with respect to national security.”⁴

1.3 Areas of Focus

This report looks at the Australian experience, as well as European competition law, the New Zealand experience and North American trends and cycles of enforcement.

Harmonisation has been an important element in welding together the European community. Like Europe, in both Australia and in other federations, there have a number of moves to ensure that business, both in the private and public sector, has been able to move across borders. A key reform has been in relation to mutual recognition legislation. Another key element has been the recognition of business entities constructed in another jurisdiction.

Competition policy is considered in light of the changing nature of the worldwide marketplace, the position of the natural monopoly and the impact of an integrated market for essential services.

The report looks at lessons from abroad and their experiences in deregulating essential services. It considers the implications for customers and competition. Customer priorities include, information, right to fair terms and conditions and a redress mechanism.

1.4 State Subsidies

The recent agreement on subsidies, negotiated as a result of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) prohibits some trade distorting subsidies. However, there are many state subsidies that are intended to entice specific investment or keep unprofitable operations afloat. Globalisation can create an incentive for governments to overbid for investments to locate them in their particular region or industry.

Investment incentives, which are a form of subsidy are granted mostly by non-federal governmental bodies, for example, individual States in the United States and Australia, the Provinces in Canada, and the Länder in Germany. In countries, where federalism is not pronounced, subsidies are also used as instruments of industrial policy by central governments.

1.5 Global Competition Policy

Competition policy includes anti-trust policy, but is often extended to include international trade measures and other policies that affect the structure, conduct and performance of individual industries. Competition policies around the world seek to combine efficiency and fairness in their markets.

There is generally still world wide support for more open-market economic activity. The Uruguay Round negotiations highlight the interface between international trade policies and competition policies.⁵ Competition policy and international trade policy are being blended in the World Trade Organization (WTO)⁶. Competition policy has been a feature in global trade negotiations. Other international organisations, notably the Organisation for Economic Co-operation and Development (OECD) are also paying attention to these issues. At the regional level the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Closer Economic Relations Agreement (CER) between Australia and New Zealand are developing competition policies on a area-wide basis.⁷ It should be noted however, that these free trade agreements are often broken in elaborate ways by the very people that promulgate them. For example, United States activities in the wheat and meat trade.

Bilateral negotiations are an important element in trade reform. The Trans-Tasman Mutual Recognition Treaty has deregulated the export of goods between Australia and New Zealand by both countries recognising each other's food standards. The European Union Mutual Recognition Agreement signed in June 1998, liberalised trade between Australia and the European Union in certain commodities.

The globalisation of business has highlighted the importance of competition issues. The Asia-Pacific Economic Co-operation (APEC) is an inter-governmental forum. Its objective is to enhance the competitive environment of the region. In 1994, APEC Ministers agreed that the Committee on Trade and Investment (CIT) would develop an understanding on competition issues, in particular competition laws and policies of the economies in the region, it would also identify potential areas of technical co-operation among member economies.

Competition policy determines the institutional mix of competition and co-operation that gives rise to the market system. As markets have become global, different competition policies and conventions have come into contact. Competition can be a means of attaining efficiency and fairness. In almost every country, competition policy aims to reduce inefficiencies. One of the most familiar inefficiencies is the wasteful underproduction and overpricing of a monopolist with market power. Competition policy aims to minimise the inefficiencies and inequities that can result under national monopolies.

⁵ Vautier K.M. & Lloyd P.J., *Op Cit*, 1997, p 3.

⁶ The WTO is an international treaty. International treaties or agreements signed by member countries and approved by national legislation as appropriate are binding upon the members, though they may not be readily enforceable.

⁷ Vautier K.M. & Lloyd P.J., *Op Cit*, 1997, p 3.

Globalisation of markets and technological change have reduced the importance of some natural monopolies. However, globalisation and technological change have created a new class of natural monopoly, the global natural monopoly. Examples of which occur in the areas of commercial aircraft production, high-technology weapons, banking, insurance, and satellite transmission services.

1.6 Globalisation

The world is being transformed by globalisation which is progressing with mounting inevitability. Consequently, the concept of globalisation is of increasing importance and it is now obvious that its impact extends even to the individual level.

As globalisation has gathered momentum, there is a corresponding intensification of competition. It has been argued that -

... developments in the global economy can lead to social unrest and protectionist pressures, especially when they coincide with high persistent unemployment ... Globalisation is often blamed for unemployment, inequality of income and de-industrialisation.⁸

Increased competition through access to product markets across national borders has been accompanied by the liberalisation of cross-border movements of capital.

Since the early 1980s, domestic financial markets in many economies have been increasingly globalised. Domestic capital markets have been more internationally integrated. It has been reported that -

... governments ... have effectively ceded their economic sovereignty to international investors.⁹

Globalisation is a result of technological changes which have reduced costs and expanded the reach of transportation, telecommunications and financial transactions. These have permitted the emergence of the international divisions of tasks and created new investment opportunities which transcend national boundaries.

The postwar economy has been characterised by increased integration of national economies into the global marketplace. The evolution of financial, communication and transportation technologies have permitted companies to conduct global operations. The increase in investment has accelerated the internationalisation or globalisation of firms active in the global economy.

An increasing share of national economic activity is conditioned by extra national transactions and influences; few goods and services and little capital and technology are still produced and consumed wholly within a single national economy.

⁸ Taniguchi M. & West J., "On the Threshold of a Global Economy", *The OECD Observer*, No. 207 August/September, 1997, p 6.

⁹ Makin T., "Financial Globalisation: Ceding Sovereignty or Safeguarding Growth?", *Policy*, Winter, 1997, p 31.

Multinational enterprises are the principal actors in the globalisation process. They play a role primarily through direct investment, trade and in a variety of non-equity relationships with host-country enterprises. A large and increasing share of world trade is now conducted between and within firms related to one another by equity holdings or linked through tightly controlled sourcing and supply relations.

The international investment environment is increasingly being shaped by the financial-commercial linkages between corporate ownership and control, the importance of capital markets, corporate bylaws and competition policy.

Legislation in the US permits the President to suspend or prohibit an acquisition of control of domestic enterprises by foreign entities if such control might threaten or impair US national security -

In the United States, some state laws are more restrictive than federal laws, ranging from an outright ban on the establishment of state branches by foreign bank operations to the granting of licenses under conditions of reciprocity.¹⁰

A number of countries in Europe also have provisions to restrict takeovers of domestic companies, real estate or review foreign investments for reasons of national security or national interest grounds.

Telecommunications and broadcasting have generally been under government control in North America and Europe. However, under competitive pressures, some of these sectors have slowly opened up to private capital, although in a very limited way.¹¹

Technology and markets are fusing. New technologies and the prospect of an explosion in tele-information have resulted in the restructuring of the communications industries. Companies traditionally in unrelated fields are finding themselves in direct competition with each other, as a result many of these companies and industries are merging. New companies and new technologies are emerging.

1.7 International Dimension of Competition Policy

The rapid growth in the volume of international trade, the emergence of multinational corporations and the increasing globalisation 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.

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

¹⁰ Sauve & Schwanen, eds., *Op Cit*, 1996, p 192.

¹¹ *Ibid*, p 192.

convergence of competition policy is aligned to the necessity for open global commerce.

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).

The importance of international co-operation in trade is underscored by Australia's involvement in the General Agreement on Tariffs and Trade (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 should 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 country. 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.

The integration of markets across national borders means that competition problems have become increasingly internationalised. This is because markets are international markets and not national markets.

Vautier and Lloyd have stated -

Advocates of some form of international action in the area of competition law believe that national legislation has a number of inherent shortcomings. National competition laws are designed in most countries to control only those restrictive practices which occur in and affect the domestic economy.¹²

1.8 International Competition Rules

The OECD Guidelines for Multinational Enterprises, although not binding form a basis of a limited agreement on substantive competition law matters. For instance, they specify that enterprises should conform with their own national competition rules and refrain from adversely affecting competition in a relevant market by abusing market power or a dominant position with respect to anti-competitive acquisitions, predatory behaviour toward competitors, unreasonable refusals to deal, anti-competitive abuse of intellectual property rights, discriminatory pricing including transfer pricing and cartel behaviour.¹³

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

¹² Vautier K.M. & Lloyd P.J., *Op Cit*, 1997, p 16.

¹³ Sauve & Schwanen, *Op Cit*, 1996, p 249.

competition law internationally. That Committee is currently focusing on three major issues -

- (i) the convergence or harmonisation of competition laws and enforcement methods;
- (ii) co-operation between competition law enforcement authorities; and
- (iii) an exploration of the interface between competition and trade policies.

There is increasing interest in harmonising national competition laws, whether by multilateral code, bilateral agreement, or unilateral national action in response to an emerging international consensus on appropriate standards -

In December 1996 a ministerial meeting of the World Trade Organization (WTO) considered the future establishment of multilateral rules to discipline anti-competitive actions by companies. In the fall of 1994, Congress passed the International Antitrust Enforcement Assistance Act, which authorises the Justice Department and the Federal Trade Commission (FTC) to co-operate with foreign antitrust authorities in multinational antitrust enforcement.¹⁴

1.9 International Co-operation and Competition Policy

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.

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.¹⁵

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.

International anti-trust co-operative agreements have been entered into among trading partners, including agreements between the United States and Australia.

Australia and New Zealand have negotiated a succession of free trade agreements known as the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). In addition to the issues to be found in a standard GATT free trade agreement, the two countries have addressed competition issues and now have the most advanced set of disciplines governing transborder competition matters. Australia and New Zealand have similar competition laws.

Vautier and Lloyd have stated -

¹⁴ Graham E.M. & Richardson J.D., eds., *Global Competition Policy*, Institute for International Economics, Washington D.C., December, 1997, p 355.

¹⁵ 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.

Transparency of domestic legislation and the exchange of information and consultation and co-operation among countries are the basis of all the multi-country agreements on competition policy to date. They do not involve any restriction or derogation of the authority of national governments.¹⁶

1.10 International Enforcement

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.¹⁷ 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. 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 harmonisation of American and European laws governing competition is being considered.

An increasing number of nations have anti-trust laws. International globalisation 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.

1.11 Regulatory Reform

As tariffs and other border measures are dismantled, national regulations are often left as the biggest impediment to a competitive market economy. Regulatory reform was stimulated by complaints from industry about the rising regulatory burden and regulations which were restricting competition and efficiency. However, general deregulation is neither feasible nor desirable in many areas which have goals such as health, safety or environmental standards.

The primary objective of regulatory reform is to achieve the legislative objective at minimum cost.

¹⁶ Vautier K.M. & Lloyd P.J., *Op Cit*, 1997, p 19.

¹⁷ United States and European Commission Co-operation Agreement 1991.

Regulatory reform in Australia has involved systematic review and reform of existing regulation and improvements in the processes for creating new regulation. Changes have involved implementing explicit standards for regulatory quality and use of regulatory impact analysis, which involved systematically weighing alternatives and a process of consultation which allows regulatory decisions to be assessed and provide visibility.

Repeal programs have dramatically reduced outdated regulations in many countries including Australia. International regulatory co-operation is growing in importance as trade increases.

It has been reported that -

Regulations that block competition also depress capital and labour productivity, raise prices, restrict consumer choice, stifle the development and diffusion of new technologies, and slow adjustment to changing market conditions.¹⁸

Priorities in reforming regulation differ among countries. Some countries have had far-reaching structural changes in sectors that were traditionally highly regulated, such as transport and public utilities. There are public misgivings about potential adverse effects of reform on safety, health and consumer protection.

Governments may have to strengthen regulatory bodies in parallel with market liberalisation. It has been noted that -

Heightened competition may initially result in job losses in individual sectors as businesses are forced to become more efficient. Although reform increases demand for labour in other firms and sectors, displacement can be costly for affected workers and society as a whole. Here, regulatory reform should be accompanied by active labour-market measures.¹⁹

1.12 Competition and the Public Sector

Over the past two decades there has been a worldwide emphasis on privatisation and deregulation of industries which have been traditionally highly regulated or government controlled.

The 1980s and 1990s saw the privatisation of almost all publicly owned utility industries including telecommunications, gas, electricity, water and sewerage, and the railways in a number of countries including Australia. Australia followed trends that had occurred in Great Britain and then New Zealand. Many of the public utilities were subject to an administrative regime usually set out in statutes that stipulated their powers and duties. They usually had a monopoly over services in their industry and a Minister was responsible for the utility. Heavy reliance was placed on parliamentary accountability for the utility.

Public utilities comprise a category of businesses which are particularly affected by competition policy reforms. Public utilities also play a key role in the provision of services to both businesses

¹⁸ Jacobs S. H., "Regulatory Reform: Time for Action", *The OECD Observer*, No 206, June/July, 1997, p 5.

¹⁹ *Ibid*, p 9.

and consumers and as a result are vital to microeconomic reform.

1.13 Privatisation

Australia has one of the largest programs of privatisation or part privatisation among OECD countries.²⁰ The value of privatisation in Australia ranks second after the United Kingdom and New Zealand, relative to gross domestic product (GDP). In the 1990s, Australian Governments, both Commonwealth and State privatised a significant portion of the public sector. Privatisation has occurred in three main sectors, financial services, electricity and gas, transport and communications. Governments have sold assets both by offering equity to the public and through trade sales. Proceeds of the sales have been used largely to reduce government debt or fund capital infrastructure.

Many countries launched programs to transfer ownership of state owned enterprises to the private sector. However, state owned enterprises account for a large share of the economic activity in Europe and North America. Many governments have set limits on private equity participation in many privatised firms or have introduced controls over management in sensitive and strategic industries.²¹

Some brief examples of deregulation and privatisation of essential services in Europe, North America and New Zealand are outlined below. A more detail report can be found in Chapters 4 to 7 of this report.

1.14 Energy

Until recently, the generation and supply of electricity was the sole preserve of national and usually State owned utilities. However, in recent times many of these utilities have been privatised and a number have been taken over by foreign firms.

In Britain a number of electricity companies have been taken over by American firms and it is reported that -

... both British and American utilities are snapping up privatised power stations in places like Australia, and pushing hard into growth areas of Asia ...²²

New Zealand privatised its electricity system several years ago. However, the Government did not separate transmission from distribution which created a monopoly in the Auckland area without sufficient checks and balances. As a result, Auckland experienced a complete power failure in February of 1998. It has been argued that the privatised energy company had sought to maximise its short-term profits by cutting staff. It has also been reported that people in the

²⁰ "Privatisation - the facts", *CEDA Bulletin*, July, 1998, p 52.

²¹ Sauve & Schwanen, eds., *Op Cit*, 1996, p 203.

²² "Intoxicated by power", *The Economist*, June 14, 1997, p 71.

company were reluctant to point out problems to management because of the fear of being made redundant.

For strategic, economic and financial reasons, the production and distribution of some types of energy continue to be largely the responsibility of monopolies in a number of countries. Monopolies exist in the production and distribution of electricity in Canada, France and Italy. Gas distribution monopolies exist in France, Italy and the United Kingdom.²³

1.15 Water

There have been beneficial effects of privatisation in some sectors such as airlines. However, in other areas such a water and railways the record is much more controversial. Of the British system, Holtham states -

... shareholders have benefited while workers have suffered, losing jobs or experiencing deteriorating pay and conditions. There has been a transfer of rents. Benefits to consumers in many areas have been at best small.²⁴

Studies of the water industry in Britain since privatisation have raised many issues of concern. A recent study found that -

Since the privatisation of Britain's water and sewerage industry in 1989, customers have been charged higher prices to cover the cost of maintaining and enhancing a vast and ageing infrastructure. Yet the industry has not ploughed its increased revenues back into the network with the result that the services it provides have deteriorated. Some areas of the country may now have insufficient water in the event of drought, while sewers in several places are likely to crack, leak and collapse. This has happened despite government assurances that standards and investment would be ensured through regulation. Any failure of the public water supply system is not an aberration due to some rogue company or unusual weather conditions: it is systemic.²⁵

This study reports that the regulator, the Office of Water Services (OFWAT), has done little to ensure that the privatised water companies met certain minimum supply and quality standards and that consumers were not charged monopoly high prices. The study reveals that the privatised companies did not carry out capital investment plans to meet the required quality standards and levels of services. It has also been revealed that -

... since privatisation, despite corporation tax of 35 percent, the water companies have paid almost nothing in tax as a result of tax allowances set at privatisation and capital allowances on the investment programme. In addition, the industry's £4.95 billion debt was written off at privatisation.²⁶

²³ Sauve & Schwanen, eds., *Op Cit*, 1996, p 195.

²⁴ Holtham G., "Ownership and Privatised Utilities", *The Political Quarterly*, Oct-Dec., 1998, p 387.

²⁵ Schofield R. & Shaoul J., "Regulating the Water Industry: Swimming Against the Tide or going Through the Motions?", *The Ecologist*, Vol. 27, No. 1, January/February, 1997, p 6.

²⁶ *Ibid*, p 7.

It has been reported that expenditure to maintain the infrastructure has been inadequate which implies a significant deterioration of the old and decaying infrastructure with public health implications which include an increase in smells, the rat population and the possibility of leaking through cracked sewers into the ground water and water systems. However, consumers have paid for their water and sewerage services at prices intended to cover infrastructure maintenance.

The report concludes that -

...under existing legislation, the regulator has a discretion not to enforce even mandatory standards if by doing so he would override his duty “to ensure ... that [the water companies] are able to finance their functions” - and the functions of a privatised company include paying out shareholder dividends.²⁷

The legislation recognises the conflict between making profits and providing a certain level of service. The report concludes that the British public have to live with a privatised industry which charges higher prices for services of lower standard. The report states -

The water industry, as the provider of one of society’s essential services, is the most cash generative sector in the country. The cash surplus has been drained as generous dividends have been given to shareholders; spectacularly unsuccessful acquisitions outside the core business of water and sewerage made, resulting in huge losses; and the remaining surplus cash recycled as interest bearing loans.²⁸

1.16 Transportation

There are limitations to foreign shareholding of domestic airlines in North America and Europe.

In the transportation services sector, the provision of rail services, especially passenger transport, is, with a few exceptions, still reserved for public monopolies in Europe and North America. Rail infrastructure is a public monopoly in Italy, France and Germany. It has been reported that the majority of the public regrets the privatisation of rail.²⁹

1.17 Financial Services

Computer communications and networking technologies are rapidly facilitating changes which will lead to the creation of a truly global electronic financial services marketplace. It will also lead to the elimination of entry barriers that have acted to insulate local financial services markets and their participants from external competition. There is a rapid movement from “deposit-driven” to “capital-market-driven” lending.

²⁷ *Ibid*, p 11.

²⁸ *Ibid*, p 12.

²⁹ Holtham G., *Op Cit*, 1998, p 387.

Chapter 2. Australia - Competition Policy

2.1 Introduction

World markets have become more integrated and open. For Australian export industries to deal with the increasing competitiveness of world markets they must be ensured the benefit of a competitive domestic economy and efficiently priced utility services.

Technological and other advancements have meant that Australia is virtually a single national market; as opposed to a set of individual State/Territory (or regional markets), as was previously the case. This has brought about increased competition throughout Australia and led to co-operation between each level of government.

The governments of Australia, the Commonwealth, States and Territories, introduced a new phase in the microeconomic reform³⁰ process when they agreed in April 1995 to the reform package known as the National Competition Policy. The reforms encompassed the non-traded and services sectors of the economy. The key objective of the National Competition Policy was to develop a more open and integrated market that limited anti-competitive conduct and removed the special advantages previously enjoyed by government business enterprises.

Part IV of the Commonwealth *Trade Practices Act 1974* (TPA), is the principle instrument promoting competition in Australia. The *Trade Practices Act 1974* seeks to enforce a competitive framework across Australia by prohibiting anti-competitive agreements, misuse of market power, resale price maintenance, price discrimination and certain mergers or acquisitions.

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.³¹

2.2 National Competition Policy Agreement

By way of background, in 1991 the Commonwealth, State and Territory governments agreed to examine a national approach to competition policy. At the request of the Council of Australian Governments (COAG) in 1992, the Independent Committee of Inquiry into National Competition Policy (Hilmer 1993) was appointed. The Hilmer report was released in August 1993. The Hilmer Committee took a broad view of competitive policy and proposed extension of the *Trade Practices Act 1974*, to all government business enterprises, statutory marketing arrangements and unincorporated associations, which had not been subject to trade practices scrutiny. It also identified many government regulations and interventions that impede the functioning of markets.

³⁰ The term "microeconomic reform" is commonly used to refer to changes in government policy directed at improving the efficiency of the use and allocation of Australia's resources.

³¹ In Australia such rules are contained in Part IV of the Commonwealth *Trade Practices Act 1974*.

All Australian Heads of Government endorsed the competition policy principles of the Hilmer Inquiry. In August 1994 they agreed to a package of competition policy reforms and to give effect to the new competition policy arrangements on 1 July 1995.

2.3 Intergovernmental Agreements

The National Competition Policy is the centrepiece of national microeconomic reform in Australia and is a result of three intergovernmental agreements signed at COAG in early 1995. The three intergovernmental agreements are outline below.

The Conduct Code Agreement set out processes for amendments to the competition laws. It dealt with the enactment of “template” legislation by the Commonwealth, which the States and Territories applied in their own jurisdictions. The Conduct Code Agreement extended the operation of Part IV of the *Trade Practices Act 1974* to cover all businesses regardless of ownership including government and unincorporated businesses.

The Competition Principles Agreement outlined the arrangements and work program of the National Competition Council (NCC). It set out agreed principles about government enterprise pricing policy, competitive neutrality policy, structural reform of public monopolies, review of regulatory legislation, access rules for essential infrastructure and application of principles to local government.³²

The Agreement to Implement the National Competition Policy and Related Reforms set out conditions for financial payments to the States in return for implementing competition policy reforms.

In its submission to the Standing Committee the Western Australian Treasury stated -

Where National Competition Policy differs from some of the other reforms in progress in Australia, is that the third agreement incorporates specific commitments from all governments linked to a formal assessment mechanism. These commitments are to implement the reforms in the other two agreements, and certain other existing agreements referring to changes in the gas, electricity, water and road transport industries, to an agreed five-year timetable. This process is driven and supported by an incentive system of payments from the Commonwealth to the States and Territories that will only be forthcoming if those commitments are met. An independent arbitrator, the National Competition Council, assesses jurisdictions’ performance in meeting these commitments and advises the Commonwealth on their eligibility for the payments.

The public attention generated by this arrangement tends to give National Competition Policy a high profile and it is often confused with various other, often long standing, reform incentives.³³

2.4 National Competition Policy

³² Para 5 of the Interpretation states “This Agreement is neutral with respect to the nature and form of ownership of business enterprises. It is not intended to promote public or private ownership”.

³³ Submission by the Western Australian Treasury, November, 1998, pp 6-7.

The key objective of the National Competition Policy was to develop a more open and integrated Australian market that limited anti-competitive conduct and removed special advantages previously enjoyed by government businesses.

As an adjunct to signing the National Competition Agreements in 1995, the Commonwealth, States and Territories reaffirmed their commitment to continue to reform key industries, notably, electricity, gas, water and road transport. This commitment was formalised in the Agreement to Implement National Competition Policy and Related Reforms. A central part of the Agreement was the requirement that there is “effective implementation” of the COAG agreements on electricity, gas, water and road transport reforms before the States/Territories can benefit from additional financial assistance offered by the Commonwealth.

The Western Australian Treasury supports National Competition Policy and advised the Standing Committee that -

Unequivocally Western Australians will benefit. It is not about benefiting particular industries or sectors of the community; it is literally about community or public benefit. That is sometimes hard because there can be winners and losers in a net benefit scenario.³⁴

2.5 Areas of National Competition Reform

National competition reforms involved the following reforms -

- Extension of the *Trade Practices Act 1974*;
- Review of anti-competitive legislation;
- Restructure of public sector monopolies;
- Introduction of competitive neutrality;
- Third Party access to essential facilities; and
- Prices surveillance of government businesses.

2.6 Competition Policy Reform Legislation

Intergovernmental Agreements were signed in April 1995 and the *Competition Policy Reform Act 1995* was passed in June 1995. All States and Territories passed application legislation by July 1996.

State and Territory governments have enacted modified versions of Part IV of the *Trade Practices Act 1974* in their respective jurisdictions. As a result State owned utilities are now

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Anne Nolan, Assistant Under Treasurer, Treasury, Evidence, Perth, Thursday, 17 December, 1998, p 57.

subject to the same competition laws and penalties as private businesses.

The “application of laws” device was used to ensure uniformity, and prevented the legislatures exercising a separate voice which may have led to legislative variations between the jurisdictions. The legislation of the “host” jurisdiction automatically applied, including amendments without further local legislation. It extended uniform national competition law the *Trade Practices Act 1974* to areas that were formerly exempt.

2.7 Overview of the Trade Practices Act

The objective of the *Trade Practices Act 1974* (TPA) is to enhance the welfare of Australians through the promotion of competition and fair-trading, and provisions for consumer protection. This objective is achieved through a variety of means.

Part IV of the *Trade Practices Act 1974* sets out the provisions for regulating market arrangements to procure and maintain competition in trade and commerce. Part IV of the TPA prohibits the following anti-competitive trade practices -

- anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts (section 45);
- misuse of market power (section 46);
- exclusive dealing (section 47);
- resale price maintenance (sections 48 and 96 - 100); and
- mergers which would have the effect or likely effect of substantially lessening competition in a substantial market (sections 50 and 50A).

Sections 51(2) and 51(3) provide a number of limited exemptions from Part IV of the *Trade Practices Act 1974*.

The most significant changes to competition policy came with the *Competition Policy Reform Act 1995* which gave universal coverage of the *Trade Practices Act 1974* to all markets. The *Trade Practices Act 1974* previously dealt with corporations and interstate trade and commerce. Previously exempt were areas such as public utilities, the professions, agricultural marketing boards and much of the health sector, all of which are now covered by the provisions of the *Trade Practices Act 1974*.

Part IIIA *Trade Practices Act 1974* provides a legal avenue for businesses to access services provided by essential monopoly infrastructure. This access can enable businesses to compete in upstream or downstream markets.

2.8 Competition in the Public Sector

Australia's Federal and State governments through the Council of Australian Governments (COAG) made commitments to implement market-based reforms designed to reduce government involvement in, and regulation of, important market sectors, as well as promote competition. Australia's National Competition Policy targeted key public sector industries including telecommunications, electricity, gas and water. Publicly owned utilities have been corporatised or privatised.

As part of National Competition Policy, governments have reformed government business enterprises, by restructuring them, making them compete with private businesses and monitoring prices where the government business retains a monopoly.

Governments have undertaken structural reform of government monopoly enterprises and separated the regulatory functions from the commercial roles. In some cases have gone further than required under the National Competition Policy agreements and privatised some government businesses.

Public utilities are affected by National Competition Policy reforms set out in the Conduct Code Agreement and the Competition Principles Agreement. The energy and water utilities are further involved in the industry specific reforms which are brought under the umbrella of National Competition Policy by the Agreement to Implement National Competition Policy and Related Reforms.

2.9 Legislation Review

Deregulation is a process by which government regulation applying to an entity, industry or market is reduced or eliminated. The National Competition Policy measure that is likely to impact on the level of regulation in Australia is the legislation review program. Under the program all legislation that restricts competition is to be reviewed and where appropriate reformed by the year 2000. Legislative restrictions should only be retained where the benefits exceed the costs and the benefits cannot be achieved otherwise.

Restrictions imposed through government regulation can impede competition in key sectors of the economy including legislative monopolies for public utilities, such as water and electricity and licensing arrangements for various occupations, businesses and professions. The legislative review element of the National Competition Policy is premised on the view that any legislative restriction on competition must be demonstrated to be in the public interest and that existing and proposed legislation should be reviewed along similar lines.

In its submission to the Standing Committee the Western Australian Treasury stated -

The impact on public utilities of legislation review may be to remove certain restrictive protections, and where the utility is granted certain advantages within its legislation, to remove those advantages. The outcome will be to expose public utilities to the rigours of a competitive market place, where this is in the public interest.³⁵

As part of the National Competition Policy, governments agreed to review and where appropriate, reform all their laws that restrict business from competing.

The Competition Principles Agreement requires that State legislation should not restrict competition unless it can be demonstrated that -

- the benefits to the community outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

While the States and Territories need to ensure that all their legislation is reviewed to eliminate provisions that restrict competition or interfere with the competitive process (so that they may qualify for compensation payments), it is equally important that they ensure that the public interest of consumers are not forgotten.

Removal of regulatory protection of government monopolies is consistent with National Competition Policy. Under National Competition Policy there is a requirement to review and reform restrictive legislation and apply competitive neutrality measures to government businesses.

In its submission to the Standing Committee, the Western Australian Treasury stated -

... it must be remembered that deregulation, and reregulation, of the public utility markets began in Western Australia long before the National Competition Policy agreements were signed.³⁶

This is discussed further in Chapter 3 of this report.

2.10 Competitive Neutrality

Government businesses be they undertaken by government departments, government owned corporations or other statutory authorities compete with the private sector businesses in a variety of markets. However, private sector firms had found that they were not competing with government businesses on equal terms because traditionally government business were exempt from taxation, did not have to pay dividends, had a cheap source of finance or exemption from some regulatory requirements. Competitive neutrality is meant to remove these sorts of disparities so that government businesses compete on equal terms with their competitors.

The Commonwealth, State and Territory governments agreed to implement competitive neutrality as part of their commitment to the National Competition Policy reform package.

The theory of competitive neutrality requires that where services are supplied in a competitive setting, public sector agencies should compete for the business on a fair and equitable basis with private sector service providers. The aim of competitive neutrality is to promote efficient competition between public and private businesses operating in the same market. Competitive

³⁶

Ibid, p 10.

neutrality seeks to ensure that government businesses do not enjoy a competitive advantage over the private sector competitors because of their public ownership.

The Competition Principles Agreement provides that competitive neutrality reforms should apply to significant business activities of government.

The Agreement recommends the adoption of a corporatisation model which requires business enterprises to pay taxes, to pay debt guarantee fees to the State Government where the business enjoys a competitive advantage due to the use of a State guarantee on its borrowings and that the same regulations which apply to the private sector apply to government business enterprise. Where corporatisation is not appropriate the enterprise should be commercialised to ensure that the prices charged for goods and services reflects the full costs. However, the reforms should only be implemented where the benefits outweigh the costs.

In its submission to the Standing Committee, the Western Australian Treasury stated -

In Western Australia, all public utilities pay tax equivalent payments and are charged for their use of government guarantee on their borrowings. All are subject to environmental and most of the planning regulations that apply to private businesses.³⁷

The Competition Principles Agreement requires the establishment of a competitive neutrality complaints mechanism. The mechanism should address claims from aggrieved parties who claim to have suffered disadvantage as a result of State business enterprises not operating on a competitively neutral basis. The structural separation of the State's role as shareholder and regulator is an integral part of the broader agenda of infrastructure reform. A key component of the reform has been to put public and private businesses on an equal footing.

The Standing Committee received a submission from the Western Australian Forest Alliance indicating that competitive neutrality has not been implemented by the Western Australian Department of Conservation and Land Management (CALM). It argues that -

The native forest timber industry, in particular sawmilling and woodchipping, buys logs obtained from 1.1 million hectares of State forest and timber reserves currently managed for wood production. It pays a relatively small amount for the logs and an administration, in-forest and roading charge, but it does not pay one cent for the use of this massive area of publicly-owned land. ... By contrast tree growers in the private sector have to buy or lease land and pay rates on that land and they must factor in those costs to their log pricing structure. This gives public native forest logs a major price advantage over privately grown logs and is a serious deterrent to competition between the public and private sectors.³⁸

2.11 Access Regime

The introduction of the third party access regime, contained in Part IIIA of the *Trade Practices Act 1974*, as part of the 1995 competition policy reforms has established a legal regime to

³⁷ *Ibid*, p 12.

³⁸ Submission by the Western Australian Forest Alliance, 30 September, 1998, p 3.

facilitate third party access to certain essential infrastructure on reasonable terms and conditions. This has meant that in areas of natural monopoly and in relation to the activities of institutions previously owned by government bodies (which have been privatised and corporatised), there are important competition issues still to be addressed.

Each State and Territory must either implement an effective third party access regime or allow the Commonwealth legislation to apply to essential facilities. The question of whether State or Territory access regimes are “effective” access regimes is matter for the National Competition Council (NCC) to address.³⁹ The objective of third party access is to ensure that owners of significant infrastructure are not able to prevent competition in other areas of production by denying others access to that infrastructure. Significant infrastructure can be found in oil, gas, water pipelines, rail tracks and electricity transmission areas.

Significant infrastructure owned by public utilities is likely to become available to competitors in the supply of services. Public utilities are entitled to charge for access and terms and conditions are to be negotiated, but arbitration is available if parties are unable to reach agreement.

2.12 Prices Oversight

The objective of prices oversight is to prevent monopoly, or near monopoly, government business enterprises charging excessive prices for their goods or services. The prices oversight mechanism must comply with the Competition Principles Agreement. The Competition Principles Agreement encourages State governments to put in place their own independent prices oversight arrangements.

2.13 Structural Reform

The Competition Principles Agreement requires governments, before introducing competition into a market that has been a public monopoly, and before privatisation, to review the structure of the monopoly with a view to separating out regulatory functions, natural monopoly functions and where appropriate separating contestable functions.

Structural reform refers to the restructuring of either individual businesses or the market in which businesses operates. Many of the large monopoly businesses in Australia are government owned. For example, water and electricity utilities, and air and sea ports. If competition is introduced into the market the structure of the markets and monopoly entities need to be reviewed. If this is not done there is a risk that government water and electricity business monopoly that is simply sold to the private sector operator will result in a privately-owned monopoly. This will likely result in no benefits to consumers or other businesses.

In its submission to the Standing Committee, the Western Australian Treasury stated -

³⁹

Queensland and New south Wales are the only States that have introduced general access regimes.

... public utilities in Western Australia generally remain vertically integrated organisations. One exception is AlintaGas, which ceased to be involved in gas transmission with the sale of the Dampier to Bunbury Natural Gas Pipeline. Further introduction of competition will require an assessment of the merits of current structures such as vertical integration.⁴⁰

2.14 Competition and Government Instrumentalities

Over the last few years a whole range of government instrumentalities have for the first time been expected to run like businesses and operate in a competitive market place. This has not just been the result of corporatisation and privatisation of government business but also the result of amendments to the *Trade Practices Act 1974* to which they are now subject.

These developments required profound cultural adaptation both on the part of the State government instrumentalities and on the part of those who deal with the instrumentalities.

In its submission to the Standing Committee, the Western Australian Treasury stated -

Where National Competition Policy applies to public utilities, it does not require economic and commercial consideration to be given precedence over the traditional objectives of public utilities related to social equity/welfare or regional development. ... National Competition Policy does not require that vertically integrated public utilities be split or sold or that any of their services should be contracted out.⁴¹

2.15 Community Service Obligations

Governments often redress inequity through community service obligations (CSOs). Community service obligations are described as non commercial activities of a government business enterprise (GBE) which have a specified social purpose and may result from an obligation specifically imposed by government. CSOs involve a cross-subsidy from some users of the service to others.

CSOs are intended to assist those in the community who could not meet the real cost of the provision of essential utility services. CSOs may also assist specifically targeted groups such as small business or rural or farming communities. CSOs are typically subsidised price concessions to assist certain groups of consumers, or subsidies to the operations of a GBE. CSOs have historically been provided through direct cross-subsidies in pricing between different groups of residential and/or business consumers or through specific rebates provided directly to such consumers.

The interest in CSOs has arisen because of microeconomic reform and the view that core business of a GBE should be confined to commercial activity. Economic inefficiencies occur because cross-subsidies distort production and investment decisions by GBEs and consumption decisions by the public.

⁴⁰ Submission by the Western Australian Treasury, November, 1998, p 13.

⁴¹ *Ibid*, p 4.

The reform of public utilities aims to separate commercial and social objects with the goals of greater transparency of functions, better targeting of benefits and greater returns on investment.

The identification of CSOs and costing them has highlighted a considerable range of problems in how to determine what are valid CSOs.

In its submission to the Standing Committee the Chamber of Commerce and Industry of Western Australia stated -

... the use of internal cross-subsidies as a means of financing community service obligations is harder and less appropriate in a competitive environment.⁴²

The Chamber of Commerce and Industry of Western Australia further advised the Standing Committee that -

... financing of community service obligations through internal cross-subsidies is not the best way to deliver such services. It leads to economic inefficiency, reduced competition and higher average costs. It lacks transparency and equity, and can lead a decline over time in the quality and quantity of services provided to high-cost relative to low-cost users.⁴³

There is a reluctance to have community service obligations and universal pricing obligations met through internal cross-subsidies for a number of reasons, including that it reduces efficiency, it precludes competition in the subsidised and subsidising parts of the market. CSOs should be funded directly from the government's budget. Alternatively, a government can purchase CSOs by accepting a lower rate of return from the business which reflects the cost of providing the CSO. Separate funding of CSOs by the government removes potential conflicts between community services and profit maximisation roles of the business activity and increases transparency.⁴⁴

Finding 1

The Standing Committee found that the delivery of community service obligations should not be compromised by National Competition Policy. It is a matter for governments to decide the nature of community service obligations, which sections of the community they should target and the level of service to be provided from public funds. National Competition Policy does not require reductions in subsidised community services.

The Western Australian Treasury advised the Standing Committee that -

⁴² Submission by the Chamber of Commerce and Industry of Western Australian, January, 1999, p 11.

⁴³ *Ibid*, p 14.

⁴⁴ National Competition Council, *Annual Report 1997-1998*, AusInfo, Canberra, p 152.

... a community service obligation should be recognised by government; that is, the government must want the service. A community service obligation is something that the private sector, in the pursuit of its own best interests, would not provide.⁴⁵

Finding 2

The Standing Committee found that there was a misapprehension that National Competition Policy prevented the provision of community service obligations. This is not the case. There is nothing within the National Competition Policy principles that prevents the continued provision of community service obligations. It is a matter of openness and transparency for governments to reveal how much the service is being subsidised and to allow them to make considered decisions on such information.

The Standing Committee has not considered CSO's in depth in this report but believes that the issues requires an in depth study. The Standing Committee understands that the Public Accounts Committee is currently conducting an inquiry on CSO's. The Standing Committee therefore believes that the subject will be more than adequately covered in that inquiry.

2.16 Competitive Tendering and Contracting Out

Although competitive tendering and contracting out have been used by governments as part of their general microeconomic reforms they were initiated prior to National Competition Policy reforms. Competitive tendering allows government agencies to purchase the provision of certain services from the private sector through seeking tenders for specific functions. Government agencies have also contracted out to private providers certain services such as maintenance services, cleaning services, and information technology services.

The Western Australian Treasury in its submission to the Standing Committee stated -

Competitive tendering and contracting out are sometimes confused with the competitive neutrality obligations under National Competition Policy. Competitive neutrality leads to the full costs of services being revealed. However, it does not require that the services be either tendered or contracted out - although these may be the logical next steps in full costing if an in-house service reveals it to be uncompetitive.⁴⁶

2.17 Corporatisation and Commercialisation

Throughout Australia governments at all levels have either corporatised or commercialised several of their business activities.

⁴⁵ Anne Nolan, Assistant Under Treasurer, Treasury, Evidence, Perth, Thursday, 17 December, 1998, p 60.

⁴⁶ Submission by the Western Australian Treasury, November, 1998, p 8.

Corporatisation of government business activities involves restructuring the activities so that they operate on a commercial basis, whilst maintaining government ownership. The corporatised business activity becomes a separate legal entity.

Commercialisation does not go as far as corporatisation. The commercialised entity remains a separate business unit within a government department.

Both corporatisation and commercialisation have been used to restructure government business enterprises to improve performance. Corporatisation and commercialisation have been strategies used to ensure competitive neutrality of government enterprises.

2.18 Privatisation

Privatisation refers to the process of selling a government owned entity to the private sector. National Competition Policy does not require privatisation. The National Competition Policy Agreements leave it to the governments to determine whether privatising a particular government business is warranted.

In the 1990s Australian governments, both Commonwealth and State, have privatised a significant portion of the public sector.

While this trend is also evident overseas, Australia has had one of the larger programs among OECD countries.⁴⁷

Privatisation has occurred in three main sectors - financial services, electricity and gas, and transport and communications.

Public trading enterprises have been sold at both State and federal levels of government in Australia. Many public trading enterprises were privatised after they had been corporatised and required to operate on a fully commercial basis.

The States initially privatised their banks and insurance offices, followed in a number of States by the sale of electricity and gas utilities.

The Western Australian Treasury advised the Standing Committee that -

Two of the highest profile privatisations in Western Australia are the sale of BankWest and the Dampier to Bunbury Natural Gas Pipeline. Recent announcements include the possible privatisation of Westrail's freight business and the sale of the Bunbury Power Station. Some scoping work is also being carried out on the possible sale of the remaining business of AlintaGas.⁴⁸

⁴⁷ "Privatisation in Australia", *Reserve Bank of Australia Bulletin*, December, 1997, p 7.

⁴⁸ Submission by the Western Australian Treasury, November, 1998, p 8.

Finding 3

The Standing Committee found that National Competition Policy does not necessarily require privatisation, the contracting out of services provided by the public sector to outside businesses or the need to make cuts in subsidised services.

2.19 Regulator

Competition policy has been important in restructuring utilities across Australia. The structural separation of the State's role as shareholder and regulator has facilitated competition in sectors previously immune from competition.

It is argued that an industry-specific regulator is best to regulate aspects of an industry unique to itself. Matters of a more general nature, such as environmental protection, public health, and occupational health and safety are better dealt with in a whole of government context, that is in general legislation that applies to all industry.

Amongst the Australian States, the creation of "overall regulators" has been handled differently, and this has allowed different arrangements and attitudes to develop. Western Australia has not yet established a single regulatory authority, within which there are units relating to water, energy, transport, and other services.

2.20 Conclusion

It has been accepted that it is no longer reasonable for national corporations to have to contend with different regulatory regimes in the different States and Territories. Such complexity only adds to costs and makes it more difficult for business to compete in export markets. Australian business is increasingly operating on a national integrated basis and a national approach to business regulation allows firms to take advantage of larger markets, to develop new products and to specialise in their strengths.

Businesses and consumers benefit from uniform protection of consumer and business rights, provided by a national competition policy, regardless of jurisdiction.

Graeme Samuel, President of the National Competition Council stated recently that National Competition Policy reforms -

... do not require privatisation, nor do they require local councils to 'contract out' services to big businesses from elsewhere, and nor do they require cuts in subsidised services. If anyone says governments must do these things because competition policy gives them no choice they are not

giving the true picture.⁴⁹

The above view was supported by the Western Australian Farmers Federation who advised the Standing Committee that -

Much of [National Competition Policy] NCP has been misrepresented by State governments in their attempts to rationalise funding cuts to community services. One example with which to highlight this activity is the current move to privatise the State run rail corporation, Westrail.⁵⁰

The overriding objective of National Competition Policy is to structure markets in such a way that the community as a whole receives the greatest benefit. As has been said before, competition is a means to an end, not an end in itself. The public benefit test applied under competition policy is broad and flexible enough to incorporate non economic considerations. The public benefit test provides a framework for systematic and structured evaluation of government activity which requires governments to justify anti-competitive regulation and legislation.

⁴⁹ Graeme Samuel, President, National Competition Council, "Competition Policy and the Farm Sector", South Australian Farmers Federation Annual Convention, Adelaide, 24 July, 1998.

⁵⁰ Submission by the Western Australian Farmers Federation, 5 November, 1998, p 3.

Chapter 3. Australia - Public Sector Reforms

3.1 Reform and Competition

Under National Competition Policy, governments throughout Australia are committed to restructuring industries traditionally dominated by public sector monopolies. As a result, energy and water utilities have been restructured through deregulation, contracting out, commercialisation, corporatisation and privatisation.

From a consumer and public interest perspective, energy and water have several characteristics which are critical to regulation and service delivery. Firstly, water and energy are essential for individual welfare and are not readily substitutable. Secondly, the production, delivery and accessibility of utility services give rise to externalities such as greenhouse gas emissions, pollution, depletion of natural resources, and impacts on public health and community welfare. Thirdly, consumer transactions with utility companies are often characterised by unequal bargaining power due to information asymmetries and market power enjoyed by incumbent suppliers.⁵¹

In this Chapter the report considers National Competition Policy and other microeconomic reforms undertaken in the public utility and other government sectors.

3.2 Energy Industry Reforms

The push to reform the power industry had its origins in 1991 with the release of the Industry Commission report into electricity generation and distribution which found that poor investment decisions lead to excess capacity and overstaffing.

Over the past several years there has been a move towards substantial restructuring of Australian energy industries including electricity. This has meant the break up of State and Territory Government utilities and the removal of barriers to interstate trade.

The need for Australian industry to be globally competitive has through the incentives of the National Competition Agreements, encouraged the States to privatise their power utilities.

The deregulation of the energy market in Western Australia began with the release of the Energy Challenge for the 21st Century, the Report of the Energy Board of Review (Carnegie Report) in 1993 which recommended the separation of State Energy Commission of Western Australia (SECWA) into separate electricity, gas utilities, a regulatory body and the corporatisation of the gas and electricity utilities as well as the deregulation of the gas market to allow for other market entrants.

⁵¹

Dieneke Walker, "Reform and Competition: a Consumers' Perspective", Paper for the IIR Conference on National Competition Policy, Sydney, 8 September, 1997, pp 1-2.

As a result in 1995 SECWA was separated into two organisations dealing with electricity and gas - Western Power and AlintaGas. This was the first step in the deregulation process. The Office of Energy was created and became the regulator/policy adviser. The next step progressively was to allow private operators into the south-west gas and electricity market, by selling the main gas transmission pipeline and other assets which included the Bunbury power station. This also led to a process to achieve a deregulated market and encouraged private investment in the gas and electricity distribution sectors.

Western Australia is isolated from the rest of the country and has been more cautious in reforming its power industry. It has been reported that -

... WA has been achieving its best results in privatisation of the power industry: through new investment rather than sale of State assets.⁵²

Western Australia's isolation and small markets is reflected in its difference to energy planning. These factors exclude Western Australia from inclusion in a national electricity grid. However, at the same time these same factors, that is, isolation and great distances have contributed to almost fully deregulated and privatised energy market in some parts of the north of Western Australia. Demand in the mining industry has led to a number of private power operators in Western Australia, many of which are foreign owned.

3.3 Electricity Reform

Significant reforms have been introduced in most States and Territories to facilitate competition in the electricity industry. The reforms have involved the separation of integrated electricity authorities into independent bodies with responsibility for generation, transmission and distribution and retail. The reforms have also involved the separation of regulatory and commercial functions. A process of corporatisation of the independent electricity bodies has been undertaken in many States and Territories.

The electricity industry is an important component of both economic and social infrastructures. Former State owned electricity generation and distribution businesses have been publicly listed. It has been reported that -

This brave new world of competition will create a \$23 billion energy market with more than 30 different companies generating and distributing electricity or gas.⁵³

Small to medium-sized electricity users in New south Wales (NSW), Victoria and the Australian Capital Territory (ACT) are free to choose their own electricity supplier. In Queensland the Electricity Commission was split into four generating businesses, a transmission company and various retail distribution companies. Unlike Victoria or NSW, Queensland has little extra generating capacity, making Queensland electricity prices higher than its counterparts until its grid

⁵² Treadgold T., "Why WA is a Different Story", *Business Review Weekly*, June 8, 1998, p 84.

⁵³ Arbouw J., "Electric Shock Treatment", *The Bulletin*, June 23, 1998, p 48.

is linked to the NSW grid.

Privatisation of some sectors of the electricity industry has occurred in Victoria. All of Victoria's electricity distribution companies are now owned, wholly or partially, by US utilities.

Recent commentary on the process of deregulation has been that -

Due to the importance of electricity for the functioning of society, there is a clear need for governments to regulate the actions of the electricity industry.⁵⁴

Many of the larger companies in Victoria have made savings on their electricity bills. However, it has been reported that -

... the pace of electricity deregulation and privatisation has also produced uncertainty, apathy, anger and occasional price increases. People have to grapple with new concepts such as "contestability", "host retailers" and "wires businesses".⁵⁵

The speed and extent of electricity deregulation and privatisation in Victoria has made it a leader among countries and provinces. The old State Electricity Commission was broken up into privatised generating stations, retailers and power distribution businesses.

The strengths and weaknesses of a deregulated, privatised structure will take years to emerge. In Victoria deregulation has resulted in a number of privatised power-distribution businesses being set up to run the poles and wires that connect consumers with the high-tension power transmission lines. Each company was given an effective monopoly in their own region. In the past the high distribution charges were pegged by the Victorian Government to cover the expense of providing rural networks, since privatisation the power bills of some businesses have made some companies in that region uncompetitive.

It is reported that lower energy prices in Victoria are mainly been a result of excess capacity that had been created during the period of government ownership and that such prices cannot be maintained as privatised companies move to recover costs and make profits for their shareholders.

3.3.1 Electricity Agreement

Western Australia is not part of the national electricity market but is developing its own State-based competitive marketing, introducing third party access to both the high voltage transmission system and the distribution network. Western Australia was not a signatory to the Electricity Agreement. Western Australia is not physically interconnected with the other States on the grid. The eastern States are not immediately affected by how the electricity industry addresses competition in Western Australia. However, the effect of the application of competition practices to Western Australia's electricity industry has considerable influence on industrial users.

3.3.2 Electricity Deregulation in WA

⁵⁴ Mills D., "The Electric Impact of Globalisation", *Wiser*, No 4, 1996, p 23.

⁵⁵ Langford R., "Private power: the jury is still out", *Business Review Weekly*, June 9, 1997, p 83.

The Western Power Corporation was created in 1995.

The electricity business is divided into four parts -

- (i) generation - the power stations;
- (ii) transmission - the big wires in the big towers;
- (iii) distribution - the small wires in front of the house; and
- (iv) retail - the part that sells it.

The transmission and distribution parts of the business are not subject to competition because they cannot be duplicated.

Western Power advised the Standing Committee that the pace of deregulation for electricity has been considerably slower than gas for a number of reasons including the fact that -

On the day that Western Power was created, SECWA had \$3.6 billion of debt. On the day prior to the split up, the gas business had \$2.2 billion of debt and the electricity business had \$1.4 billion of debt. They day after the amounts were reversed.⁵⁶

The arrangement was designed to give the two organisations commercial balance sheets. Western Power also was directed to build the Collie Power Station and associated transmission line. This capital works program, and the fact that the majority of the North West Shelf gas and contracts went to Western Power did put Western Power in an uncommercial situation.

Western Power started with about \$270 million or \$280 million of inventory of fuel it could not use with a planned draw down that would take it well into the next century.⁵⁷

Western Power advised the Standing Committee that -

... on current expectations, and on the current deregulation program, it will be able to draw down all remaining fuel stock by 2003 or 2004.⁵⁸

A change in the deregulation program and the loss of any customers would negate those expectations.

Western Power is Western Australia's main electricity utility and generates two-thirds of all electricity within the State. It operates two interconnected transmission systems. The South West interconnected system supplies the south west corner of the State and communities north

⁵⁶ Nenad Ninkov, General Manager, Corporate Strategy, Western Power, Evidence, Perth, Friday, 18 December, 1998, p 24.

⁵⁷ *Ibid*, p 25.

⁵⁸ *Ibid*, p 26.

to Kalbarri and east to the Goldfields. The Pilbara interconnected system supplies major towns in the Pilbara including Port Hedland and Karratha. There are 29 isolated systems supplying remote towns throughout the State and outside the interconnected systems. Some of the regional areas supplied are very small, the smallest is a 250 kW power station. This compares with the South West interconnected system in which private and Western Power assets provide 3 500 000 kW. There are economies of scale. Not only are there capital problems in small regional areas but also most regional stations run on diesel power. Fuel excise is imposed. Unlike the private sector, particularly the mining companies which were made fuel excise exempt by the Federal Government for mining purpose Western Power must pay the full cost of the excise. The cost in some regional towns can be up to 65 cents a unit to produce power.

The biggest source of electricity generation in Western Australia is at Collie, which has the State's only commercial coalfield. Two power stations are operated in Collie by Western Power. The stations are fed by adjoining privately operated coal mines.

There are also a number of power stations owned and operated by the private sector in Western Australia. These include BHP power stations in Port Hedland, Goldfields Power's Parkeston plant in Kalgoorlie, Mission Energy's plant in Kwinana, and Pacific Hydro's plant in the Kimberley.

The Western Australian Treasury advised the Standing Committee that -

Deregulation has also enabled large electricity customers to enter into contracts with either Western Power or private sector generators to purchase electricity which is supplied via Western Power's transmission and distribution systems. This has resulted in increased competition for the supply of electricity to large industrial and mining companies, particularly in the Goldfields region.⁵⁹

The biggest winners from micro-economic reform of the national energy market have been the large industrial users operating in the wholesale market.

3.3.3 Electricity - Cross-Subsidies

The obligation to cross-subsidise is applied by the State to Western Power. It is regarded as a condition of Western Power's franchise as a supplier of electricity to the community. There is a cross-subsidy of \$150 million to \$200 million a year.⁶⁰

Western Power has to operate regional power systems in 29 regional towns. This results in losses of between \$30 and \$40 million a year which is cross-subsidised by the South West interconnected system. An example, is that Western Power is selling electricity in Esperance to residential customers for about 14 cents a unit and commercial customers for about 16 cents a unit when the average cost of supply is around 30 cents kWh.

Western Power advised the Standing Committee that -

⁵⁹ Submission by the Western Australian Treasury, November, 1998, p 18.

⁶⁰ Dr Leslie Farrant, Co-ordinator of Energy, Office of Energy, Evidence, Perth, Friday, 18 December, 1998, p 37.

... the only profitable part of the Western Power network is the Perth central business district and the Kwinana and Kalgoorlie areas. Everything else generally loses money. Essentially what is being done in this State is that we finance rural areas through cross-subsidies because it is just accepted that people in the metropolitan areas have some obligation to people in rural areas.⁶¹

Western Power is subject to *Corporations Law* liabilities but is subsidising country areas through the continued application of uniform tariffs. This means lower returns for the State.

3.3.4 Corporatisation - Electricity

Western Power on its inception as a corporation was set up with a balance sheet of 80 percent debt and 20 percent equity which, in commercial terms, is an excessive debt/equity ratio. Secondly, Western Power is locked into very high take or pay contract on coal and gas, which run to the year 2005, when the North West Shelf gas contracts were renegotiated. This commits Western Power to buy at least 110 terajoules of gas per day from the North West Shelf whether they use it or not. The price is very much higher than the market dictates. Competitors can buy gas at the prevailing market price.

Although Western Power was corporatised to meet market requirements it does not have the independence to meet those market issues.

Deregulation of the industry further, would disadvantage Western Power because the industry had not been restructured prior to corporatisation. Legislation requires Western Power to operate on a commercial basis. However, factors including contracts which oblige Western Power to purchase gas and coal at uncompetitive rates and to supply electricity to small regional centres at below cost, mean that Western Power cannot function at a commercial capacity.

Western Power is a vertically integrated monopoly, with customers having a limited choice over supplier. Although about a third of electricity generated in the State comes from private generators, much of this is either dedicated to specific users or is tied up by Western Power through contracting out arrangements. The NCC stated -

Electricity prices are relatively high in WA.⁶²

Although Western Power is corporatised, under the current legislative status the Minister is not only the owner, but also the regulator and energy policy maker in the State.

3.3.5 Community Service Obligations - Electricity

Western Power must fund the community service obligations (CSOs) itself. Rebates are available for health and pension card holders which amount to about \$30 million a year. However, uniform

⁶¹ Nenad Ninkov, General Manager, Corporate Strategy, Western Power, Evidence, Perth, Friday, 18 December, 1998, p 32.

⁶² Graeme Samuel, President, National Competition Council, "Competition Policy and the Energy Industry", Energy in Western Australia 98 Conference, Perth, 18 March, 1998, p1.

tariff policy is not recognised as being a CSO and is therefore not clearly defined in Western Power's accounts.

The Standing Committee was advised that Western Power makes its profits in basically two areas in the State, from the greater metropolitan area down to Kwinana and north to Yanchep and out to the Darling Scarp and Kalgoorlie, everywhere else it loses money.

At Esperance, Western Power does not pass on its full electricity charges to the customers of the port. If it were to do so it could suddenly become uneconomic for the cargo to go out through Esperance.

The Standing Committee is of the view that while it is quite acceptable for such subsidies to exist, accounting methods should be set up so as to make any and all subsidies transparent.

The Western Australian Chamber of Commerce and the Chamber of Minerals and Energy of WA have called for the Western Australian Government to restructure and privatise the electricity utility. It has called for disclosure of the higher cost of supplying electricity to rural and remote areas instead of spreading the cost across other customers in the metropolitan region who are paying extra to cover such costs. It has called for open accounting and for such losses to be recognised as community service obligations and funded from government consolidated revenue.⁶³

3.3.6 Privatisation - Electricity

The Western Australian Government announced that it has now ruled out the privatisation of Western Power for at least five years. Mr Barnett, the Western Australian Minister for Energy, has been reported as stating that -

... selling generating capacity and encouraging new private electricity generators will deliver the best result for WA, which has a unique power system in that it is so isolated and cannot call on power from other States to overcome a major system failure.⁶⁴

The Western Australian Chamber of Commerce and Industry (CCI) recently stated -

The State Government's recent decision to defer privatisation of Western Power for at least five years highlights the disappointing pace of energy market reform in WA.⁶⁵

Privatisation is not the whole answer to reform. Little benefit would flow from a decision to convert a public monopoly into a private one. The Competition Principles Agreement requires governments to review the structure of a public monopoly prior to the introduction of competition to the market or privatisation. CCI further stated -

⁶³ "Further call for split of Western Power", *Business Advocate*, August, 1998.

⁶⁴ Treadgold T., "Barnett fuels power surge of speculation", *The West Australian*, Tuesday, 15 September, 1998, p 10.

⁶⁵ Rowe L., CCI Chief Executive, "State government's pace of electricity market reform disappoints - CCI", *Business Advocate*, October, 1998, p 3.

Industry strongly believes there must be separation of generation and network functions and establishment of an independent regulator for the electricity market to deliver its full potential.⁶⁶

The 120 MW Bunbury power station was sold.

3.3.7 Third Party Access - Electricity

Western Australia is developing its own State-based competitive market in electricity and has introduced third party access to the transmission and distribution network.⁶⁷

There is currently fully open access on the transmission system in electricity to any size customer, at a 5 megawatt level for an average load customer on a single site in the electricity distribution system, with an announcement of liberalisation of Western Power's markets beyond that date. From January 1999 consumers in regional areas have been able to use Western Power's wire system to receive power from a third party if a third party is available in those areas and the customer's use is 300 000 kilowatt hours per year or above.

Independent producers are currently seeking to supply electricity to certain regional areas.

3.3.8 Independent Regulator - Electricity

The Office of Energy controls the regulatory and policy arrangements which previously were in the State monopoly. It is the regulator for both electricity and gas. The Office of Energy has overseen the deregulation or liberalisation of access to markets.

3.4 Gas Reform

Since 1980, energy consumption in Western Australia has risen at a rate about double the national average and growth above the national average is predicted to continue. The impetus for growth comes from the WA's energy-intensive industries such as alumina, chemicals, mineral sands, iron and steel. But costs need to be contained to ensure the international competitiveness of these industries. Competitiveness in the energy industry is therefore vital.

Graeme Samuel stated -

Although Western Australia has vast gas reserves it has high transmission access charges. For example, tariffs (per km) on the Dampier to Bunbury pipeline are more than double those charged for the tariffs in other States.⁶⁸

The Western Australian Government in February 1994 at the COAG meeting made a commitment

⁶⁶ *Ibid.*, p 3.

⁶⁷ Graeme Samuel, President, National Competition Council, "Competition Policy and the Energy Industry", Energy in Western Australia 98 Conference, Perth, 18 March, 1998.

⁶⁸ *Ibid.*

to free and fair trade in gas across Australia. One of the commitments made related to providing access for third parties to use pipeline infrastructure for the transport of gas.

The aims of the gas reform agenda was to promote free and fair trade in gas between and within States. All governments agreed to -

- implement a uniform national framework for third party access to gas transmission and distribution pipelines;
- remove legislative and regulatory barriers to free and fair trade in gas between and within States; and
- separate publicly owned gas transmission and distribution facilities, and ring fence to separate privately owned transmission and distribution facilities.

3.4.1 Gas Deregulation

On 1 January 1995 SECWA was split and AlintaGas and Western Power were formed to provide direct competition between gas and electricity. AlintaGas was established to operate the gas business as a corporatised business. The Office of Energy was established and the North West Shelf gas contract was disaggregated and an open access regime was implemented for the Dampier to Bunbury Natural Gas Pipeline (DBNGP). The deregulation process incorporated a deregulation timetable which allowed access to AlintaGas's transmission system. The deregulation timetable was designed to allow the largest customers and progressively over time smaller customers to buy from the gas supplier of their choice.

In 1995 AlintaGas owned the transmission business, which was the Dampier to Bunbury Natural Gas Pipeline, the distribution business, which is the natural gas reticulation system that comes off the Dampier to Bunbury Natural Gas Pipeline; some isolated systems such as Albany and the Vines Estate and on the retail side, which is the purchasing and selling of gas at a contract level to industrial and commercial customers and at a tariff level to residential and small business consumers. In March 1998 the Dampier to Bunbury Natural Gas Pipeline was sold and AlintaGas now has no involvement in the ownership of transmission pipelines.

AlintaGas owns the gas distribution systems operating in the South West and Mid West of the State, and is the sole supplier of natural gas coming through the DBNGP to customers on the South West system using less than 250 terajoules of gas annually from a single metered connection on a single site. AlintaGas operates the gas distribution and sale system in Kalgoorlie under a franchise arrangement. The rest of the natural gas industry operates in an open market for the supply of pipeline gas.

Western Australia was one of the first States to initiate competitive arrangements in gas, with deregulation of the Pilbara market from 1995 resulting in swift and substantial price reductions for some of the State's biggest industrial customers. WA was also one of the first States to facilitate access to gas pipeline services, with access regimes for the Dampier to Bunbury Natural Gas Pipeline, separate AlintaGas distribution networks and Goldfields Pipeline established ahead

of the national reform process.⁶⁹

In Western Australia, gas prices fell 50 percent for certain industrial users after deregulation in the Pilbara in 1995.⁷⁰

3.4.2 Natural Gas Access Regime

In 1994 the Council of Australian Governments (COAG) made a commitment to achieve “free and fair trade” in natural gas. In 1995 COAG established a Gas Reform Task Force (GRTF) to develop a National Third Party Access Code for Natural Gas Pipelines. The code to apply to both transmission and distribution systems was to be given legal effect through legislation enacted by all governments. The Gas Reform Implementation Group (GRIG) comprising representatives of all jurisdictions and industry bodies was established in late 1996 to rework the draft national access code and consider legislative and implementation issues. The group recommended proposals for an intergovernmental agreement, national legislation, and legislation in each jurisdiction in order to implement the national code in a uniform and consistent manner across Australia.

According to GRIG the national access regime has the following objectives -

- to provide an open and transparent process for third party access to gas pipelines in order to reduce uncertainty for market participants;
- to facilitate the efficient development and operation of a national natural gas market and to safeguard against abuse of monopoly power;
- to promote a competitive market for gas, where consumers are able to choose their suppliers;
- to provide a right to access transmission and distribution networks on fair and equitable terms, with a right to a binding dispute resolution mechanism; and
- to encourage the development of an integrated pipeline network.⁷¹

3.4.3 Intergovernmental Natural Gas Pipelines Access Agreement

On 7 November 1997 the States, Territories as well as the Commonwealth signed an intergovernmental agreement which committed all jurisdictions to a uniform regulatory framework for third party access. It dealt with access to the gas pipeline infrastructure across Australia and set out each jurisdiction’s commitment to a National Gas Pipelines Access Law.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Dr Allen Beasley, “National Gas Reform”, Paper at IIR National Competition Policy Conference, Sydney 9-10 October, 1997, p 3.

The intergovernmental agreement provides that all jurisdictions who are party to the agreement will ensure that the code and the legislation are implemented, maintained and updated when changes are necessary and is kept in step across all jurisdictions. All parties to the agreement are decision makers in any changes to the substance of the code or the legislation.

The code aims to introduce free and fair trade in gas and includes a provision for third-party access to transmission and distribution (reticulation) pipelines. Third-party access to pipelines is intended to foster competition in both the wholesale and retail gas supply markets.

The Australian Competition and Consumer Commission (ACCC) was the national regulator of transmission pipelines. However, Western Australia has established an essentially similar access regime under the administration of State regulatory and appeals bodies.

The National Access Code outlines the access principles that apply to natural gas transmission and distribution networks in Australia. The code aims to provide fairness and equity to both providers and users of the natural gas network to encourage competition at all levels of the gas industry.

The code cover pipelines that exhibit natural monopoly characteristics for which access regulation is necessary to achieve competition within and between markets.

3.4.4 Gas Pipelines Access Law

The National Gas Pipelines Access Law provides the legal framework for the national gas access regime. The Gas Pipelines Access Law was required to be passed in each State and Territory. The law was given effect by a “application of laws” approach. South Australia was the lead legislator with other jurisdictions applying the South Australian law. The Gas Pipeline Access Law gives legal effect to the National Access Code. Western Australia introduced its own complementary legislation having an essentially identical effect to the South Australian legislation. Other States adopted the “model” South Australian legislation.

The *Gas Pipelines Access (Western Australia) Act 1998* was assented to in January 1999 and came into effect on 9 February 1999. The legislation provides for the application as a law of Western Australia the National Gas Pipelines Access Law. It establishes an independent regulator in Western Australia as well as a review body and disputes arbitrator. The legislation gives legal effect in Western Australia to the National Third Party Access Code for Natural Gas Pipeline System.

The *Gas Pipelines Access (Western Australia) Act 1998* deems certain existing access regimes to comply with the code until 1 January 2000 and provides for the preservation of existing specified gas transportation contracts.

All States and Territories introduced legislation to allow third party access to national gas pipelines based on the National Access Code.

3.4.5 Independent Regulator - Gas

Along with the National Access Code came the concept of an independent regulator to assess the

reference tariffs for not only of certain independently owned pipelines but also of those pipelines which are held by States.

The National Gas Pipelines Access Law established the Australian Competition and Consumer Commission (ACCC) as the regulator for transmission pipelines other than in Western Australia. The regulator of distribution systems will be an independent regulator for that particular State or Territory, specified by the legislation in the jurisdiction where the distribution system is located. Because Western Australia is not interconnected with other States, it does not have the practical problem of making sure that the same regulator deals with gas coming from across the border. Western Australia has opted for a State based regulator for both the transmission and distribution systems. The other States will have the ACCC as the regulator for transmission systems, and State based regulators for distribution systems.

3.4.6 Uniform Tariffs - Gas

Uniform tariffs in gas means that some customers provide AlintaGas with a higher profit than others. It is more profitable for AlintaGas to supply its bigger customers than its smaller customers. Though AlintaGas supports an open market it is aware that its larger more profitable customers would be “cherry picked” and it would be left with having to supply customers who are less profitable. AlintaGas would become a supplier of last resort. There are concerns about the need to put in place rules to deal with deregulation of the residential market by July of the year 2002.

It is difficult to maintain a uniform tariff policy when there is competition. A competitive market works only if people are allowed to fail. However a lack of competition will result in no incentive for innovation.

Finding 4

The Standing Committee found that there were concerns by some sectors regarding the maintenance of uniform tariffs in a fully deregulated market. However, in some limited circumstances they can be justified.

3.4.7 Reference Tariffs - Gas

A central feature of the National Access Code is the concept of a reference tariff which sets maximum prices for standard services. The reference tariff or tariffs will be part of the access arrangement by each pipeline operator and must be approved by the regulator.

3.4.8 Gas Industry Structure in WA

As a result of the intergovernmental agreement further deregulation of the gas market will occur in Western Australia by the July of year 2002. AlintaGas has “take or pay” contracts that go to the year 2005. The main contract for the North West Shelf goes to 2005, with a further commitment extending to 2020.

AlintaGas had three businesses -

- (i) The transmission business operated the Dampier to Bunbury Natural Gas Pipeline. The pipeline is a natural monopoly. It must be regulated so the prices do not get out of hand and reflect very high monopoly rent. The transmission business was ring fenced so its accounting was kept separate from the rest of AlintaGas. The transmission business has been sold.
- (ii) The trading business, is a wholesale business. It is responsible for buying all the gas AlintaGas uses, and selling the bulk of it under individually negotiated contracts to larger contract customers and to the AlintaGas retail business.
- (iii) The retail business, operates the distribution network in Perth, Bunbury and other country areas. It markets and supplies gas to almost 400,000 customers. It is responsible for the hardware, that is, putting the pipes in the ground and connecting the meters at customers premises. It is AlintaGas's policy not to work beyond the meter. It has arrangements to work with private installers.

Third party access is provided for customers who consume over 250 TJ per annum at a single site and this will be reduced to 100 TJ per annum from 1 January 2000 and totally deregulated from 1 July 2002.

3.4.9 Coverage - Gas

Most States have already implemented State based gas reforms including third party access to gas transmission pipelines. In the case of New South Wales and Western Australia access to large gas users on the gas distribution network has commenced.

Western Australia has had third party access arrangements to major gas transmission pipelines such as the Goldfields Gas Pipeline since 1994. Access to distribution networks was implemented in January 1997. The Western Australian Dampier to Bunbury Natural Gas Pipeline was highly regulated from January 1995. In March 1998 the Western Australian Government sold the Dampier to Bunbury Natural Gas Pipeline⁷². The sale removed AlintaGas from the gas transmission market at present.

3.4.10 Privatisation - Gas

Natural gas is supplied by a number of private suppliers, the largest being the North West Shelf Joint Venture. There are four major transmission pipelines, all privately owned; the Dampier to Bunbury Natural Gas Pipeline, the Goldfields Gas Pipeline, the Pilbara Energy Pipeline and the Parmelia Pipeline. The first two are subject to open access requirements to allow supplier and distributors or customers to deal directly with each other. Limited open access applies to the Pilbara Energy Pipeline and the Parmelia Pipeline through provisions in the *Petroleum Pipelines Act 1969*. All four pipelines are covered by the national gas access arrangements under the *Gas*

⁷²

Sale to Epic Energy Australia for \$2 407 million announced by the Western Australian Government on 3 March, 1998.

*Pipelines Access (Western Australia) Act 1998.*⁷³

The Goldfield Gas Pipeline is a privately operated gas pipeline serving the iron ore, gold and nickel mines in the centre of the State. Gas transmission, apart from residential distribution, is becoming dominated by big private operators.

The Dampier to Bunbury Natural Gas Pipeline is booked to capacity and there is a need for increased capacity to transport gas from the North West Shelf to the south-western corner of the State. It is believed that the construction of a second pipeline would promote competition between gas fields in WA.⁷⁴ The Western Australian Government has established a Dampier-Bunbury national gas pipeline corridor which new pipelines, in addition to the existing operator, may use.

The Standing Committee was advised by David Williams, General Counsel to AlintaGas that market forces would determine the need for a second pipeline. He stated -

No one will construct a second pipeline if there is not a significant quantity of contracting capacity that they can allow.⁷⁵

The Western Australian Government has flagged the sale of the remainder of AlintaGas by 2001.⁷⁶

The Western Australian Chamber of Commerce and Industry has supported the privatisation plan but believes that -

AlintaGas should be broken up to allow true competition and lower gas prices. Concerns have been raised by others that selling AlintaGas would only create a private monopoly and prices would increase.⁷⁷

⁷³ Submission by the Western Australian Treasury, November, 1998, p 20.

⁷⁴ In February 1998 the ACCC advised AlintaGas that the agreement between AlintaGas and Epic Energy Pty Ltd for the haulage of gas to the An Feng Kingstream Steel Project near Geraldton in WA involved the misuse of market power by AlintaGas and was anti-competitive. The terms appeared to have the purpose of preventing the entry of a second pipeline to the market. AlintaGas did not proceed with the agreement.

⁷⁵ Lindsay Williams, General Counsel to AlintaGas, Evidence, Perth, Friday, 18 December, 1998, p 15.

⁷⁶ Wendy Pryer, "\$1.1b gas sell-off sparks price fear", *The West Australian*, Thursday, December 24, 1998, p 1.

⁷⁷ *Ibid*, p 1.

Finding 5

The Standing Committee found that there may be a number of issues concerning the privatisation of AlintaGas that need to be addressed including the need to restructure AlintaGas. The Government should proceed with caution when transferring a public monopoly to a private monopoly.

3.5 Agreement on Water Reform

In February 1994 the Council of Australian Governments (COAG) agreed to develop a national framework for water reform. In April 1995 this national framework was brought within the ambit of the National Competition Policy framework. This made allocation and trading reforms part of the agreement and the States implementation of such reforms are linked to competition payments. The National Competition Policy water reforms seek to address both the economic viability and ecological sustainability of water supply. Such reforms are in accord with the Water and Rivers Commission of Western Australia practice.

Water reform has as its goal efficient pricing, rather than competition. As part of the reforms, some water charges have increased. This is to encourage economic use of water and provide more funds for maintenance.

In his submission to the Standing Committee, the Chairman of the Water Corporation of Western Australia, the Hon. Peter Jones made a number of comments on the National Competition Agreements. He stated -

The reality of hindsight has shown that the Agreements have become a happy hunting ground for those who seek to turn the general principles of competition into administrative requirements, far exceeding what we understand was the intention, or in the minds, of the original signatories.⁷⁸

3.5.1 Water Reform

In 1995 the water industry in WA was restructured with the separation of the commercial and regulatory functions of the Water Authority. The Water Corporation was set up as a corporation and separate resource management and regulatory bodies established. The Water Corporation is the dominant supplier of water services in Western Australia.

The National Competition Policy principles and reforms have lead to significant improvements in a range of services and in public accountability. Services are required to be transparent, financial accountability is required and utilities must publicly issue statements on their financial affairs. These changes have lead to improvements in the Water Corporation of Western Australia.

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Submission received by Hon Peter Jones, Chairman of the Water Corporation of Western Australia, 17 December, 1998, p 1.

Reform in Western Australia must take account of demographic and geographic spread in Western Australia. The Hon. Peter Jones, Chairman of the Water Corporation in Western Australia advised the Standing Committee that -

The Water Corporation charges some 80 cents for domestic water services to Kalgoorlie, however the cost of providing the services is some \$3.80.⁷⁹

The Standing Committee accepts that subsidies may be granted for a variety of policy reasons, but believes that all subsidies should be transparent.

3.5.2 Regulation - Water

The Office of Water Regulation regulates the water industry and is responsible for advising the Minister for Water Resources of water supply policy matters referred to it. The Office of Water Regulation issues licences with conditions to water service providers which cover the areas of delivery of water, irrigation, drainage and sewerage. The Office of Water Regulation cannot regulate prices. It does however, have power to impose sanctions such as fines or the removal of a licence. The Department of Environmental Protection is a regulator in the sense that it issues a licence for every wastewater plant. It issues licences regarding effluent disposal and imposes disciplines.

3.5.3 Environmental Considerations - Water

The Water and Rivers Commission was created in the restructure. It is also a regulator on the use and management of bulk water resources. It is responsible for water management, including resource allocation, protection and evaluation as well as, environmental and research management issues. The Water and Rivers Commission is considering water trading and water rights.

3.5.4 Water Trading

Water trading allows voluntary transactions to transfer water to areas where it has a higher value. Water trading schemes will allow farmers who have water rights to sell them to others, if they have excess water or if they can get a better price for their water than the returns they would get by using the water on their farms. In the past, water rights were permanently attached to land and thus could not be traded or shifted. This prevented farmers from taking advantage of market opportunities.

Such an approach to water property rights, and hence tradeable entitlements, is intended to encourage greater efficiency in water use through facilitating trading of water from low yield uses to high value uses.

The issue of water entitlements and water rights is about how they are set up, whether the rights will be sold, whether they will become property rights, or whether they fall within a licensing regime where those rights are given for a period and people have the use of that water.

⁷⁹

Hon. Peter Jones, Chairman Water Corporation, Evidence, Perth, Thursday, 17 December, 1998, p 28.

Competition for water resources not only occurs between industry, urban users, agriculture/horticulture and the environment, but also increasingly between different agricultural/horticultural pursuits.

The Western Australian Water Users Coalition in its submission to the Senate Select Committee Inquiry into the Socio-Economic Consequences of the National Competition Policy stated -

Unless the policies of favouring the transfer of water to higher value users also takes account of the impact on existing or potential downstream users there will be severe dislocation of enterprises and economic activity within a catchment or region.⁸⁰

Full trading in water entitlements started in July 1998 in the South West Irrigation Scheme -

The Water Corporation transferred to the South West Irrigation Asset Cooperative all assets involved in the Waroona Dam and the Harvey and Collie river schemes stretching from Waroona to Dardanup. The Water Corporation provides bulk water to the cooperative.⁸¹

The Preston Valley irrigators will manage and distribute water which they purchase from the Water Corporation.⁸²

3.5.5 Uniform Tariffs - Water

The Standing Committee was advised that there are currently about 20 sewerage schemes which are run by local councils. However, most services in regional Western Australia are loss-making ventures to the Water Corporation. It is because there is a community service obligation (CSO) policy that prices have not changed. Effectively, there are uniform prices throughout the State.⁸³

The Western Australian Treasury advised the Standing Committee that -

Tariff reforms to wind back cross-subsidies in both the water and sewerage businesses to better reflect the cost of service provisions have been ongoing since 1992.⁸⁴

3.5.6 Water Reform and Community Service Obligations

The Water Corporation receives revenue from the government's consolidated fund to meet community service obligations.

⁸⁰ Senate Select Committee inquiry into the Socio-Economic Consequences of National Competition Policy, Submissions, Vol 7, Submissions 121-136, p 1536.

⁸¹ Productivity Commission 1998, *Microeconomic Reform by Australian Governments 1997-98*, Annual Report Series 1997-98, AusInfo, Melbourne, p 36.

⁸² *Ibid*, p 36.

⁸³ Derek Perez, Principal Economist, Office of Water Regulation, Evidence, Perth, Friday, 18 December, 1998, p 44.

⁸⁴ Submission by the Western Australian Treasury, November, 1998, p 23.

The Western Australian Treasury advised the Standing Committee that -

To ensure that the government's social policy objectives do not impact adversely on the Water Corporation's commercial performance, community service obligations performed by the Water Corporation are directly funded from the consolidated fund. Community service obligations include the provision of rebates to certain customers, such as pensioners and seniors, the provision of services in country areas on less than a full economic cost recovery basis and the provision of deep sewerage services to existing properties in metropolitan and country areas.⁸⁵

The Hon. Peter Jones, Chairman of the Water Corporation in Western Australia advised the Standing Committee that -

In the 1997-98 financial year, the Water Corporation made a profit of some \$250 million after tax. The Corporation paid to its owner a total of some \$310 million of which our owner gave us back some \$180 million for community service obligations. Of the \$180 million, some \$136 million or \$137 million went to rural and regional areas. The remainder went to pensioner benefits, subsidies and costs of that nature.⁸⁶

3.5.7 Privatisation - Water

Water privatisation, although on the minds of State governments, is not an easy idea to sell to the people who believe some services should always remain in the public domain.

Even in the United States, water remains largely in the public sector.⁸⁷

Victoria has corporatised Water Boards and introduced a user pays system. South Australia has out-sourced water and sewerage to an Anglo/French consortium. Queensland is contemplating privatising three of its main water pipes and New South Wales has increased the private sector's involvement in water-treatment projects -

Much of Western Europe's water and sewerage has been privatised and the companies involved are making fat profits. The British lobby group Water Watch says shareholder dividends account for between 12% and 42% of water bills for ordinary customers.⁸⁸

The Hon. Peter Jones, Chairman of the Water Corporation of Western Australia in his submission to the Standing Committee stated -

The entry of international utilities for reasons of comparative assessment, is both unnecessary and damaging to the value of public assets. To gradually whittle away asset value by taking away the licence to deliver those services and granting it to a competitor is an academic exercise built around some biased interpretation of the Competition Policy and the COAG Agreements. Nowhere within the Agreements is it required that existing publicly owned utilities should be cut up or partly sold,

⁸⁵ *Ibid*, p 23.

⁸⁶ Hon. Peter Jones, Chairman Water Corporation, Evidence, Perth, Thursday, 17 December, 1998, p 32.

⁸⁷ Ferguson A., "L'eau de profit", *Business Review Weekly*, April 29, 1998, p 23.

⁸⁸ *Ibid*, p 23.

in order to provide a form of competition.⁸⁹

The Standing Committee received a submission from South West Irrigation (SWI) which is a Co-operative. Before privatisation the irrigation scheme was administered by the Water Corporation. Although the company is privatised it does retain a monopoly on irrigation water distribution. South West Irrigation benefits from an income underwriting arrangement with government for the first 5 years of privatisation. South West Irrigation advised the Standing Committee that -

... the privatisation of SWI as a result of implementation of competition policy has had the effect of stabilising the price of irrigation water and providing irrigators with the basis for a stable price in future.⁹⁰

In the same submission SWI acknowledges the significant benefits obtained by irrigators as a result of the implementation of competition policy but it does not favour deregulation in the dairy industry. Over 70 percent of SWI's income comes from dairy farmers. In its submission it expressed concern that competition in the dairy industry in Western Australia will result in a loss of dairy farmers from the irrigation area.⁹¹

Finding 6

The Standing Committee found that because of the infrastructure requirements and the range of subsidies that are required, overseas experience has demonstrated that it is better for the supply of water services to remain in public ownership, except in some isolated cases under special circumstances.

3.6 Road Transport Reform

National Competition Policy also covers road transport. There has been significant competition in the road transport industry. Reforms have focused on matters such as national licensing for heavy vehicles, road use pricing and vehicle standards.

3.6.1 Intergovernmental Agreements - Road Transport Reform

An Intergovernmental Agreement on Heavy Vehicles was signed by all Heads of Government in Australia in June 1991. Its aim was to establish uniform or consistent road transport legislation to be adopted in all jurisdictions throughout Australia. It covered virtually all regulatory controls on the movement of heavy vehicles. It covered not only the design standards, the operational standards, mass loadings they could carry, but also the behaviour of drivers. The Road Traffic

⁸⁹ Submission by the Hon. Peter Jones, Chairman of the Water Corporation of Western Australia, 17 December, 1998, p 4.

⁹⁰ Submission by South West Irrigation, 28 October, 1998.

⁹¹ *Ibid.*

Code is within the province of the national legislation. It seeks to have uniform driver licensing and vehicle registration systems throughout the nation.

In May 1992 the Heads of Government signed the Light Vehicle Agreement. Effectively the agreement was similar to the Heavy Vehicle Agreement although not quite as extensive in scope. These two agreements are schedules to the *National Road Transport Commission Act 1991*.

3.6.2 National Road Transport Commission

The National Road Transport Commission (NRTC) is an independent body, established under the Commonwealth's *National Road Transport Commission Act 1991*. It is funded jointly by all participating parties; namely the nine jurisdictions, the Commonwealth, the States of the Commonwealth, the Northern Territory and the Australian Capital Territory. The NRTC reports to the Ministerial Council for Road Transport. The Ministerial Council comprises the Transport Ministers of each jurisdiction.

3.6.3 Ministerial Council - Road

The Ministerial Council considers legislation and/or policies presented to it by the NRTC. The Ministerial Council cannot amend national legislation proposals put to it but can reject them. The NRTC must then make adjustments and resubmit proposals to the Ministerial Council. A majority vote by the Ministerial Council is required to adopt national legislation. As there are nine jurisdictions, five need to vote in favour for the proposed legislation to enable it to become effective nationally.

3.6.4 Legislative Model - Road

It was originally intended that "template" legislation be adopted for the national law. However, national implementation has been hampered by difficulties perceived with the "template"⁹² legislation approach and it has since been agreed that national law could be adopted in varying formats. This could be achieved by picking up the national legislation automatically or amending existing State legislation to reflect the national law. It has been proposed that the adopting of "template" legislation should be the subject of a special review and reconsideration by Heads of Government. It is recognised that, even within a nationally agreed framework and with "template" legislation, there was provision in the initial intergovernmental agreements for variations. These were to be undertaken by "application" orders, which effectively were able to suspend, or vary, the national law in certain areas, but required the majority agreement of Ministerial Council. It did recognise that a national uniform, or even consistent law, may need to be varied for particular reasons in regional areas.

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Under the "template" legislation approach, the Commonwealth Government was to enact legislation to apply the agreed reforms in the ACT. Other State and Territory Governments were to apply the Commonwealth "template" legislation, by reference, in their own jurisdictions.

In 1997 the Ministerial Council of Road Transport (MCRT)⁹³ moved away from the “template” approach and agreed that jurisdictions could implement the reform modules, once approved by the MCRT, without waiting for the Commonwealth “template”. This new arrangement focused on national consistency, rather than national uniformity.

3.6.5 National Road Transport Law Reform

It was initially intended that one overriding piece of legislation would cover all road transport matters and could be achieved within three or four years. However, it was quickly recognised that this was overly ambitious. Consequently, the national road transport law was broken down into six modules. It was thought that this would speed up the process, or at least enable some parts of the national law to be adopted earlier.

The six reform modules are -

- (i) uniform heavy vehicle charges;
- (ii) dangerous goods;
- (iii) vehicle operations (including vehicle standards);
- (iv) national heavy vehicle registration scheme;
- (v) national driver licensing scheme; and
- (vi) consistent compliance and enforcement.

Ministers subsequently agreed to fast track a number of specific elements of some of the reform modules, using existing jurisdictional legislation to achieve some practical reforms for the industry in advance of implementation of the national legislation.

Difficulties were also experienced with the “modular” approach, because there were some linkages between some of the modules, yet the modules were being developed at different rates. In particular, each module requires compliance and enforcement provisions, but the compliance and enforcement module was subject to the slowest development. The proposed law was to deal not only with the standards that need to be met, but also the compliance provisions, sanctions and penalties if those standards are not met. Consequently, the attempt to speed up the process was significantly frustrated because jurisdictions wanted to see the package as a whole.

As a result, very little of the national law was progressed by jurisdictions under the then required “template” legislation method. More recently, with the decision to dispense with “template” (at least temporarily) and with a number of the reform modules proposals reaching completion, the pace of reform implementation has started to increase. On current expectations, the vast majority of reforms are scheduled for implementation by all jurisdictions during 1999.

⁹³

The Ministerial Council of Road Transport (MCRT) is an inter-jurisdictional body that manages the implementation of the specific reforms developed by the National Road Transport Commission (NRTC).

One of the difficulties in devising a national policy is that it tends to concentrate on areas which have the greatest traffic flows. However, the needs of capital cities are often very different from the outback needs of Western Australia and the Northern Territory. This has recently been better recognised and a remote area project group has been set up to ensure that the special requirements of these areas are addressed and considered as part of the total reform process.

3.6.6 Competition Policy and National Road Transport

Under the National Competition Policy Agreement, the payments to be made to jurisdictions by the Commonwealth in three tranches were tied - *inter alia* - to the States and Territories giving “effective observance to nationally agreed road transport reforms”. The National Competition Council (NCC) is to evaluate jurisdictional performance prior to each of the three tranche payments, but no performance measures were specified; in particular there were no implementation timelines for the various reforms.

The initial implementation schedule endorsed by Ministerial Council proved overly ambitious due primarily to delays in various reform recommendations being submitted for Ministerial Council’s vote. As subsequent schedule endorsements suffered the same fate for various reasons, the NCC requested that a firm endorsement be provided by the Council of Australian Governments (COAG).

In December 1998, Ministers agreed to forward an evaluation framework (including specific implementation timelines) for COAG endorsement and subsequent forwarding to NCC. The achievement of the recommended implementation timelines in the evaluation framework depended in a number of instances on governments being in a position to accord high priority to necessary legislative processes - this might not always be possible. COAG has yet to finalise its position on the recommended framework.

3.6.7 Mutual Recognition

Although it is a bilateral arrangement, all States and the Commonwealth are signatories to the trans-Tasman mutual recognition agreement. Consideration was given to including New Zealand in the road transport reforms in so far as they related to vehicle standards.

3.7 Deregulation - Rail

Following the deregulation of the transport industry in Western Australia, Westrail significantly downsized its staff and relinquished unprofitable operations such as small parcel freight, machinery and fertiliser transport and contracted out significant support functions such as maintenance. Most of the regulatory functions were transferred to the Department of Transport. Westrail concentrated on the bulk haulage of grain, which makes up a quarter of its freight operations, and minerals, which constitutes the other three-quarters.

The installation of new grain loading facilities at a number of receival points has facilitated the rapid loading of and movement of grain between country receival points and the ports. This

innovation has greatly increased productivity and reduced costs of freight. However, the Government plans to privatise the freight operations of Westrail which has concerned many farmers -

Farmers are worried about the privatisation of WA's profitable grain haulage railway service. Since the deregulation of the transport industry in WA, Westrail has been providing grain growers a quality service at reasonable and competitive prices.⁹⁴

The Western Australian Government introduced the *Rail Freight Systems Bill 1999* on 2 June 1999 which will facilitate the sale of Westrail's freight business. The government proposes to lease the track and corridor to the purchaser of the freight business which will permit a vertically integrated operation, although many people have called for the vertical separation of Westrail into a track owner and a rail operator.

The new railway operator will however, be required to allow other rail service providers access to the railway within the framework of the State's rail access regime.

During the Second Reading Speech, the Minister representing the Minister for Transport stated -

... the Government proposes to sell Westrail's freight business as a trade sale.⁹⁵

In the past, there was no national transport plan to enable parallel development of effective road and rail networks without "breaks of gauge" and under conditions of competitive neutrality. There was no focus on improving competitive advantage of rail by upgrading infrastructure on the national track system as there has been for road since 1970s. Investment in freight carrying assets, systems and people could not be fully productive without complementary investment in track and communications.

The Chamber of Commerce and Industry advised the Standing Committee that -

... the process of deregulation and price competition and opening up competition between rail and road have already yielded some substantial benefits, particularly for farmers. ... the real reduction in grain freight price charges as a result of deregulation is 23 percent.⁹⁶

The Farmers Federation⁹⁷ expressed the view to the Standing Committee that if there was complete deregulation there would be plenty of competition on the standard gauge, but it is questionable what other traffic or competition would be viable on the spur lines that carry grain. It further stated -

⁹⁴ Nicholl C., "Concern over sale of WA's rail freight system", *News Weekly*, September 5, 1998, p 3.

⁹⁵ Western Australia, Parliamentary Debates, 3 June, 1999, p 8773.

⁹⁶ Nicola Cusworth, Chief Economist, Chamber of Commerce and Industry of Western Australian, Evidence, Perth, Thursday, 17 December, 1998, p 50.

⁹⁷ The Western Australian Farmers Federation is the State's largest rural lobby organisation and represents nearly 6,000 individual farmers including wool producers, grain growers, meat producers, horticulturalists, dairy farmers, beekeepers and members from other areas of primary industry. Affiliate membership also covers a range of diverse agricultural industries such as poultry farmers, pig producers, cashmere growers and potato growers.

Westrail's grain freight operation is currently partially cross-subsidised between some receival points in order to make it competitive across the board with road transport, and growers throughout the State have clearly indicated their support for this system. ... A privatised Westrail will be profit driven rather than service driven with many grain producers suffering high freight prices in the long term and putting more freight on road. Community attitudes would certainly oppose this happening.⁹⁸

3.7.1 Westrail

Westrail owns all the government railway track in Western Australia except for the interstate line east of Kalgoorlie. It is a vertically integrated organisation and is the only intrastate rail freight operator on those lines. It competes directly with road transport for traffic such as grain, wood chips and some minerals since rail freight has been deregulated. It operates the urban passenger network on contract to Transperth and three intrastate passenger services as community service obligations. Three interstate rail freight operators and one interstate passenger service use the standard gauge track between Kalgoorlie and Perth, and the National Rail Corporation also runs a service into the Port of Fremantle. All third party use is by way of individual commercial contract with Westrail.

There are three major iron ore railways in the Pilbara Region, which are all wholly owned and operated by private sector mining companies.

3.7.2 Rail Reform - National Competition Policy

The introduction of National Competition Policy is about dealing with monopoly infrastructure and endeavouring to open up as much as possible to competition. While rail reform is not formally covered by the National Competition Policy agreements, there has been pressure for change resulting from the operation of the National Competition Policy access regime. Competition policy required action to draft legislation and principles to enable third-party track access in Western Australia.

Rail reform has lagged compared to other industry sectors. A major barrier to an efficient interstate rail system has been the existence of separate State regimes with different access conditions, safety and other requirements. A rail operator requiring to move freight from New South Wales to Perth has to negotiate separately with each regime.

Under National Competition Policy all interstate and intrastate rail services will be exposed to open competition and the requirement to provide track access to private sector operators -

... rail freight rates for grain in Western Australia have fallen by over 20 percent in real terms since deregulation in 1992-93, while freight rates between Melbourne and Perth fell by 40 percent ...⁹⁹

James Ferguson, Executive Director of the Western Australian Farmers Federation stated -

⁹⁸ Submission by the Western Australian Farmers Federation, 5 November, 1998, p 5.

⁹⁹ Graeme Samuel, President, National Competition Council, "Competition Policy and the farm sector", South Australian Farmers Federation Annual Convention, Adelaide, 24 July, 1998.

Our concern is that National Competition Policy is potentially used by politicians or Treasury as a useful screen behind which they can justify their motives. Perhaps the deregulation of Westrail is an example. As we see it there is no requirement under National Competition Policy for the State to divest itself of its interest in rail.¹⁰⁰

3.7.3 National Rail Access Regime

Part IIIA of the *Trade Practices Act 1974* is a framework for access to infrastructure of national importance, provided all conditions are met, including the “essential facilities” test.

A national access regime will promote competition if it is complemented by an effective track system, that eliminates “boundary effects”. National entities which are accountable for quality access and asset management across the system are needed.

The Western Australian Government applied the State Rail Access Code to interstate operators who wish to use the standard gauge line between Kalgoorlie and Kwinana. This was the initial step towards allowing expanded competition on the State’s rail system. The Code applies a uniform framework in which commercial negotiations can occur.¹⁰¹

3.7.4 Intergovernmental Agreement - Rail

In September 1997, Transport Ministers agreed to a series of reforms which would reduce the cost of transporting freight by rail and standardise practices technologies and conditions. In November 1997, Transport Ministers from Queensland, New South Wales, Victoria, South Australia and Western Australia and the Commonwealth signed an Intergovernmental Agreement whereby they agreed to form a national track authority to manage access to the interstate network.

The Australian Rail Track Corporation (ARTC) was established with the objective of being the sole provider of access to the national rail network.

3.7.5 Rail Access Law

The Western Australian Parliament passed the *Government Railways (Access) Act 1998* in November 1998. The access regime in the legislation consists of a code to provide a right of access and legislation giving legal force to the code. The legislation establishes an access regime governing the negotiation of access to the rail network and a regulator to oversee the process.

The legislation addresses Western Australia’s commitment towards principles agreed to in the intergovernmental competition policy agreements signed in 1995. These agreements endorsed a commitment to improved economic efficiency through a review of anti-competitive legislation and regulation, third party access to essential infrastructure facilities and the elimination of any competitive advantage possessed by government businesses.

¹⁰⁰ James Ferguson, Executive Director, Western Australian Farmers Federation, Evidence, Perth, Thursday, 17 December, 1998, p 19.

¹⁰¹ Productivity Commission 1998, *Op Cit*, p 56.

The Western Australian Treasury advised the Standing Committee that the rail access regime -

... will open the whole Westrail network to competition by rail freight operators. The legislation also removes the constitutional barriers to the National Rail Corporation competing for intrastate freight.¹⁰²

However, concerns were also expressed by James Ferguson, Executive Director of the Western Australian Farmers Federation who advised the Standing Committee that -

We have grave concerns about third-party access because the profitability of the standard gauge line is much greater than of the narrow gauge. There is no question that there are huge cross-subsidies between growers delivering grain to the standard gauge line as opposed to the narrow gauge line.¹⁰³

3.7.6 Regulator - Rail

The Department of Transport has been nominated as the regulator.

3.7.7 Privatisation - Rail

Westrail is operating profitably and is competitive with road transport. The proposal to sell Westrail's freight business including the infrastructure is to maximise the amount of money that can be obtained from the sale. Westrail is competing with a world-best practice trucking industry.

The Standing Committee was advised by Westrail that -

... we have the opportunity of making a premium profit from it now.¹⁰⁴

The privatisation of Westrail could see the rationalisation of railways based on a principle of return on assets and possibly a further rationalisation of the network. This would be inevitable because it is driven by an economic bias of a privatised railway.

The Western Australian Farmers Federation in its submission to the Standing Committee stated -

One of the difficulties is trying to determine whether the sale of Westrail is a reality, is the lack of consultation the farm sector has received in this State. Western Australian grain growers represent about 25% of the freight business conducted by Westrail - \$80 million per annum. This is expected to rise with the increasing tonnage coming out of the Wheatbelt. In 1997 Westrail's grain freight tonnage increased 8 percent.¹⁰⁵

¹⁰² Submission by the Western Australian Treasury, November, 1998, p 25.

¹⁰³ James Ferguson, Executive Director, Western Australian Farmers Federation, Evidence, Perth, Thursday, 17 December, 1998, p 26.

¹⁰⁴ Garry James, Acting Commissioner of Railways, Westrail, Evidence, Perth, Thursday, 17 December, 1998, p 70.

¹⁰⁵ Submission by the Western Australian Farmers Federation, 5 November 1998, p 4.

The Western Australian Farmers Federation expressed grave concerns about the sale of Westrail. It stated -

There are elements of the Westrail business that are contestable now and should be in the future. However, there are parts of it that are probably natural monopolies, ... such natural monopolies, it is almost certainly in the public interest to have some degree of regulation to ensure that a maximum, range of services is available and that we have maximum contestability. At this stage, the Federation is opposed to the sale of Westrail.¹⁰⁶

The Western Australian government's decision to sell Westrail's freight business has been applauded by the Chamber of Commerce and Industry of Western Australia (CCI).¹⁰⁷ Westrail's freight business operates profitably. CCI stated regarding the sale of Westrail that -

... a case can be made for privatising [Westrail] as an integrated organisation which revolves around the efficiency and the economy of scale this might attract. Of course, one must weigh up that potential benefit with the cost of the loss of competition.¹⁰⁸

It has been reported that -

The Western Australian Government claims that it is necessary to sell Westrail because of the third party access requirements under National Competition Policy and the *Trade Practices Act 1974*.¹⁰⁹

However, as the Standing Committee has found National Competition Policy does not require the privatisation of public utilities.

Westrail advised the Standing Committee that Westrail, Co-operative Bulk Handling Limited (CBH), and the grower organisations have treated the grain network as a total network built around CBH facilities. The grain network is basically narrow gauge.¹¹⁰

The Western Australian Farmers Federation, in their submission to the Standing Committee stated -

The Federation is opposed to the sale of Westrail. The State Government has been unable to provide farmers in this State with the necessary evidence to show that a private company would provide any more beneficial service or indeed even maintain the current service to the State's grain growers.¹¹¹

¹⁰⁶ James Ferguson, Executive Director, Western Australian Farmers Federation, Evidence, Perth, Thursday, 17 December, 1998, p 24.

¹⁰⁷ "Sale of Westrail's freight business will put WA on right track - CCI", *Business Advocate*, September 1998, p 3.

¹⁰⁸ Nicola Cusworth, Chief Economist, Chamber of Commerce and Industry of Western Australian, Evidence, Perth, Thursday, 17 December, 1998, p 42.

¹⁰⁹ Nicholl C., "Concern over sale of WA's rail freight system", *News Weekly*, September 5, 1998, p 3.

¹¹⁰ Garry James, Acting Commissioner of Railways, Evidence, Perth, Thursday, 17 December, 1998, p 64.

¹¹¹ Submission by the Western Australian Farmers Federation, 5 November, 1998, p 6.

There is general concern among farmers about the future of small freight lines in the grain network if Westrail's rail freight business is sold. The sale of Westrail's infrastructure and freight business, is estimated to be worth nearly \$1 billion.¹¹²

Finding 7

The Standing Committee found that the pace and direction of deregulation and privatisation was of concern to some export orientated sectors of industry but that given time they have the capacity to accommodate change.

3.8 Ports and Commercial Shipping

Fremantle Port is Western Australia's largest cargo port and one of the fastest growing general cargo ports in Australia. The Fremantle Port Authority is the strategic port manager with the responsibility for ensuring that port services and facilities are provided in a reliable, competitive and efficient manner. The Fremantle Port Authority is a Western Australian government owned enterprise and subject to commercialisation principles.

Western Australia also has a number of regional ports, all of which provide facilities, equipment and services for the handling of ships and cargoes. Six are operated by government port authorities, two by the Department of Transport, one by the Shire of Derby/West Kimberly and another six are privately owned and operated. Of the government owned port authorities, the Bunbury Port Authority was selected as a pilot for implementing a comprehensive commercialisation reform program in regional ports.

3.8.1 Commercialisation - Ports

The Fremantle and Bunbury Port Authorities were commercialised in 1996.

An independent study conducted by ACIL Consulting on behalf of the CCI and the Chamber of Minerals and Energy of Western Australia of Western Australia's ports has called for more competition and efficiency. The study made a number of recommendations including -

- port authorities should be corporatised rather than commercialised and be subject to Commonwealth *Corporations Law* or equivalent;
- dividends paid by port authorities to the government shareholder must be based on profitability and the need for investment and working capital rather than government revenue needs; and
- port pricing policies should be regulated from such bodies at the Australian Competition

¹¹²

Burns A., "Rail sale plan faces party room obstacle", *The West Australian*, Tuesday, March 2, 1999, p 24.

and Consumer Commission (ACCC) through the *Trade Practices Act 1974*.¹¹³

3.8.2 Ports and Competition

The Standing Committee received a submission from the Bunbury Port Authority who advised that competition has contributed to a positive change in work practices in the Bunbury Port.¹¹⁴

In its submission the Western Australian Treasury advised the Standing Committee that -

The Port Authorities assist the broader community through their prime objective of trade facilitation. Over the past five years all ports have improved performance and trade through the ports has increased significantly.¹¹⁵

The Western Australian Treasury also advised that all Port Authorities are operating profitably and have achieved declining debt to asset ratios.

3.8.3 Corporatisation Legislation - Ports

The Western Australian Government introduced the *Port Authorities Bill 1998* into the Parliament in 1998. The Bill is intended to give effect to the Government's policies on port reform. The Bill would corporatise Western Australian Port Authorities. Like the water, electricity and gas utilities the port authorities would be subject to provisions based on the *Corporations Law*. The legislation aims to rationalise existing Port Authority legislation and is intended to meet competitive neutrality principles.

The port and shipping reforms are linked to other transport reforms.

3.9 Agricultural Reform - National Competition Policy

Under National Competition Policy principles governments are in the process of reviewing anti-competitive pieces of legislation. Under guidelines set down for review of legislation the benefits of those anti-competitive provisions must outweigh the costs to the community.

Rural reform issues include a review of compulsory marketing laws. The reviews are to determine whether compulsory marketing arrangements are justified. Whether they provided an overall community benefit and if they are the only feasible way to get that benefit. Compulsory marketing arrangements which involve single export desk selling have been justified as a means to maximise high prices in overseas markets. However, some marketing monopolies for domestic sales have been found to be detrimental to both farmers and consumers.

¹¹³ "Independent study of WA's ports calls for more competition and efficiency", *Business Advocate*, September, 1998, p 10.

¹¹⁴ Submission by the Bunbury Port Authority, 15 October, 1998.

¹¹⁵ Submission by the Western Australian Treasury, November, 1998, p 28.

3.9.1 Statutory Marketing Authorities - Agriculture

Marketing authorities have been a feature of Australia's rural industries. Marketing authorities have been established and maintained for a number of reasons including to use market power and to maximise producer income by selling through a monopoly body in domestic and overseas markets, to ensure standards, stabilise prices and to achieve economies of scale for transport and storage. Under the National Competition Policy reforms governments are required to assess whether restriction on competition brought about by statutory marketing arrangements are justified. To be justified the anti-competitive arrangement must demonstrate that the benefits to the whole community outweigh the costs of that restriction and the benefits to the community cannot be achieved without the restriction.

In its submission to the Standing Committee the Chamber of Commerce and Industry of Western Australia stated -

State governments have already undertaken a range of reviews of marketing authorities. Their diverse outcomes - with some retaining full regulatory powers, some authorities having their powers reduced or modified and some authorities abolished - demonstrate that National Competition Policy is not fundamentally hostile to marketing authorities *per se*, only those which cannot demonstrate a net benefit to the community.¹¹⁶

The Chamber of Commerce and Industry of Western Australia has been calling for the abolition of the *Marketing of Potatoes Act 1946* and the complete deregulation of the potato growing, marketing and distribution industries in Western Australia. CCI is of the view that the *Marketing of Potatoes Act 1946* reduces competition in the industry causing serious distortion in the rural growing and distribution markets. CCI stated -

A CCI study has found the WA potato price was 29 percent higher than the national benchmark, resulting in WA consumers paying more than \$12 million a year more for local potatoes than they should.¹¹⁷

Farmer representatives advised the Standing Committee that there are manifest community benefits from single desk arrangements such as the wheat board export process. There are a large number of producers producing an identical product. The capacity for them to compete against each other would reduce the net value of the crop.

The grain industry advised the Standing Committee that it supports the single desk selling and the orderly structure of marketing which it claims benefits the industry.

The Western Australian Farmers Federation who were concerned about the impact of deregulation in the industry advised the Standing Committee that there was benefit in the statutory

¹¹⁶ Submission by the Chamber of Commerce and Industry of Western Australia, January, 1999, p 17.

¹¹⁷ Submission by the Chamber of Commerce and Industry of Western Australia, January, 1999, Appendix 3.

monopoly in grain storage and handling in Western Australia. James Ferguson, Executive Director of the Western Australian Farmers Federation stated -

With deregulation the risk is that we convert what is a controlled monopoly into basically a private monopoly. Private monopolies have the tendency to restrict services in order to maximise profits.¹¹⁸

3.9.2 Agriculture - Deregulation

The Standing Committee took evidence from a number of grain industry organisations. About 95 percent of grain product handled through the Grain Pool of Western Australia¹¹⁹ and Western Australian Division of the Australian Wheat Board is exported to overseas markets. The domestic grain market has been deregulated.

Representatives of the grain industry advised the Standing Committee that -

... while they [the industry] were not against individual growers marketing their crop, they did not accept different groups amassing huge tonnage and competing with them. Competition would affect the price.¹²⁰

The Grain Pool of Western Australia is the only seller of barley, lupins and canola and has a very strong market advantage being able to control the price of the product in that market. The domestic market is a very small part of the business and it is deregulated.

The Australian Wheat Board advised the Standing Committee that -

In the past 10 years their 100 percent market share fell to about 65 to 70 percent of the actual domestic wheat trade. The domestic market was deregulated in 1989. In Western Australia the estimated production of wheat this harvest is 8.5 million tonnes and perhaps 300,000 to 400,000 tonnes would go to the domestic market, the balance goes to export.¹²¹

The Grain Pool of Western Australia stated that the Standing Committee should look at the big picture. The Australian grain industry is subject to the world trading block and subsequent restrictions and it therefore asked the Standing Committee to -

... not only look at the Australian economy but also at the world economy because that is where we are selling 95 percent of our product.¹²²

The grain industry is of the view that the market for grain is the worldwide market and not the

¹¹⁸ James Ferguson, Executive Director, Western Australian Farmers Federation, Evidence, Perth, Thursday, 17 December, 1998, p 18.

¹¹⁹ The Grain Pool of Western Australia has statutory powers for three commodities; namely, barley, lupins and canola.

¹²⁰ Robert Sewell, Chairman, Grain Pool of Western Australia, Evidence, Perth, Friday, 18 December, 1998, p 3.

¹²¹ Gregory Harvey, Regional Manager, Australian Wheat Board, Evidence, Perth, Friday, 18 December, 1998, p 5.

¹²² Robert Sewell, Chairman, Grain Pool of Western Australia, Evidence, Perth, Friday, 18 December, 1998, p 6.

Australian market as the majority of Australian grain is produced for the export market.

The Australian Wheat Board advised the Standing Committee that 70 percent of its stock is exported. The domestic market bases its price on the export pool price. To attract wheat out of the export pool onto the domestic market, domestic customers usually need to pay a premium upfront or offer better payment terms. The onus is on the domestic market to attract wheat away from the export pool.

The Standing Committee was advised that -

The Australian Wheat Board believes the deregulation of the domestic wheat market for the past 10 years has, all things being equal, been good in the sense it has increased the amount of consumption of domestic wheat over time and opened up new markets.¹²³

Deregulation of the domestic grain market has allowed some efficiencies, although there are also some costs in that it allows individuals to cherry pick the domestic market. The domestic market is able to target specific wheat varieties and quality from certain geographical areas. The end users can now contact directly the individual growers to source the wheat they require.

The WA Farmers Federation raised concerns to the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy that the effect of deregulation has been to shift the balance of power away from producers and consumers towards the retailer who can dominate the price of their goods. The Potato Growers Association of Western Australia has similar concerns. They stated -

With the local market being dominated and controlled by three major retailers, producers are aware that they have no countervailing marketing powers, and would be at the complete mercy of these companies in negotiating price and supply.¹²⁴

3.10 Forestry - National Competition Policy

The Standing Committee received a submission from the Western Australian Forest Alliance who allege breaches of competitive neutrality principles by the Department of Conservation and Land Management (CALM). The submission states that CALM has a major financial interest in maintaining high levels of log extraction from Western Australian native forests because it receives royalties which are a major component of CALM's income. The submission also states that -

Plantation investors, growers, processors and product sellers state that their opportunities have been limited as a result of the resource and pricing "cartel" operated by CALM and Wesfarmers Bunnings. ... on top of the routine anti-competitive selling of subsidised native hardwood logs, large quantities of discount price native hardwood timbers are regularly dumped on the domestic market in unfair

¹²³ *Ibid*, p 7.

¹²⁴ Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, Submissions, Vol 5, Submission No 86, p 957.

competition with plantation timbers.¹²⁵

The Standing Committee has been advised that CALM has a conflict of interest as it not only is responsible for the management of the State's forests but also has commercial operations in forest logging.

3.11 Cross-Subsidies - Rural and Regional Sector

The Western Australian Farmers Federation expressed concerns to the Standing Committee of the effects in rural and regional areas of deregulation and the view that in many cases a degree of cross-subsidisation in the rural community could be justified on public interest grounds. James Ferguson, Executive Director of the Western Australian Farmers Federation stated -

There are many cross-subsidies and rural people have benefited from those cross-subsidies in many instances. Once regulation is removed, the likelihood of private enterprise maintaining cross-subsidies is remote.¹²⁶

3.12 National Competition Policy - Rural and Regional Sector

The Western Australian Farmers Federation in its submission to the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy supported the principle of competition. The Federation believes that there is continual misrepresentation of National Competition Policy by the States. It stated -

State governments undertake privatisation or contracting out of essential services under the guise of NCP. This is not only a misrepresentation of the NCP, but a politically motivated act designed to deflect criticism away from the States. It has been very difficult for Western Australians to identify which actions are part of NCP, and which are purely political or economically driven. For example, the Federation could accept that NCP calls for third party track access on government owned railways. Whether it then follows that it is also necessary to privatise the government run railway company, Westrail, is open to conjecture. It is certainly not a requirement under NCP.¹²⁷

There has been concern about the effects of National Competition Policy on regional economies. Although it would be a mistake to suggest that National Competition Policy is the primary cause of rural decline, Professor John Quiggin stated -

... it is arguable that National Competition Policy and other aspects of microeconomic reform have increased the rate of change and made it unnecessarily traumatic.¹²⁸

¹²⁵ Submission by the Western Australian Forest Alliance, 30 September, 1998, p 2.

¹²⁶ James Ferguson, Executive Director, Western Australian Farmers Federation, Evidence, Perth, Thursday, 17 December, 1998, p 20.

¹²⁷ Excerpt from the WA Farmers Federation submission tot the Senate Select Committee inquiry into the Socio-Economic Consequences of National Competition Policy, *WA Farmers Federation*, Spring Edition, p 8.

¹²⁸ Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, Submissions, Vol 5, Submission No 91, p 1076.

All communities are socially and economically interdependent. In the past the existence of stable employers such as banks, post office, railways, and local government in regional towns cushioned the impact of adverse economic shocks such as a downturn in key industries.

Professor John Quiggin states -

National Competition Policy closes off some routes by which governments have traditionally sought to slow down the rate of adjustment. For example, local governments are effectively prohibited from favouring local contractors, even if the closure of those businesses would lead to contraction in the local economy which would in turn accelerate the withdrawal of banks, schools, post offices and so on.¹²⁹

The Standing Committee has become aware of concerns raised in relation to the potential conflict with the professed policy objectives of decentralisation and regionalisation and the implementation of National Competition Policy, or more correctly economic reforms.

In smaller communities there is not always a competitive market from which to draw. The Western Australian Municipal Association in its submission to the Senate Select Committee on Socio-Economic Consequences of the National Competition Policy stated -

Regionalisation incentives, or disincentives, must be measured not only in terms of service deprivation to non-metropolitan communities, but also in terms of built infrastructure cost and social decay in the city.¹³⁰

Finding 8

The Standing Committee found that there is a strong perception that rural and regional economies have been adversely affected by the reduction of services and the privatisation and contracting out of essential services.

¹²⁹ *Ibid*, p 1077.

¹³⁰ Senate Select Committee inquiry into the Socio-Economic Consequences of National Competition Policy, Submissions, Vol 7, Submissions 121-136, p 1550.

Chapter 4. European Union

4.1 Introduction

At a time of increasing globalisation 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.

The European Union (EU), is the world's largest trading block, and has considerable influence in world trade at bilateral, regional and world levels and tends to be look to as a model.

The EU acts against the plethora of hidden barriers to trade such as discriminatory national laws on investment and the non-enforcement of domestic competition laws.

4.2 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).¹³¹ 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 -

By the terms of the Rome treaty, both the trade policies and the competition policies of the European Union are tilted toward improving market efficiency by reducing or eliminating barriers erected by governments or firms.¹³²

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.

4.3 The Single Market and Competition

The single market makes European firms more competitive by creating the largest market in the industrialised world. It provides them with the opportunity for bigger production runs and economies of scale as well as simplified standards and access to contracts awarded by public authorities in other EU countries.

¹³¹ David Harbord and Tom Hoehan, "Barriers to Entry and Exit in European Competition Policy", *International Review of Law and Economics*, 14, No 4, December, 1994, pp 411-435.

¹³² Graham E.M. & Richardson J.D., eds., *Op Cit*, 1997, p 395.

This enables them to cut costs, lower prices for the European consumer as well as compete effectively in global markets.

The removal of frontiers and transportation controls has reduced operating costs for business. In some cases, the increased competition among transport firms has resulted in manufacturing companies saving up to 50% on delivery costs. The lifting of capital restriction has enabled banks, companies and individuals to invest in the currency and market of their choice.

The European Commission (EC) is aware that if EU legislation is applied differently from one Member State to another it can create *de facto* trade barriers. The EC and the European Parliament have moved to adopt programs to ensure that EU legislation is applied uniformly in all Member States.

Small countries which still have special national standards to protect their own companies from outside competition have come to realise the shortsightedness of this approach. Their domestic markets turn out to be too small to enable home companies to survive. These firms then have to change products specification anyway if they wish to export to other countries. In this way, national standards are not a defence against imports but an obstacle to local exports.

Competition must ensure that the benefits established by the single market are not eroded by state subsidies to companies, anti-competitive agreements and mergers or the abuse of dominant positions by large enterprises.

It is considered that a single market increases competition and as a result the consumer ultimately benefits from a wider choice of products at more competitive prices.

4.4 Interaction of Competition Policy with other EU Policies

Competition policy does not exist in isolation. It is an essential element of industrial policy. There is a complex interaction between competition policy, the development of the single market, and a wide range of other policies including trade, agriculture, transport and research.

The dominant goal of both competition policy and trade policy is to overcome the restrictions that would separate national markets from one another.

4.5 Mutual Recognition

Mutual recognition recognised the national rules and regulations of Member States. Mutual recognition enables goods to be traded unhampered across national borders and enables banks and insurance companies to serve customers throughout Europe. The acceptance of the educational

qualifications of Member States has enabled the mobility of professionals and workers and is regarded as a valuable asset for a truly competitive European economy -

... Member States cannot refuse to recognise ... diplomas awarded by other member countries, thereby opening the door for applicants from other Member States.¹³³

4.6 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. Just as state aid distorts competition, luring corporations with low tax rates also distorts competition. It was recently stated in the European Parliament -

We are not just talking about tax on savings but corporate tax where some countries undertake fiscal engineering which is, to say the least, highly ingenious.¹³⁴

The EU Commissioner for policing the single European market is working towards achieving tax harmonisation. Some countries engage in the practice of offering minimal tax to attract foreign corporations. Some aspects of such tax regimes are harmful to competition, including a lack of transparency in tax regimes, varying treatment for residents and non-residents as well as failure to comply with the relevant OECD tax codes.

In the European Union subsidies or state aids are prohibited under Article 92 of the Treaty of Rome to the extent that they distort or threaten to distort competition. Article 92 prohibits -

... any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens competition by favouring certain undertakings or the production of certain goods.

The European Court of Justice has adopted a very low standard of evidence to determine whether competition and trade between Member States is distorted.

4.7 State Monopolies

Enterprises with special or exclusive rights, operating in network markets such as communications, postal services, energy, water and railways, are often government monopolies. Their impact can sometimes be detrimental to the competitiveness of European business if the effect is to increase industry's cost base or hinder the adoption of new technologies. There has been a certain amount of deregulation and increased competition in these network markets.

The EU has introduced competition into certain sectors such as telecommunications, postal

¹³³ Graham E.M. & Richardson J.D., eds., *Op Cit*, 1997, p 299.

¹³⁴ Brechley F., "EU tackles the last obstacle to single market", *The Australian Financial Review*, Tuesday, September 9, 1997.

services, energy distribution and air transport where national monopolies have been operating in most Member States. The aim is to promote intra-Union competition while taking account of public and consumer interest such as the supply of a universal services for telecommunications and postal services to subscribers throughout the Member States at fair prices irrespective of geographic location.

Although there has been liberalisation of telecommunications services, progress has been slower in the postal sector because EU governments have moved more slowly towards consensus on postal services, partly because of the key role postal services play particularly in rural communities throughout the European Union.

The EU's drive to encourage greater cross border competition in their markets has provided a powerful incentive for greater efficiency in organisations unused to commercial pressures.

4.8 Enforcement

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 European 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.

4.9 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 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.

4.10 Competition Policy - European Union and Member States

An example of the operation of European Union competition policy with the competition policy of a Member State is Germany.

There is no conflict between EU and German competition law because EU law, wherever it applies, supersedes national law. In a practical sense German national competition laws have converged with EU rules.

Competition policy in Germany is concerned with merger policy aimed at limiting the external growth of firms and the control of the abuse of a dominant position.

Most matters concerning competition or trade are regulated by the legislation of the Federal government in Germany. In Germany, according to the Constitution, economic matters and especially competition matters lie exclusively with the Federation (the Federal Government). There is a real conflict of competences between the Member States which have competences concerning cartels and mergers and the European Union which also has competence in both areas.¹³⁵

4.11 Competition Policy Administration - Germany

In Germany competition policy is administered by the Bundeskartellamt, or Federal Cartel Office, which is responsible for both merger control and control of abuses of dominant position. There is no difference if that corporation is a private one or if it is a public one and includes gas and water utilities. Government owned companies are subject to the same competition policy rules and subject to the same competitive pressures as private companies. The Monopolkommission, or Monopolies Commission, is another important institution for German competition policy. The Commission reports on the state of concentration in the economy and reviews the Cartel Office's decisions. There is a strong federalist element in competition policy, in that the cartel offices of the Länder (the States) deal with cases of only regional importance. Big mergers go to the EC in Brussels, smaller ones stay in the Member States. The European Union can intervene in all cases that have transnational effects. If a cartel or a dominant corporation has transnational effects in several Member States, it is in the competence of the European Union in addition to the existing and remaining competence of the Member States. The European Union legislation prevails in any case of conflict.

Michael Baron, Head of Division on Competition Policy in Germany stated -

The existing situation in Germany is as follows; the authority of the Bundeskartellamt is not limited in any way concerning state authorities. Gas and power, is distributed by corporations which are owned by the cities and they are bound by the decisions of the national competition authority, the Bundeskartellamt and national competition legislation.¹³⁶

There are a number of industry exemptions from competition policy in Germany which includes postal services and telecommunications, the transport sector, the banking and insurance industries, and public utilities. In addition exemptions are granted to agriculture, the Bundesbank and the government owned credit institute. These exempted industries are subject to extensive regulation. The Cartel Office shares control with the independent regulatory bodies for certain competition matters. However, there is increasing pressure from the European Union to bring all such sectors under the general control of European competition policy rules.¹³⁷ The European Commission has actively sought to bring the areas exempted from competition policy under regular competition rules. Some reforms have began in the transport sector in Germany through the application of European competition policy rules. The German government is committed to

¹³⁵ Michael Baron, Head of Division on Competition Policy, Bonn, Germany, 10 July, 1997.

¹³⁶ *Ibid.*

¹³⁷ Graham E.M. & Richardson J.D., eds., *Op Cit*, 1997, p 125-6.

deregulation of these exempted areas -

The German Cartel Office recently tried to force the pace of deregulation in the public utilities sector by challenging exclusive-supply arrangements between an electricity company and a municipality under Article 85(1) of the Treaty of Rome.¹³⁸

The German government is pressing local governments to withdraw from their ownership of local utilities as part of a general privatisation drive.

4.12 Banking and Financial Services

A directive removing capital controls was adopted in 1988. This was followed by a series of directives liberalising banking and financial services. Freedom of capital movement and the creation of uniform financial area were vital for the internal European market.

4.13 Energy

In 1990 European Community legislation on the completion of the “internal energy market” was adopted. It aimed to encourage the sale of electricity and gas across national borders in the European Community, by opening national networks to foreign suppliers, obliging suppliers to publish their prices and co-ordinating investment in energy.

4.14 Telecommunications

Liberalisation is forging ahead in the area of telecommunications services in the EU. The EU has recognised the importance of a deregulated and competitive telecommunications sector. The EC brought down a directive in 1990 concerning the demonopolisation of value added services. Competition among communications operators and the liberalisation of the network infrastructure is well underway.

In 1991 the EC adopted a directive requiring Member States to liberalise their rules on the supply of telecommunications terminal equipment, thus ending the monopolies enjoyed by national telecommunications authorities. It also adopted a plan for the gradual introduction of a competitive market in satellite communications.

In June 1993 Ministers of telecommunications agreed to end national monopolies in the voice telephony sector by 1998 in at least one-half of the Member States. In 1994, Ministers expanded on the accord by approving the end of national monopolies in telecommunications infrastructure by January 1998.

In 1995 the European Commission adopted a directive liberalising the use of cable

telecommunications, requiring Member States to permit a wide range of services, in addition to television broadcasts, on such networks.

4.15 Transport

Transport is a vital sector of the EU economy. Transport services have been progressively liberalised. Quota restrictions on hauliers have been lifted. Regulations have been put in place to enable road transport companies to bid for domestic business in other EU countries.

Frontier controls were abolished to permit the free movement of persons. There have also been agreements to liberalise the road haulage market to allow road hauliers to provide service in the domestic market of another Member State.

Agreements have been made on railway policy to achieve greater integration including the standardisation of track gauges, signalling and guaranteed rights of transit for joint ventures between railways of different Member States. A directive was also adopted on the development of the European Community's railways. This was aimed at the financial and administrative independence of railway undertakings, to provide for EC railways to be guaranteed access to and transit through the entire EC network for the purposes operating an international combined goods and transport service.

4.16 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) countries¹³⁹, as well as the countries of central and eastern Europe.¹⁴⁰ They have also been accepted by the European Union's neighbours on the southern shores of the Mediterranean Sea. The European Commission has, for instance, pushed hard recently to liberalise telecommunications in Europe so that EU firms and consumers benefit from the advantages of the information society and matching the interests of free market competition with guarantees that universal telephone service at affordable prices will still be available to all its citizens wherever they live.

4.17 European Union and Australia

Michael Baron, Head of Division on Competition Policy, in Germany stated -

The European Union and Australia co-operation agreement was an agreement between the European Union and Australia. All trade agreements have a human rights provision inserted. Australia wanted it omitted. The European Union would not sign the agreement without the human rights provision. The agreement was not signed. In Europe the provision was like a basic law decided by the

¹³⁹ The Agreement on the European Economic Area, 1994.

¹⁴⁰ The Europe and Interim Agreements, 1994.

Council's Ministers. It was not possible for the Commission to take it out of the agreement.¹⁴¹

¹⁴¹ Michael Baron, Head of Division on Competition Policy, Germany Bonn, 10 July 1997.

Chapter 5. Canada

5.1 Competition Policy

Competition policy can be effectively administered in a relatively small economy such as Canada. Responsibility for competition policy *per se* and what constitutes unfair competition is at the federal level.

A number of areas which are growing in importance to business, are still governed by the Provinces. That gives rise, to different regimes between the Provinces, for example, packaging of margarine, transportation regulation, environmental regulation and fiscal regimes that do not fall under competition policy *per se* but dramatically effect competition. The Federal Government, apart from its legislative authority, embodied in the *Competition Act 1985*, also has general constitutional powers for trade and commerce. However, contrary to what has been the trend in the United States where anything related to interstate commerce, is considered legitimate for the Federal Government to intervene, - for all kinds of historical reasons the Privy Council in London had in the early years of the Canadian Federation adjudicated against power for the Federal Government. The power of the Canadian Federal Government over the years has been increasingly transferred to the Provinces. Early decisions of the Privy Council and subsequently the Supreme Court of Canada have been loathe to expand the powers of the Federal Government. Provinces cannot impose anything that resembles a duty, or a different duty for out of Province goods in terms of their indirect taxation powers. Increasingly, there are problems in terms of government procurement which increasingly favours Provincially owned companies.

5.2 Legislation - *Competition Act 1985*

The *Competition Act 1985* is administered by the Competition Bureau. The *Competition Act 1985* applies to all sectors of the Canadian economy. It does not regulate subsidies or State aids to industry at either the Provincial or federal level. The *Competition Act 1985* is binding on Crown corporations in respect to their commercial activities. There was a major revision to the *Competition Act 1985* in 1986. That revision was spurred by two facts. The first was that prior to that time most of the law was criminal law and therefore, it had been very difficult in criminal courts to prove guilt on the part of various parties. The onus of proof is higher in criminal matters than it is in civil matters. As a result, the law had proved relatively ineffective. The second consideration was the changing trade and corporate environment which resulted in larger companies, freer trade and more foreign competition.

Amendments introduced to the *Competition Act 1985* brought provisions under the civil law. The provisions essentially replicated provisions under the criminal law regime. The Competition Bureau investigates competition cases which are reviewable by the Competition Tribunal. It investigates cases of abuse of dominant position, refusal to deal, exclusive dealing, tied selling, and mergers.

The criminal matters retained under the revised Act were restricted to price discrimination,

predatory pricing and also misleading representations, advertising and promotions.¹⁴² In Canada since the revision price discrimination and predatory pricing are also now covered under abuse of dominance in the civil section of the Act.

Previously regulated markets, whether transportation, financial services, telecommunication and others or a government monopoly are being opened up to competition and are coming under the jurisdiction of the *Competition Act 1985* and of the Competition Bureau.

The Canadian Competition Bureau is also involved in international co-operation and liaison with other government departments and agencies.

As many Canadian and US markets continue to integrate, the Competition Bureau is involved in an increasing number of investigations on both sides of the border -

Under the Canada-US treaty on mutual legal assistance in criminal matters (MLAT), in effect since 1990, either the Canadian or US Government can require certain assistance of the other.¹⁴³

5.3 Competition Tribunal

The civil matters under the *Competition Act 1985* are heard in the Competition Tribunal. It is a three person tribunal - one lay representative and two judges. The membership rotates through various people from whom the three people can be selected.

The current structure of competition law does not allow private interests to go direct to the Competition Tribunal to make private complaints without the intervention of the Bureau. The Bureau is the only body that is empowered to bring a complaint to the Competition Tribunal.

This is unlike the Australian system which allows private actions to be taken to the Federal Court. Under the *Trade Practices Act 1974*, the ACCC can take an action or competitors can bring actions against each other.

The merger provisions, even the anti-competitive provisions, have been relaxed to allow for an increase in trade, the elimination of trade barriers, particularly *vis-a-vis* the US. It is now an accepted defence that there are foreign competitors, US based competitors. The Tribunal is required to take into account potential foreign competition in deciding any cases dealing with anti-competitive behaviour and any possibility of lessening competition.

¹⁴² Professor Fred Lazar, Professor of Economics, Faculty of Arts, Schulich School of Business, York University, Toronto, Canada, 14 July, 1997.

¹⁴³ Graham E.M. & Richardson J.D., eds., *Op Cit*, 1997, p 62.

5.4 Provincial Intervention in Competition Law

Provincial governments have a very limited role in competition law enforcement. Under competition law the Provinces have the right to intervene as any other party. Generally the Provinces intervene when a merger involves a major company located in their particular jurisdiction, otherwise they rarely get involved.

A Province can intervene but a defence is that there are US based competitors that may or may not be operating in Canada. The existence of US based competitors provides a potential source of competition and therefore even if a merger in Canada were to result in only one Canadian company surviving in that particular field, as long as there are US based competitors, that merger will be permitted. There are still some markets that are very local but they are becoming fewer in number.

5.5 Deregulation

Up until the mid 1980s Canada protected its domestic industries through tariffs and screened foreign investment. However, it was soon recognised that such policies discouraged foreign investment -

The effects of these policies, combined with the relatively small Canadian population spread over a large land mass, was to create small, segmented, and relatively insignificant markets within Canada.¹⁴⁴

By the mid-1980s the Canadian economy had matured considerably as a result of other developing economic trends, including the tariff reductions under the General Agreement on Tariffs and Trade (GATT). It also led to the signing of the Canada-US Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA) and the reform of Canadian competition, foreign investment, and intellectual property legislation.

Quite independent from the *Competition Act 1985*, or the need to strengthen the internal market, changes in Canada have been driven by events in the United States. For example, the US deregulated in a number of areas, in the past 15 years and is continuing to do so in telecommunications, electricity, natural gas and financial services. The process has forced Canada to consider deregulation. Canada is part of NAFTA and Canadian businesses are finding that, whereas they have no pretension of competing with Mexico or with the southern US in terms of lower wages or in terms of looser labour legislation, there has been tremendous pressure under the free trade agreements for businesses to compete on the basis of costs of certain inputs. Canadian businesses have been demanding more open financial services, lower costs of hydro electricity, more competition in hydro electricity, telecommunications and transportation. There has been a greater integration of the North American markets, for example, a doubling of trade between Canada and the United States over the past eight years, partly as a result of the Free Trade Agreement, which has driven the deregulatory measures.

¹⁴⁴

Graham E.M. & Richardson J.D., eds., *Op Cit*, 1997, p 49.

5.6 Privatisation

Privatisation has become an issue in Canada since the mid 1980s and is in line with events in the US.

Government cut backs on spending has lead to policies to privatise the railways and the national airline. The Canadian Government has been looking not just at the competitive reasons, but also in terms of fiscal management at privatising the liquor control board as well as Hydro Ontario. It is a combination of the greater integration of North American markets and the financial constraints on government.

In terms of community service obligations, the privatised companies have been given mostly free reign to do away with them.

5.7 Free Trade Agreements

Since 1989 Canada has implemented three major trade agreements, the Canada-US Free Trade Agreement (FTA), the North American Free Trade Agreement (NAFTA) in 1994, and the liberalising measures flowing from the Uruguay Round of multilateral trade negotiations that created the World Trade Organization (WTO) in 1995.

Free trade agreements forbid countries from discriminating against the goods, services or business of their trading partners, in exchange for the same treatment from other member countries. Such agreements also establish some reciprocal standards of market access.

The parties to NAFTA have agreed to adopt or maintain measures to proscribe anti-competitive business conduct, to consult periodically about the effectiveness of each other's measures, and to co-operate on enforcing competition law through mutual legal assistance, notification, consultation and exchanges of information relating to enforcement.

5.8 Anti-Dumping

Canada has anti-dumping laws as permitted under GATT and NAFTA but there have been ongoing discussions with the US to essentially disband anti-dumping provisions and deal with dumping under the competition laws in the two countries -

There have been, over the past five or six years, several anti-dumping cases brought against US companies. Though they tend to be rather local. For example, a lumber company selling a product into the Vancouver market, British Columbia market or some other company selling a particular product in the Ontario market. They tend to be rather specific and periodic episodes.¹⁴⁵

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Professor Fred Lazar, Professor of Economics, Faculty of Arts, Schulich School of Business, York University, Toronto, Canada, 14 July, 1997.

5.9 Agreement on Internal Trade - Mutual Recognition

Canadian manufacturers have complained over the years about a number of regulatory restrictions including -

- different regulations across Provinces; and
- practices which because of Provincial monopolies prohibit distribution in the Province.

As a result since the early 1990s, the Federal Government has been urging the Provinces to negotiate an Agreement on Internal Trade -

[Canada] signed in 1989 the Free Trade Agreement between Canada and the United States. It was getting to the point where, beer shipped from Newfoundland to be sold in Ontario, because of the interprovincial restrictions and because of the Free Trade Agreement with the Americans - it was cheaper for the beer company, in Newfoundland, to ship the beer to the United States and then ship it back to Ontario. Some bizarre situations in relation to the fact that world trade - certainly North American trade - was becoming more and more open.¹⁴⁶

Canada is a country of 30 million people trying to compete with a country of 250 million people, the United States.¹⁴⁷

Canada has undergone a period of decentralisation and it was considered beneficial in terms of delivering services closer to the public. However, it was recognised that the Federal Government was responsible to ensure that decentralisation did not lead to discrimination between the Provinces. These factors and various forces led to the Provinces agreeing to the Agreement on Internal Trade which was signed in July 1994 and came into effect in July 1995.

The Agreement on Internal Trade is a complex agreement. The agreement tries to ensure that the standards imposed or introduced by the Provinces meet legitimate objectives, as defined in the agreement. The standards should not become a trade barrier, and not be more trade restrictive than necessary.

Prior to the Agreement on Internal Trade, there were serious restrictions on movement of skilled trades people between Provinces in the construction industry. While there has been some easing of restrictions it is still difficult for a skilled trades person to move from one Province to another and to have his or her skills fully recognised. Apprenticeship programs for skilled trades in one Province are not recognised by another Province. Apprenticeship labour is under Provincial jurisdiction. The Federal Government tries to pressure the Provinces, to harmonise the

¹⁴⁶ Daniel Schwanen, Senior Policy Analyst, C.D. Howe Institute, Toronto, Canada, 14 July, 1997.

¹⁴⁷ In the United States there are three or four giant beer manufacturers, in Canada there are 10, one per Province.

apprenticeship provisions and to eliminate any impediments to labour mobility. The Standing Committee was advised that -

Quebec has restrictions against construction workers from Ontario coming into Quebec to work. This is done strictly to protect employment.¹⁴⁸

In the area of law, to practise in a Province a practitioner must be licensed in that Province. It has become somewhat easier for somebody to be licensed in another Province because of the removal of Provincial trade barriers but some still exist -

In Quebec because of French-English Canada there are different legal systems. Trained lawyers in Ontario, Manitoba or British Columbia cannot practise in Quebec and *vice versa*. Quebec trained lawyers cannot practise in Ontario or at least cannot go before the courts.¹⁴⁹

Some restrictions apply in the case of other professions. For example, auditors have to be licensed in a Province in order to provide the audit function. There are also restrictions in the engineering and architectural fields, as well as in the health care area - doctors, dentists, nurses. However, restrictions are being relaxed -

Doctors essentially chose a Province and stay there - not caring to move across the country because there was a public health care system and it was not much of a monetary advantage or professional advantage to move from one Province to another.¹⁵⁰

The Agreement on Internal Trade in the labour mobility chapter, provides for example, if the training required for an occupation is 80 percent comparable between Provinces there is no need to re-certify or have that person pass additional exams -

An engineer certified in Quebec, for example, can practice in Ontario.¹⁵¹

The Agreement on Internal Trade requires the Provinces to try and harmonise as much as possible and to mutually recognise as much as possible. It forces Provinces and the various regulatory bodies to address why differences exist. For example -

... regulations in Manitoba require that truck drivers not drive for more than 14 hours in a day, while in Ontario it is no more than 16 hours. Problems occur when a driver crosses a Provincial border.¹⁵²

148 Professor Fred Lazar, Professor of Economics, Faculty of Arts, Schulich School of Business, York University, Toronto, Canada, 14 July, 1997.

149 *Ibid.*

150 *Ibid.*

151 Daniel Schwanen, Senior Policy Analyst, C.D. Howe Institute, Toronto, Canada, 14 July, 1997.

152 *Ibid.*

5.10 Financial Services

Competition has occurred within the financial services industry. The Canadian financial services, banks, trust companies, brokers, investment dealers and insurance companies were quite separate. In the mid 1980s ownership restrictions between banks and investment dealers were removed. Progressively banks and trust companies have merged although the Minister for Finance has to approve the merger. In the financial services industry the roles of the banks and insurance companies are being deregulated -

As long as there is protection in place for the consumers, *vis a vis* the various products that the institutions have to offer, in reality it does not matter who owns what. All financial institutions should be able to become deposit taking institutions and participate in the payment system which is currently a monopoly of the banks and the credit unions. The financial system should be the responsibility of the Bank of Canada and any financial institutions that meet prudential requirements should be allowed to participate.¹⁵³

Many industries including the financial services industry or many of their activities instead of being regulated separately may fall also under the broader competition legislation.

5.11 Telecommunications

Canada has 11 Provincial but federally regulated telephone companies active in the local and long distance businesses. It has two national cellular providers and four personal communications service providers and an increasingly competitive long distance market.

Increasingly areas such as energy and telecommunications are being deregulated. This has introduced new competitors.

In May 1997 the Canadian Radio-TV & Telecommunications Commission (CRTC) opened up local telecommunications markets to competition. Bell Canada's monopoly, in terms of long distance calls and also the local community telecommunication market have been opened up to competition with a new competitor, AT&T coming into the market. It has been reported that -

CRTC as a regulator has to deal with technological change as well as address the impact of changes and try to preserve Canadian sovereignty in what has become a borderless communications service.¹⁵⁴

¹⁵³ *Ibid.*

¹⁵⁴ Pearce A., "Strained Relations? Canada is our good/bad telecom neighbor", 15 March, 1998, <http://www.americanetwork.com/issues/98issues/980315-lastcall.html>.

5.12 Electricity

The forces of free trade and the deregulation of electricity since 1996 have enabled access to the US wholesale market in electricity. The wholesale distribution market is separate from the generation and indeed the retail market. A Canadian utility, whether government owned or not, has a right to access that market but it depends on whether the Province in which that particular utility originates is now open to US electricity generators, or can sell to the wholesale market. This was an area that was completely regulated and closed. Hydro Quebec which has electricity surpluses is aggressively marketing in the United States and has received approval from the regulatory authorities in the United States to sell their electricity in return for having the Quebec wholesale market opened.

The wholesale market in the Province of Ontario is a monopoly which was not open or competitive. The wholesale market was closed to out of Province or out of country providers but has been forced because of competition to aggressively market their energy in the United States. Provincially owned Ontario Hydro will introduce competition. Professor Lazar advised the Standing Committee that -

The hydro electric utility, Ontario Hydro, is a trading enterprise, a corporatised body. It receives some funding from the Provincial government, however, at this time, it is self-financing and running a surplus of \$500 million to \$600 million a year.¹⁵⁵

Deregulation has occurred because of competitive forces and integration with the United States.¹⁵⁶

The Standing Committee was further advised that -

Ontario Hydro has gone through a major restructuring in the past few years, to a large extent to be set up for privatisation. There are two reasons it has not been privatised to date. One, it is simply too massive an effort for the Provincial Government to lead with in the privatisation initiatives and there is no public groundswell for privatising this institution. On the other hand, there is no great support for keeping it as a public entity. The other major stumbling block is about \$32 billion in debt most of which was accumulated for financing the building of nuclear power plants.¹⁵⁷

Canada has substantial hydro-electric capacity because of the Niagara Falls but adopted the nuclear route in part because the federal government's energy corporation had developed particular technology which was seen to be the way of the future.

There are perhaps somewhere between 16 and 25 nuclear power plants in Canada. These are facing serious maintenance problems and there is increasing frequency in breakdowns where one

¹⁵⁵ Professor Fred Lazar, Professor of Economics, Faculty of Arts, Schulich School of Business, York University, Toronto, Canada, 14 July, 1997.

¹⁵⁶ Daniel Schwanen, Senior Policy Analyst, C.D. Howe Institute, Toronto, Canada, 14 July, 1997.

¹⁵⁷ Professor Fred Lazar, Professor of Economics, Faculty of Arts, Schulich School of Business, York University, Toronto, Canada, 14 July, 1997.

or more plants have to be shut down. Some of the newer ones are operating at a fraction of capacity.

The Standing Committee was advised -

The Pickering nuclear stations are actually built on a fault line and can sustain an earthquake of up to six on the Richter scale. The belief is that it is an inactive fault line. There have been some minor earthquakes in Lake Ontario. A serious look is required at the ability of those plants to sustain more modest earthquakes. What has stopped the move towards nuclear was the fact that tens of billions of dollars were spent on new plants that either were mothballed or underutilised and were proving to be a serious cash drain on the Province.¹⁵⁸

In the United States many nuclear powered facilities are proving to be financial disasters. There has been strong opposition to nuclear energy following the Three Mile Island power station incident. It has slowed down the pace of expansion of nuclear energy.

The potential exists for substantial quantities of electricity to be generated through cogeneration facilities and a number of companies are interested in cogeneration and selling the surplus electricity that would then be put into the hydro grid.

5.13 Water

There is a push in Canada to privatise what have been municipal or Provincial water and waste water utilities. Some operations are being privatised, but they must meet standards set by Provincial agencies. Professor Lazar advised the Standing Committee that -

Environmental legislation sets environmental standards and the utilities have to abide by those standards.¹⁵⁹

5.14 Airports

Most of the major airports in Canada have been privatised. The airports were under Federal control and the Federal Government transferred the operations to local boards. Membership on the local boards were appointed by the municipalities, the Province and the Federal government. They are now separate and independent entities that can generate revenues, to finance the expansion and modernisation of the airports.

Professor Lazar advised the Standing Committee that -

Toronto had two terminals, a third terminal built in the late 1980s was built by a private consortium. The terminal itself, the runways are still under federal control. Then the Federal Government in early 1990s wanted to sell the other two terminals. They struck a deal which they signed during the middle of the 1993 election campaign. Even though it was signed prior to the election date. The new

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

government then, settled out of court to pay damages to the party that won the right to operate those two terminals. At the same time the owners of terminal three sold the terminal to the Federal Government who then in turn transferred it to a new local board that has taken responsibility for the Toronto airport. So now it is an independent body and they collect the revenues from leasing space.¹⁶⁰

There is no regulatory body that supervises the activities of the airports. As independent entities they are just subject to Provincial laws, national laws as any other corporation. Any Crown corporation is subject to the Federal or Provincial laws including, environmental, labour and consumer laws.

5.15 Airlines

Prior to the privatisation of Air Canada, there were many routes offered by the airlines which provided services to certain regional areas. With privatisation many of these routes were transferred to their regional subsidiaries which provided the service with smaller aircraft or propeller aircraft. Many less viable routes closed altogether or had their services reduced to minimum levels. The Federal Government lacks the power to intervene to require the services to be provided. In the United States there are subsidies for essential services.

In southern Canada which has been totally deregulated, there are no subsidies and many of the routes were transferred and operated by the regional carriers. The frequency of flights has been reduced or in some cases have ceased. In northern Canada, which is the equivalent to Western Australia with a large geographic region which is sparsely populated,¹⁶¹ air routes are subsidised by the Federal Government. This was the only way of ensuring a continued service. In the United States many essential services have been taken over by commuter or regional carriers and are operated in most cases without the need of any subsidy.

In recent times, there has been a consolidation of the industry. Air Canada and Canadian Airlines have absorbed all the regional carriers. There are a few charter carriers, however, these third level carriers are very small in number and limited in terms of their operation. The number of carriers has declined.

There is an "Open Skies Agreement". It is open skies as far as cross border traffic with the US is concerned. Canada has two main airlines that compete, both are affiliated. American Airlines own 30 percent of Canadian Airlines. Both Canadian airlines are too small to compete internationally so they have arrangements each separately with either European or American carriers. Internally there is very little competition, recently Greyhound started an air service in British Columbia competing directly with Canadian Airlines, trying to take advantage of the more competitive environment.

¹⁶⁰ *Ibid.*

¹⁶¹ It is a huge area comprising more than 50 percent of the land area of the country with a total population of about 120 000 people.

5.16 Transport

The transportation system in Canada is municipally run and owned. It is funded in part from the revenues generated from the payments by users. The remainder is financed by property taxes and by contributions from the Provincial governments. There are lower prices for seniors and students. The transport authority that runs the transport system has the power to set whatever prices are necessary. The problem with the urban transport system is the steady deficits. There are also pressures at the Provincial level to cut back government spending and subsidies. Professor Lazar advised the Standing Committee that -

The increasing financial problems faced by the municipal government has resulted in increased pressure on the transportation authorities to reduce costs, control the prices they charge and at the same time reduce the subsidies that are necessary.¹⁶²

5.17 Liquor

The Liquor Control Boards are involved in the sale and distribution of alcoholic beverages. There have been discussions to privatise the liquor control boards. However, privatisation is not a priority. The Liquor Control Board generates a profit of about \$700 million a year for the Provinces and that has resulted in a slow down in the privatising initiatives -

The Province of Alberta privatised its liquor control board and as a result prices of alcoholic beverages have risen because essentially it was a transfer from a public monopoly to a private monopoly and although they tried to encourage competition by increasing distribution through grocery stores and other channels it has resulted in increased sales to minors. There have been some serious social problems as well as competitive problems that have arisen from the Alberta experience and that has been used by critics against the need to privatise the liquor control boards.¹⁶³

5.18 Community Service Obligations

When the railways were privatised there was extensive leeway to simply close uneconomic lines that were essential to serve small communities. The same thing happened with grain elevators. The subsidy to Canadian Pacific to serve all the little grain elevators ended, but the farmers received compensation. As a result a more central system with bigger elevators was introduced.

¹⁶² Professor Fred Lazar, Professor of Economics, Faculty of Arts, Schulich School of Business, York University, Toronto, Canada, 14 July, 1997.

¹⁶³ *Ibid.*

There are no longer any little rail lines in each rural community. Overall it is a more efficient system. Privatisation gave the leeway to close down lines and there has been very little obligation on the part of the privatised entity to keep them open. However, in rail transportation, for example, existing labour contracts were honoured. Half of the workforce was retrenched but they were given full pay for 15 years. It was considered cheaper than to continue the employment of these workers with full benefits.

Chapter 6. United States of America

6.1 Introduction

The anti-trust laws in United States 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.¹

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.² 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.³ Trade policy has been linked with anti-trust policy since the birth of US anti-trust law. In the 1970s reduced tariffs and fewer restraints on foreign firms allowed more efficient foreign firms access to US markets. Which brought intense competition to US firms.

Until recently, national security considerations were not formally examined in connection with enforcement of competition policy. However, an amendment passed by Congress authorised the President to investigate and block or suspend any acquisition or other foreign investment where US national security is threatened.⁴

The benefit of having a competitive market is that it puts resources where they are most valued and used most efficiently.

¹ *Sherman Antitrust Act 1890 and Clayton Act 1914.*

² Overton T.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.

³ Robert Pitofsky, "Remarks of Professor Robert Pitofsky: The future of anti-trust", *The Anti-trust Bulletin*, 39, No 4, Winter, 1994, pp 911-921.

⁴ The term "national security" is not defined.

6.2 Constitution

When the *Sherman Act 1890* was passed it affected almost nothing because at that time the commerce power of the US Constitution was interpreted by the Supreme Court to be extremely narrow. The interpretation of the commerce clause changed dramatically over 45 years. The Supreme Court has held that Congress was meant to exercise its full power under the commerce clause. That wider interpretation changed the scope of the *Sherman Act 1890*. By the mid 1930s the *Sherman Act 1890* began to have full effect.

6.3 Discrimination

States in the US cannot unduly discriminate against residents of another State. One State cannot, for example, impose a tax that adversely affects commerce between the States. The commerce clause was included in the US Constitution to give the federal courts an opportunity to prevent discrimination by one State against another.

The Supreme Court has struck out certain State regulations where it was clear that the motivation was to protect some State interest or State enterprise.

Historically, there has been a fair amount of litigation under the commerce clause. The Supreme Court very early asserted the value of the commerce clause in preventing discrimination. For example -

Florida avocados are kept out of California. It was considered a health and safety issue to regulate the fat content in avocados. Because the Florida avocados were lower in fat, regulations have been enacted that provide that avocados which were below a certain fat content could not be imported into the State of California.⁵

6.4. Competition Laws

The coverage of the federal anti-trust laws is broader than Australia's *Trade Practices Act 1974* before the reforms 1995. The first US federal anti-trust laws were enacted in 1890. Anti-trust law limits business behaviour which would achieve monopoly power and also behaviour of companies that possess monopoly power.

Over the years the States in the US enacted anti-trust laws. The substance of US federal anti-trust enforcement derives from four statutes, the *Sherman Act 1890*, the *Clayton Act 1914*, the *Robinson-Patman Act 1936*, and the *Celler-Kefauver Merger Act 1950*. These statutes are generally concise and lack detail. Most US anti-trust policy originates in court interpretation.

Supreme Court cases have allowed the *Sherman Act 1890* to reach almost all conduct, even if its purely within a State because almost any activity within a State will affect interstate commerce. For example, a merger of two hospitals located within a particular State will, because of federal

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Milton Marquis, Senior Counsel to the Acting Assistant Attorney General, Anti-Trust Division, US Department of Justice, Washington DC, 17 July, 1997.

funding to hospitals and Medicare come within federal jurisdiction. There is very little conduct that is not reachable by the federal anti-trust laws.⁶

The *Sherman Act 1890* prohibits restraints that affect commerce. The word “commerce” expressly includes commerce between and among the States of the US and with foreign nations. The US has adopted a doctrine that the *Sherman Act 1890* applies, when acts performed abroad have an effect or impact on US commerce.

One of the differences between the United States and Australia in the anti-trust area is that the legislative drafting style is quite different. In Australia, legislation tends to be very complex and very precise in detail. US anti-trust laws are written extremely broadly. As the economy evolves, as new problems come up or old problems are resolved, that flexibility permits the courts to interpret the law to reflect changed conditions -

The Antitrust Division of Justice Department are prosecutors, they have to go to court and convince a judge or jury that the law has been violated and seek relief. An enforcement policy can evolve over time to reflect changing economic conditions and economic learning. In the merger area, for example, some mergers these days pose no competitive concerns because the markets that are involved are national markets instead of regional markets as they might have been 30 years ago, or either western hemisphere or world markets. That is an area where in a sense the policy hasn't necessarily changed but the economic facts have.⁷

The basic language of section one of the *Sherman Act 1890* which is “Thou shalt not fix prices or enter into other anti-competitive agreements”. Section two is “Thou shalt not monopolise or attempt to monopolise”.⁸ That language has not been changed in a material way since 1890. Most anti-trust law is common law which has evolved through the courts, the content that is read into those words has changed over time. From time to time the anti-trust laws are amended in various ways exemptions have been created over the years. For example, major league baseball is not subject to the anti-trust laws because the Supreme Court decided back in the 1920s that Congress could not have intended that baseball was subject to anti-trust laws -

The first baseball decision was decided before the commerce jurisdiction was decided and in the jurisprudence of the day, it was held that baseball was not commerce. Later it was decided that it was commerce. However, the court held it would be wrong at that point to change the rules and say that baseball was subject to the anti-trust laws even though they did for all the other industries. The result has been that professional baseball is treated under the anti-trust laws differently than professional football or professional basketball or professional hockey.⁹

⁶ Greg Warden Director of Research, Chief Appellate Liaison Unit, Economic Analysis Group, Anti-trust Division, US Department of Justice, Washington DC, 17 July, 1997.

⁷ Ed Hand, Assistant Section Chief, Foreign Commerce Section, Anti-Trust Division, US Department of Justice, Washington DC, 17 July, 1997.

⁸ *Ibid.*

⁹ Greg Werden, Director of Research, Chief Appellate Liaison Unit, Economic Analysis Group, Anti-Trust Division, US Department of Justice, Washington DC, 17 July, 1997.

6.5 Federalism - Competition Law

The USA has federal competition law. Many US States also have enacted competition laws, most are very much like the federal law. State officials have no power to enforce the federal law. They have power only to enforce the State laws, but they can act like private citizens in bringing actions under the federal law. That is the principal way that the States have got involved in national cases under federal law, just by appearing as though they were private litigants.

State anti-trust laws are similar in most respects to federal anti-trust laws and are interpreted to be consistent with federal court interpretation of the *Sherman Act 1890* and the *Clayton Act 1914*.

On the consumer protection side, many of the States have statutes which are textually identical to the *Federal Trade Commission Act 1914*, and under State law are required to be interpreted in the same way as the federal law. Defendants do raise interstate commerce as a defence, but it has never been successful.

6.6 Enforcement of Competition Law

The Federal Department of Justice, shares responsibilities with the States in anti-trust enforcement. The Department of Justice is one of two federal agencies; the other is the Federal Trade Commission who have responsibility at the federal level for enforcing the anti-trust laws. About 30 States have active anti-trust enforcement programs and all but two States have State anti-trust statutes.

Most conduct will be under the jurisdiction of the federal anti-trust statutes. State statutes are important because it allows the States to investigate anti-trust offences. State statutes give the State Attorneys General the power to subpoena documents. They cover those very few areas, although within interstate commerce, where federal authorities would not become involved. For example, price fixing among local barber shops.

State statutes are explicitly modelled after the federal statutes. They virtually mirror the provisions of the federal statutes. Many State statutes expressly provide that they are to be interpreted in line with federal interpretations and even if they do not the State courts very frequently look to federal case law to interpret the State statutes. Mergers are not subject to some anti-trust State laws but federal law.

Historically, the Federal Government has put more resources into enforcement than the States. The States, can bring actions under federal statutes in federal courts, but when they do, they act essentially as private parties and not as governments. When the States act through State laws they act as governments. The States do frequently bring cases under federal laws on behalf of consumers.

Most State Attorneys General generally would bring cases in the federal court because the judiciary is more familiar with anti-trust law. Most States will investigate a matter using State powers to subpoena documents and obtain the testimony of witnesses and then file the case in the federal courts.

The federal department does not have that authority to recover damages on behalf of consumers who may have been injured by anti-trust violations. The federal department can bring a criminal case to prosecute those companies and individuals who violate the anti-trust laws but the State Attorneys General compete with the private bar to bring class action lawsuits on behalf of individuals who have been damaged. Private lawyers can also bring cases on behalf of companies who have suffered damages as a result of anti-trust violations.

6.7 Federal Trade Commission

The Federal Trade Commission (FTC) has anti-trust and competition and consumer protection responsibilities. The FTC itself consists of five Commissioners who are appointed by the President and confirmed by the Senate. They serve for seven year staggered terms. It is organised into three main bureaus; the two enforcement bureaus - competition and consumer protection - and the bureau of economics which works with those two bureaus.¹⁰

The FTC has 10 regional offices located in major cities around the US. It works closely with the States Attorneys General in enforcing their laws and assisting to deal with area-wide problems, frauds and criminal matters. The FTC also provides advice to State enforcement agencies, State legislatures and to federal agencies at their request on the likely competitive effects of proposed policy changes and new policy directions.

6.8 Intellectual Property

Ensuring that the innovator of technology appropriates the value of knowledge they develop is the major economic justification for intellectual property protection. That protection is contrary to competition policy. Such protection gives the innovator a limited monopoly right to that new technology. It is argued that intellectual property protection provides incentive to innovate. However, others argue that such strong protection slows the spread of new technology and improvements upon it.

In recent years the US Justice Department has become very active in intellectual property law. Intellectual property laws in their own terms are interpreted in a way that are consistent with competition policy.

6.9 Deregulation

Deregulation involves -

- ▶ Economic monopoly - sorting out the real natural monopoly from the ones that can be competitive. For example, in the area of electric power there is a consensus that the

¹⁰

Jacques Feullian, Asian/pacific Regional Counsel, International Division, Federal Trade Commission, Bureau of Competition, Washington DC, 18 July, 1997.

generation function ought to be hived off into separate competitive corporate institutions. Transmission is always going to be a monopoly because of the economies of scale problem and local distribution.

- ▶ Ownership - whether it is a government instrumentality or privately owned?
- ▶ Regulation - the regulator should be separate from the company itself because a commercial operation should not have a regulatory function.

In the USA ownership is complex. There are some major publicly owned utility firms. Most of those are federal publicly owned utilities. To the extent there is public ownership, it is either national or a few big regional operations or purely city/local. There is also private owners of utilities.

The essential idea of deregulation is to have private actors make the basic decisions about prices. However, it is necessary the public interest in maintaining standards and preventing health problems is sustained. The Standing Committee was advised that it is important to ensure that what are claimed to be quality and health problems do not in fact become excuses for preventing competition.

There have been many mergers in the telecommunications industry.

6.10 Access Regime

Access is something that has in numerous areas in the United States been dealt with by the anti-trust laws over the years as well as by regulation. There are basically two access type issues in the electric power industry. One is the transmission grid. In order to have effective competition among wholesalers, there needs to be non-discriminatory access to the grid. That can be achieved under a competition policy regime and there have been a number of anti-trust cases. In theory at least, discrimination is not permitted. A new regulatory regime has been introduced in the US. The Federal Energy Regulatory Commission (FERC) is an independent regulatory agency within the Department of Energy. It has jurisdiction and can compel access. The Federal Energy Regulatory Commission administers the access rules. If access is denied and favouritism persists, the electricity utility can be made to formally separate functions. The Standing Committee was advised of an alternative access regime -

There is another idea, which is probably better and will quickly replace either the anti-trust or the regulatory commission, the independent system operator, who is not beholden to any of the players in the industry whose job it is to manage the grid into operating in a non-discriminatory way. An independent body to run the grid regardless of who might own the grid be they state or private. The body would decide what transactions are allowed to take place.¹¹

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Milton Marquis, Senior Counsel to the Acting Assistant Attorney General, Anti-Trust Division, US Department of Justice, Washington DC, 17 July, 1997.

Another potential discrimination problem is where the local utility may discriminate against other power providers if they are in competition in the retail market. The Standing Committee was advised that -

In California the electricity utility is required to purchase all of its power through a pool. This eliminates discrimination because the utility cannot buy or sell power except through the pool.¹²

A legal principle of common carrier regime has developed which provides that a firm shipping natural gas long distance in a pipeline or transmitting electric power over long distances on a high tension line has an obligation to make that facility available to anybody who meets the terms and conditions of access. The Standing Committee was advised that applying the principle can be vexing especially how to handle the company that owns the pipeline and is also involved in other parts of the business. The Federal Trade Commission stated -

Our recommendation is that they cannot be in both businesses, that it is just impossible to keep the operation separate.¹³

Industries that once co-operated, and were used to having prices controlled now tend to react to the new environment by merging defences, by getting together to become too big to fail. The Standing Committee was advised that -

There are a large number of mergers that seem to be driven, not by obvious efficiency, but by concern at who will be the last one standing.¹⁴

6.11 Utilities

In the United States governments have been involved in delivering services in a number of areas, for example, State hospitals and State liquor stores. There is local government ownership of local utilities including, water and electricity. Water is typically a government owned utility. Water in the United States is municipally provided and has not been deregulated. Small towns have municipal electric power systems. A municipality is subject to the anti-trust laws but it is not subject to private damage suits.

The electrical power industry is beginning to undergo legal and economic changes. The Standing Committee was advised that some federal entities did generate power. An example is -

About 15 years ago there was a case in which Los Angeles (LA) wanted to buy power from BC Hydro in British Columbia, Canada. To get that power from British Columbia to LA, it was going to have to come via the Bonnyville grid. Bonnyville refused access. There was a lawsuit and the

¹² *Ibid.*

¹³ Michael O. Wise, Advocacy Co-ordinator, Bureau of Economics, Federal Trade Commission, Washington DC, 18 July, 1997.

¹⁴ Jacques Feullian, Asian/Pacific Regional Counsel, International Division, Federal Trade Commission, Bureau of Competition, Washington DC, 18 July, 1997.

court said, Bonnyville can do that because they are a federal instrumentality.¹⁵

The Standing Committee was advised that as a matter of economic efficiency subsidies should be explicit.

If a class is going to benefit from a supported service, it should be made clear in the accounts and provided for, rather than by hidden subsidies.¹⁶

6.12 Electricity

Production of electricity is a trillion-dollar global industry. In the US in the past public or quasi-public providers generated power. Regulators set prices. However, in the late 1970s and early 1980s, changes began to occur, stimulated by technological change and a ready supply of cheap gas. Cheap natural gas encouraged innovation in small-scale gas-fired technologies.

The United States of America is restructuring its electricity supply business -

Generally liberalisation has meant opening the markets for supply (allowing non-utility providers to offer services to consumers), for power generation and for distribution (allowing power to move across boundaries). At the moment, transmission remains a natural monopoly.¹⁷

Federal and State regulators and legislators are involved in restructuring the electricity utility industry around the concept of competition. However, the electricity utility restructuring has the potential to benefit only a few large customers seeking lower electricity bills and a few utilities and marketers anxious to either expand their market share or enter the electricity market -

... Americans fear that their country, ... is rushing ahead with too little thought. All the benefits of a freer market for power will go to large users, it is argued, leaving individual consumers to enjoy only a surfeit of nuisance-calls from telemarketers.¹⁸

In most of the US States the electricity grid is privately owned. The utility companies are regulated, and in most cases are subject to standards. State utility commissions regulate prices.

Deregulation is being driven by the changes in co-generation technology and the coming on line of the small gas fired generating plant.

¹⁵ Ed Hand, Assistant Section Chief, Foreign Commerce Section, Anti-Trust Division, US Department of Justice, Washington DC, 17 July, 1997.

¹⁶ Jacques Feullian, Asian/Pacific Regional Counsel, International Division, Federal Trade Commission, Bureau of Competition, Washington DC, 18 July, 1997.

¹⁷ "The electricity business: Power to the people", *The Economist*, March 28, 1998, p 65.

¹⁸ *Ibid*, p 67.

The Standing Committee was advised that -

If power cannot be provided on an economic basis to an area because of distances and the population being so widely dispersed then direct subsidies may be considered important for social reasons.¹⁹

It is argued that there is more benefit for the same expenditure by making the subsidy direct rather than by making the company provide the service even though it is not economic.

Traditionally electric power generation and distribution has been regarded as a natural monopoly and there has been a system for State regulation and price fixing for those natural monopolies. The States are moving to set up systems where power companies can compete with one another and compete on an interstate basis. The Standing Committee was advised that -

There is a strong desire to retain a State regulatory authority in the interests of ensuring that the ordinary ratepayer will be treated fairly in the deregulatory process. In other words, there is a fear that without at least some continuing State law with respect to consumer protection, large industrial enterprises will be able to negotiate far lower electric utility rates than it would be possible for an individual consumer to negotiate.²⁰

6.13 Gas

The gas industry in the US is virtually entirely privately owned. Until 20 years ago the gas industry was regulated the same way as electricity. There was a federal regulatory body that approved every application for building a new pipeline and approved who the customers would be and the rates at which it could buy and sell gas. The industry has been substantially deregulated. There is still some oversight of the pipelines in their capacity as common carriers, and some rules to ensure access, but for the most part it has been deregulated and is subject to competition.

6.14 Airlines

All of the important airline mergers in the US took place when Department of Transport had ultimate authority before the Anti-Trust Division of the US Department of Justice had the authority to challenge airline mergers.

The maintenance of air safety requirements has not been deregulated. It has been kept under a federal regulatory agency, the Federal Aviation Administration (FAA). The Civil Aeronautics Board which set the rates and routes is no longer in existence but the areas of maintenance standards, what records have to be kept, and what kinds of parts have to be used is still the

¹⁹ Jacques Feullian, Asian/Pacific Regional Counsel, International Division, Federal Trade Commission, Bureau of Competition, Washington DC, 18 July, 1997.

²⁰ Bill Waren, Convenor, Trade and Agricultural Committee, National Conference of State Legislatures, Washington DC, 21 July, 1997.

responsibility of the FAA.

The main concern with the switch to smaller commuter planes for serving small regional markets was that smaller planes did not historically have as good a safety record as the larger planes. The Standing Committee was advised that there was a widely publicised crash where one of these airlines did in fact cut corners. As a result of that episode, there has been an increase in policing. The airline was suspended from operating for several months.

There has been a continual emergence and vanishing of discount airlines. Some 200 airlines have started up since deregulation, but only two or three of them are still in business. The Standing Committee was advised that -

South West, an airline which started in the south western part of the country, is expanding to the east coast and is now offering a very steep discount on tickets up the north east corridor.²¹

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Michael O. Wise, Advocacy Co-ordinator, Bureau of Economics, Federal Trade Commission, Washington DC, 18 July, 1997.

Chapter 7. New Zealand

7.1 Introduction

New Zealand's economy was regarded as one of the most extensively regulated in the world. Change in New Zealand was driven by a state of crisis in the 1980s. The Government embarked on a program of sweeping liberalisation. Deregulation of the New Zealand economy commenced in 1984. The main features of the reform package were that all forms of subsidy were taken away and land values fell 50 percent. The New Zealand dollar was floated in April 1985. There was a decline in asset values. The restructuring of industry and the public sector saw massive job losses. The New Zealand debt crises drove the eventual corporatisation of government owned enterprises and their privatisation. Most being sold to foreign companies. They were sold as a monopoly to obtain the best return. Anti-trust policies provided some constraint on the potential for monopoly pricing.

New Zealand opened markets to international competition. The economic reform program in 1985 saw a general opening of the economy to competition both internally and externally. Emphasis was put on reducing import protection and other such barriers to competition. New Zealand's commitment to APEC was the vehicle to push for lower trade barriers in Asia.

No industry-specific regulators have been established for any of the privatised sectors and restrictions on foreign ownership are minimal.

7.2 Taxation Reforms

Tax reforms were designed to improve efficiency while raising more revenue. The tax base was broadened which allowed marginal income tax rates to be reduced for many taxpayers while raising average tax rates. A goods and services tax (GST) was introduced in 1986. The tax was levied initially at 10 percent and in 1989 was increased to 12.5 percent for revenue reasons. There are some exemptions for monetary transactions and exports. The GST introduced a new way of collecting tax. The Standing Committee was advised that it has been a burden on small business. For example, filling out forms and making payments. The Standing Committee was also informed that all additional administrative costs incurred by business as a result of collecting the GST tax was subsequently passed on to the consumer.

7.3 Deregulation

Deregulation of various industries began prior to 1986, with the financial, broadcasting and transport sectors being amongst the first sectors to experience the effect of free market economic policies. Deregulation in New Zealand was dramatic. The deregulation of the New Zealand economy designed to promote more efficiency was underpinned by competition law, all other regulation was removed.

Government owned enterprises were subject to corporatisation (or commercialisation), deregulation, and privatisation. Every state owned enterprise had to operate as a business. Government dominated industries deregulated included electricity generation and distribution, postal services and telecommunications. Privatisation has meant a decrease in the demand for government capital and the subsidisation of inefficient operations.

Tariffs were abolished and industry opened up. Although tariffs still exist on footwear and clothing, they are reducing and will be abolished by the year 2005. The labour market was deregulated. All licencing regimes have been abolished without compensation.²² Government spending was significantly reduced with the biggest falls in direct assistance to industry.²³ There has been an increase in manufactured exports. For example, cheese to Asia.

Many government monopolies were privatised as monopolies without firstly restructuring them. The New Zealand Government has indicated it will revisit control of monopoly businesses. It will force a structural split of the lines and retail business in electricity.

Despite trade liberalisation and internal deregulation both within Australia and New Zealand, competition laws are still complementary policy.

7.4 Privatisation

The objective of transferring ownership from the public to the private sector was to remove risk from the Crown balance sheet. However -

Experience in New Zealand has shown that it is difficult for a government to shed all its risk by cleanly transferring ownership.²⁴

The effects of privatisation were great. The majority of the significant sales (for example, PostBank, Air New Zealand, Telecom, State Insurance and the Bank of New Zealand) and some smaller sales were to overseas interests -

Corporatisation, deregulation and privatisation have, however, also had very substantial social impacts. Thousands of jobs have been lost as the former state businesses have adjusted to the demands of competition. Communities that once depended on a single major industry - forestry, timber production, coal-mining, heavy construction (eg. hydro-electricity development) - have been hard-hit. Rural communities in particular felt the losses of local Post Offices, which were often their main link to the wide range of services once provided by the government.²⁵

²² The taxi industry was deregulated without compensation for taxi license plates.

²³ Evans L. & Others, "Economic Reform in New Zealand 1984-95: The Pursuit of Efficiency", *Journal of Economic Literature*, Vol XXXIV, December, 1996, p 1868.

²⁴ Duncan I., "Public Enterprises", in Silverstone, B. & Others, eds., *A Study of Economic Reform: The Case of New Zealand*, 1996, p 401.

²⁵ "New Zealand's State Sector Reform: A Decade of Change", *State Services Commission*, Wellington, New Zealand, 1996, p 12.

7.5 Competition Policy

The key feature of New Zealand's reforms has been to open up the economy to international competition -

Industry policy, and competition policy more generally, focused on developing a competitive environment in which no sector was singled out for encouragement by policy intervention: rather, the market place was to be the sole determinant of commercial outcomes.²⁶

The reform process included trade and capital liberalisation with the removal of foreign exchange controls and import quotas, reductions in tariffs and less restrictions on foreign ownership. The result of these reforms has been a massive reduction in direct government assistance to industry and almost the complete abolition of agricultural subsidies.

Competition policy is now focussing on local government services including water and sewerage and a review of competition policy.

As trade liberalisation improves market access and markets become more internationally competitive, interest in competition policy increases. The growing international dimension of competition is accompanied by reductions in border barriers.

7.6 Competition Law

The *Commerce Act 1986* applies to all sectors of the economy. There is no sector specific regulator. The Commerce Commission set up under the *Commerce Act 1986* is the enforcement body for anti-competitive conduct. The New Zealand *Commerce Act 1986* was based on the Australian *Trade Practices Act 1974*. The two statutes are similar in terms of statutory language, scope and procedure.

The *Commerce Act 1986* is directed at business practices that substantially reduce competition, and prevent firms in a dominant position from using that position for anti-competitive purposes. The *Commerce Act 1986* scrutinises mergers and takeovers to prevent acquisitions or strengthening of market dominance. Trade practices such as exclusive dealing, tie-in sales, price fixing and market sharing fall within the general prohibitions of the *Commerce Act 1986*. Australia and New Zealand harmonised their competition laws applicable to trans-Tasman trade in 1990 by extending the prohibitions on the use of anti-competitive market power.²⁷ The amendments extended coverage by outlawing use of a dominant position in that market. In particular, the use of a dominant position in a market in Australia for exclusionary purposes in a New Zealand market was prohibited. The *Commerce Act 1986* allows the government to impose price control. There is no provisions to break up monopolies.

New Zealand is a small economy and must balance issues of size and competition. Under the

²⁶ Evans L. & Others, *Op Cit*, 1996, p 1884.

²⁷ Section 46A *Trade Practices Act 1974* and Section 36A *Commerce Act 1986*.

Commerce Act 1986 it can authorise conduct which is anti-competitive. The legislation provides for the aggregation of ownership and authorisation. This is subject to the public benefit versus the detriment to competition test.

There is a reliance on general competition law. New Zealand's approach to regulation, which has been described as "light-handed", can be contrasted with other countries which have used industry-specific regulatory bodies.

7.7 Closer Economic Relations

The 1983 Closer Economic Relations Agreement (CER) envisaged a trans-Tasman free trade area. It also foresaw that Australia and New Zealand would work towards business law harmonisation and the national competition laws were part of that reform. The CER Trade Agreement was to achieve free trade between Australia and New Zealand. New Zealand gained access to the Australian market (with a population of 17.5 million) thus expanding its own domestic market beyond its small population of 3.4 million. In return New Zealand had to accept Australian competition in its small market. A further development was the elimination of the anti-dumping remedy for trans-Tasman trade relying instead on protection against predatory trading practices through harmonised competition law provisions.

Since the CER agreement business accepted that competition law harmonisation was part of the CER agenda. A greater degree of harmonisation was achieved when Australia extended the coverage of the *Trade Practices Act 1974* to the trading activities of the Australian States. Australia and New Zealand are the only two economies within APEC whose competition laws are harmonised.

The development of more open economic relations with Australia has reduced barriers to entry in a significant market for New Zealand, and has provided competition for New Zealand firms.

7.8 State Owned Enterprises

Since the mid 1980s, New Zealand's government sector has been substantially reformed and restructured. Trading departments were converted into state owned enterprises and many were sold. Contracting out, more flexible employment conditions and accrual accounting was imposed on the remaining departments. The main elements of reform was through three pieces of legislation, the *State Owned Enterprises Act 1986*, which provided for converting trading departments and corporations into businesses along private sector lines, the *State Sector Act 1988*, made departmental chief executives accountable for managing the organisation, and the *Public Finance Act 1989*, focused financial management on outputs and outcomes. The *Treaty of Waitangi (State Owned Enterprises Act) 1988* established a series of safeguards to apply after the transfer of assets to state owned enterprises. These safeguards included power for the Waitangi Tribunal to make binding recommendations for the return to Maori ownership of any land transferred to state owned enterprises under the *State Owned Enterprises Act 1986*.

Government enterprise reform, was part of microeconomic reforms to improve productivity and

efficiency. Public sector reform was not confined to central government but included organisations of local government which traditionally operated some utilities and other local services.

7.9 Postal Services

Up until 1987 the New Zealand Post Office was involved in all mail receipt, processing and delivery, ownership and management of the telephone system and regulation of telecommunications and operation of a retail banking network. These functions were diverse and in some cases unrelated. The postal and telecommunications operations were protected monopolies. The Post Office was separated into three main businesses, postal services, telecommunications and banking and set up as state owned enterprises -

Soon after corporatisation NZ Post reduced its staff numbers by 30 percent and closed 40 percent of retail outlets.²⁸

The third branch of the old Post Office corporatised was PostBank which was subsequently fully privatised and is now owned by the ANZ Banking Group.

Reforms associated with the mail system have attracted considerable controversy, especially the closure of post offices in small communities and increases, by New Zealand Post, in charges for rural mail deliveries -

The company has a monopoly over delivery of standard letter post, although it faces intense competition in the delivery of other items and in the wider communications market.²⁹

7.10 Telecommunications

Telecom New Zealand inherited the telecommunications business which had been part of the Post Office. Telecom had a monopoly in the supply of all telephone connections, facsimile lines and provisions of all calls. Telecom's statutory monopoly was eliminated by 1989. The telecommunications industry is not subject to an industry-specific regulatory body but subject only to the economy-wide *Commerce Act 1986*.

Deregulation of the telecommunications industry encouraged competition. Telecom has since been completely privatised. It is partly owned by American companies Ameritech and Bell Atlantic. There was also a public float for part of Telecom. The new operator must maintain "Kiwi" share which means that they must provide free local calls for residential consumers and rental on a standard line must not rise above the consumer price index (CPI) and rural rentals must not exceed urban rentals. When telecommunications was deregulated Telecom controlled

²⁸ "New Zealand's State Sector Reform: A Decade of Change", *State Services Commission*, Wellington, New Zealand, 1996, p 11.

²⁹ Duncan I., *Op Cit*, 1996, p 406.

the numbering plan which gave it the opportunity to create a monopoly.

Under section 36 of the *Commerce Act 1986*, Telecom cannot use its ownership of the network, and hence its network contract, to inhibit competition.

Recent surveys have concluded that Telecom's high profitability reflects its monopoly power in some markets. It also noted that -

... the welfare gains do not include any welfare costs of workers made redundant.³⁰

7.11 Electricity

Electricity reforms in New Zealand have been protracted. The electricity industry in New Zealand has undergone a series of reforms in the last decade. Prior to the mid 1980s, electricity supply and distribution authorities were a mixture of departments within local government, municipal electricity departments in the larger cities and local body electricity power boards. The electricity supply authorities purchased electricity from the country-wide grid of the electricity department of central government, and the grid was supplied by generators owned by the government department. In 1987 the Electricity Corporation of New Zealand Limited (ECNZ) was corporatised.

Until 1992 electricity generation was all owned by the government or local government. Generation is government owned. The national grid has been corporatised. The lines companies have different ownership arrangements. The *Energy Companies Act* passed in 1992 deregulated the retail sector and saw the corporatisation of the electricity supply authorities which allowed customers to choose their supplier.

In 1994 ECNZ transmission subsidiary Transpower New Zealand Limited was created as a separate state owned enterprise. It owns the main grid and carries the responsibility for carrying the electricity of any client from an entry point to its destination on the main grid. Transpower is subject to open access rules. In 1995 ECNZ was further divided by splitting out 30 percent of its generation capacity into another state owned enterprise. There are two large state owned enterprise generator companies and a large state owned enterprise that owned the main transmission lines.

In 1996 a competitive wholesale market was established. ECNZ has been involved in a number of cogeneration projects with private operators and a number of ECNZ's subsidiaries have been sold. In 1998 the government decided to split ECNZ into three state owned enterprises and separate the monopoly lines and energy supply businesses of power companies. The *Electricity Industry Reform Act 1998* intends to reduce barriers to competition at both the wholesale and retail levels.

The regulator is the same for public and private companies. Competition laws applies to all. There are specific regulation for safety of lines and generation.

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Duncan I., *Op Cit*, 1996, p 411.

The Standing Committee was advised that since privatisation there has been a rebalancing and tariffs have been removed. There have been price increases for lower generation domestic consumers as opposed to industrial users. There is no cross-subsidy in electricity.

The Standing Committee was also advised that since privatisation there has been a growing excess of capacity because the private operators have built more power generators. There has been long term neglect of the infrastructure and there is currently a debate between the parties regarding the upgrade of the lines.

7.12 Local Government

In 1989 the principles of corporatisation and privatisation were extended to the trading activities of local government. Legislation required that in order to qualify for central government subsidies, passenger transport and public works operations, for example, water boards, had to be made into local authority trading enterprises which had to operate competitively. Former municipal electricity departments were corporatised.

The general reform program included reconsideration of legislation controlling town and country development and resource management. The *Resources Management Act 1992* replaced all previous legislation and provided a framework for sustainable use of resources.

Local government authorities have the responsibility of administering the *Resources Management Act 1992* and adopted various positions on the trade off between regulatory restrictions and freedom for owners.

Local government is involved in the provision of services such as water and sewerage in New Zealand. Local government is now moving to become competitive. However, the *Resources Management Act 1992* does set standards about resources. The Treaty of Waitangi 1840 also affects resources.

7.13 Water

New Zealand has not had water reform. Local government is involved in the supply of water services with franchise contracts.

7.14 Railways

New Zealand Railways was sold to Wisconsin Central, a US company. Employment with the railways has been reduced from 24,000 to 4000. The rail company is a monopoly and there is no competition or regulation of the railways industry.

7.15 Airports

Airport reform in New Zealand involved moving the control of international airports from airport authorities and vesting them in airport companies. Airports in New Zealand have been privatised. Auckland airport was sold by a public float. The contract to manage the airport has gone to a US company. A half share of the Wellington airport has been sold. The provision of air navigation services especially air safety is provided by the Airways Corporation which has a government imposed monopoly.

7.16 Agriculture

Agriculture had been very important to New Zealand's economy providing up to 90 percent of earnings in the 1960s. Agriculture received substantial subsidies to maintain production in the face of declining agricultural terms of trade and high input costs generated by regulation, manufacturing protection and subsidies. Some of the subsidies were the outcome of mechanisms designed to smooth farmers' fluctuating incomes. Subsidies and regulations had reached the point where they were widely perceived as not sustainable. Changes in market access and declining terms of trade forced reforms in agriculture. Reforms were announced in 1984 -

Farm land prices fell by as much as 50 percent in real terms. Restructuring was not smoothed by transitional arrangements, and a proportion of farmers were bankrupted. Others retained ownership by selling portions of their farms. The terms of trade for traditional agriculture did improve somewhat in the late 1980s, and the restructured rural areas led New Zealand's early 1990s recovery.³¹

The impact of agriculture in New Zealand's economy has changed -

... commodities now account for less than 50 percent of total exports, and there has been much change in operation and products.³²

There has been diversification in other farming and horticulture which accounted for much of the growth in agricultural and value added exports -

The changed operation of farms reflects the need for individual farmers to manage their own risk rather than rely on government programs.³³

The reforms over the past ten years have resulted in rural New Zealand being more diversified and there is a continuing decline in the importance of traditional farming operations and products. Evans states -

... other demands for rural use together with the GATT Uruguay-Round agreement have led to rebounding farm land prices.³⁴

³¹ Evans L. & Others, *Op Cit*, 1996, p 1891.

³² Evans L & Others, *Op Cit*, 1996, p 1891.

³³ Evans L. & Others, *Op Cit*, 1996, p 1891.

³⁴ Evans L & Others, *Op Cit*, 1996, p 1893.

7.17 Statutory Marketing Organisations

A number of producer organisations still retain statutory powers over the purchase and distribution of product. The statutory monopoly of a number of producer boards is unresolved. Different boards have different powers which include the right to levy producers, compulsory product purchase, the sole right of export and the responsibility for the administration of quotas imposed by foreign countries -

The effect of these boards on competitive supply, price signals, and the efficient provision of supply, marketing, contracting and transport services remains under wide scrutiny and debate.³⁵

Producer boards have been deregulated. In agriculture there is still a debate about single desk selling. The Standing Committee was advised that the Dairy Board in New Zealand is working reasonably well. However, in the meat industry there have been complaints about collusion over price by meat packing companies.

7.18 Conclusions

The key features of New Zealand's economy-wide reforms have been their comprehensive and coherent nature -

By attacking multiple problems at once, the costs to any one sector, in terms of lost protection or subsidies, were compensated or obfuscated by gains to the sector originating from reforms elsewhere. Additionally, each constituency that lost its sheltered position immediately called for the removal of protection for its suppliers thus accelerating the pace of reform.³⁶

Public policy in New Zealand has moved away from cross-subsidies. Mr John Martin, Senior Lecturer in Public Policy stated -

There were no subsidies for lifestyle in the country.³⁷

Growth in New Zealand has slowed down and the country has moved into recession. The slow down is due to tight monetary policy. Most public assets have been sold and privatisation payments have gone to pay debt.

Dr Stephen Gale of the New Zealand Institute of Economic Research stated -

The most efficiency gains were attained by state owned enterprises during their corporatisation, little

³⁵ Evans L. & Others, *Op Cit*, 1996, p 1892.

³⁶ Evans L. & Others, *Op Cit*, 1996, p 1894.

³⁷ John Martin, Senior Lecturer in Public Policy, School of Business & Public Management, Victoria University, Wellington, New Zealand, meeting Tuesday, 10 November, 1998.

efficiency gains where achieved after privatisation.³⁸

There were major social costs in New Zealand from job losses with severe effects on employees with limited skills or those living in smaller communities. In some cases redundancy and restructuring costs were borne directly by the government. Unemployment in rural areas has seen a repricing of assets.

It has been reported that -

... proponents of privatisation tend to focus on national benefit issues. They avoid becoming involved in arguments about whether the loss of asset value to the Crown matches the debt reduction benefits of the individual transaction. In contrast, critics of privatisation argue that proponents have an inappropriately narrow attitude to national benefit, discounting such things as the social cost of redundancy.³⁹

Professor John Quiggin in his submission to the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy stated -

Experience in New Zealand casts even more doubt on claim of large benefits from reforms aimed at making the economy more competitive. ... Like Australia, but a little earlier, New Zealand had two good years, 1993-94 and 1994-95, giving rise to hopes that a permanent improvement in productivity growth rates had been achieved. However, high growth was not sustained.⁴⁰

Time has seen the emergence of new industry in New Zealand and opportunities in many areas. People have relocated in pursuit of better opportunities. However, there has been -

some unfortunate effects - particularly through the enormous reduction in the supply of low-skilled and semi-skilled jobs, and consequently high levels of unemployment.⁴¹

³⁸ Dr Stephen Gale, Head of Managerial Economics Division, New Zealand Institute of Economic Research, meeting Monday, 9 November, 1998.

³⁹ Duncan I., *Op Cit*, 1996, p 405.

⁴⁰ Select Committee on the Socio-Economic Consequences of National Competition Policy, Submissions, Vol 5, Submission No 91, Professor John Quiggin, p 1073.

⁴¹ "New Zealand's State Sector Reform: A Decade of Change", *State Services Commission*, Wellington, New Zealand, 1996, p 12.

Given the scale and pace of reform in New Zealand it was impossible to respond to distributional effects even if they were justified on equity grounds. Some of the adverse effects were concentrated in particular sub groups, while in the medium and long term, benefits have accrued or will accrue in a more dispersed fashion to the majority of the population.⁴²

⁴²

Duncan I., *Op Cit*, 1996, p 418.

Chapter 8. Conclusions

8.1 Globalisation

The Standing Committee found that much of the commentary on globalisation concentrates on economic issues and the benefits of free trade and deregulation. However, the process of globalisation requires a more integrated approach taking into account the social, cultural, environmental and political consequences. Wiseman states -

But even the most fervent supporters of deregulation have discovered that the volatility of globalised money markets creates a climate of economic and political instability that can undermine the creation of sustainable long-term investment strategies.⁴³

Reports on globalisation have stated that -

[Certain large companies] ... have learnt the advantages of globalisation: the ability to minimise tax, create economies of scale, transfer information to and from offices around the world, discover trends in advance of competitors and extend influence over governments due to sheer size.⁴⁴

It has been further reported that -

... the global webs threaten national sovereignty. National governments have less control over their treasuries when billions of dollars can flow in and out of a country in minutes because of financiers' interpretation of economic data.⁴⁵

Dusevic states that -

... reforms like the floating of the dollar, tariff reductions, smaller government, privatisation and industry deregulation have opened up a country where competition had been slack and productivity growth slow.⁴⁶

Finding 9

The Standing Committee found that market forces are global, but the social fallout that policy makers have to manage are local.

⁴³ John Wiseman, *Global Nation? Australia and the Politics of Globalisation*, Cambridge University Press, Cambridge, 1998, pp 15-16.

⁴⁴ Ferguson A. & James D., "Globalisation, ready or not", *Business Review Weekly*, August 31, 1998, p 40.

⁴⁵ *Ibid*, p 42.

⁴⁶ Dusevic T., "No Turning Back", *Time*, September 28, 1998, p 42.

8.2 Deregulation

It has been reported that -

Deregulation is considered to be a way of increasing competition, yet it is leading to the establishment of global oligopolies in conventional industries.⁴⁷

The Standing Committee found in its research that many of the submissions to the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy strongly opposed deregulation especially in the primary producing sector of the economy. Many small retailers were opposed to the deregulation of trading hours. While many other businesses saw the restriction in trading hours as hindering competition and consumer choice.

Professional groups raised concerns that deregulation would allow untrained, unregistered persons to perform the functions of practitioners. Competition in health care assumes an efficient market of consumers who are well informed and capable of making discriminating choices; however, this is not the case in most cases. It has been argued that unregulated competition in medicine may give “charlatans” the opportunity to pass off as properly trained practitioners.

In his submission to the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy, Dr Christopher Clay stated -

I believe that the application of the current competition policy to medical practice is more likely to cause detriment than progress. The introduction of intense “tooth and claw” competition is unlikely to engender a more compassionate and civil society in the caring professions.⁴⁸

Finding 10

The Standing Committee found that although competition policy espouses production at the lowest cost, there are social costs which must be taken into account. There are also ramifications for professional standards in the future.

8.3 Corporatisation

The Standing Committee found that Australian governments have in recent years implemented a program of microeconomic reform which has resulted in commercialisation and corporatisation of service delivery activities.

⁴⁷ Ferguson A. & James D., *Op Cit*, 1998, p 43.

⁴⁸ Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, Submission, Vol 6, Submission No 107, p 1276.

Sprott states -

Outsourcing, corporatisation and privatisation place consumers of community services in a particularly vulnerable position especially with regard to inappropriate decisions and actions of service providers in the name of cost-effectiveness and efficiency.⁴⁹

8.4 Privatisation

Many public enterprises have operated very profitably in the past returning large dividends to consolidated revenue which have been spent by governments on other legitimate public purposes. It must be noted that many such enterprises were inefficient and only remained in existence by virtue of their legislative monopoly position.

The Standing Committee found that many commentators are now increasingly critical of the sale of public assets, questioning whether the privatisation of public assets will affect the delivery of services to rural areas. Many public corporations were established by governments and Parliaments to hold and manage important public properties in the public interest. The Parliament had a crucial role monitoring the work of the public corporations.

Finding 11

The Standing Committee found that with corporatisation, public utilities have been removed from the scrutiny of the Parliament and are now subject to corporate governance. They operate to increase profits and dividends without necessarily considering the public interest.

The Standing Committee found that not all financial analysts and commentators have seen great benefits in privatisation. It has been reported that -

Privatisation promised savings for the consumer, the end to monopolies and a reduction in government debt. The savings have yet to materialise and, in many cases, public monopolies and their debt have been replaced by private monopolies financed through borrowing. New infrastructure projects are underwritten by the state through generous tax concessions and guaranteed returns.⁵⁰

It has been argued by many commentators that many public enterprises have been undervalued and sold at bargain basement prices. The sales of such enterprises will deprive consolidated revenue funds of dividends and of a dividend stream. A heavier burden will be placed on the tax-paying community to fund essential programs which were once funded through revenue producing government enterprises. However, this factor must be considered alongside the concomitant benefit of reducing public debt.

⁴⁹ Sprott J., "Privatisation, Corporatisation and Outsourcing: Critical Analysis from the Consumer Perspective", *Australian Journal of Administrative Law*, Vol 5, August, 1998, p 223.

⁵⁰ Brown R., "Infrastructure: how the taxpayer underwrites private investment", *News Weekly*, July 11, 1998, p 8.

It has been reported that far from the record prices for the sale of the Brisbane, Melbourne and Perth airports, the government had merely been “pre-paid” for the taxes foregone over the next 10 to 20 years.⁵¹ The report states -

... had the airports been floated on the stock exchange instead of giving big tax concessions to consortiums who borrowed to buy them, the government would have greatly increased its tax revenue.⁵²

It is further reported that government debt has been replaced by private debt as the companies that have purchased such public enterprises have borrowed most of the purchase price.

It should be remembered however, that one of the proposed advantages of selling airports was to allow private enterprise to work to its fullest potential in attracting more traffic and therefore, allow the flow on benefit to be realised by the tourism and hospitality industries.

In respect of the privatisation of Victoria’s Electricity Commission it has been reported that -

the successful bidder has received an annual return of 40%.⁵³

The Standing Committee noted concerns raised in the community about the privatisation of public utilities. As Watts states -

... incidents like the Sydney water contamination and the Melbourne gas crisis cause people to question whether they can trust private operators.⁵⁴

Finding 12

The Standing Committee found that there were doubts in the community about the economic and social benefits of outsourcing and privatising some services which are traditionally provided by the public sector.

8.5 Public Utilities

National Competition Policy is not about competition for its own sake, but a reform process to be undertaken only where the benefits to the community outweigh the costs.

Many commentators in the United Kingdom are calling for the government to address the down

⁵¹ *Ibid*, p 8.

⁵² *Ibid*, p 8.

⁵³ *Ibid*, p 8.

⁵⁴ Watts T., “More power to the little people”, *Business Review Weekly*, January 25, 1999, p 24.

side of utility privatisation. It has been noted that there is no public policy framework to underpin the utilities' behaviour. Each industry has an independent economic regulator to temper the powerful market position of companies. Lennard states -

... there is a need for government to take responsibility for public policy issues: how the less well off can be helped with rising utility bills and the threat of disconnection, for instance, and how broader environmental and water conservation policies can be reconciled with private company activities.⁵⁵

Finding 13

The Standing Committee found that the pace of reforms has not been matched by a similar rate of change in the public's perception about the delivery of essential services.

Watts states -

A few years ago, a supply of power - like clean water and gas - was considered to be a right. Now it has been converted to a service you buy.⁵⁶

The companies responsibility is to its shareholders and their private status justifies their lack of responsibility for the social consequences of their policies.

Finding 14

The Standing Committee found that the privatisation of public utilities often raised questions of public welfare. The perception is often that even when precautions to ensure public benefit and the supply of essential services have been made a condition of sale, these may not, in some cases, be able to be maintained.

As Beder states -

Once a utility has been privatised the government loses control over who eventually comes to own it. The status of the public in respect to a privatised utility changes from collective owners to passive consumers.⁵⁷

Competition in domestic gas supply in the United Kingdom has resulted in large differentials between the prices offered to consumers according to how they pay.

⁵⁵ Lennard L., "Time to put the poor in the picture", *New Statesman*", 24 July, 1998, p xxiv.

⁵⁶ Watts T., *Op Cit*, 1999, p 24.

⁵⁷ Beder S., "Corporate integrity difficult to control following privatisation", *Engineers Australia*, February, 1999, p 60.

The Western Australian Treasury in its submission to the Standing Committee stated -

Where National Competition Policy applies to public utilities, therefore, it does not require economic and commercial considerations to be given precedence over the traditional objectives of public utilities related to social equity/welfare or regional development. Neither does it demand “bottom line” performance at the expense of either the consumers of public utility services or the employees of public utilities. National Competition Policy does not require that vertically integrated public utilities be split or sold or that any of their services should be contracted out.⁵⁸

Finding 15

The Standing Committee found that National Competition Policy only requires that the operations of public utilities should be examined to ensure that services are provided to the public in the most effective and efficient manner and also that other providers can enter the market on fair and equitable terms.

8.6 Contracting Out

There has been an emphasis in recent years on contracting out of government services. That is, where the government or one of its agencies, pays a contractor to deliver a service previously delivered by the government.

The trend of contracting out traditional government services and requiring government services to compete against the private sector is a worldwide phenomena. The rigours of global competition and the National Competition Policy principles have put pressures on State governments to undertake microeconomic reforms. This has changed the way governments operate and how they deliver services.

The contracting out of government services has resulted in many cases in a loss or diminution of government accountability to the people and to the Parliament. Contracting out has also negatively affected the ability of consumers to seek redress where they have been affected by the actions of a contractor.

The Productivity Commission advised the Standing Committee that a study of contracting out of government services has found that there have been a number of shortcomings. Not enough resources were allocated to ensure that the process was correct, that specifications were accurate and that there was supervision. The contractors also avoided scrutiny by using the “commercial-in-confidence” provisions.

The Standing Committee found that regional areas are also concerned about the effects of contracting out services of government business enterprises, especially services provided by local shires. The result of contracting out has meant the local shire cannot employ a permanent

⁵⁸

Submission by the Western Australian Treasury, November, 1998, p29.

workforce. An itinerant workforce from outside the local area is often employed. This sometimes results in a lowering of the level of services and a lack of continuity. It also means that the rural workforce must move out of the area to find work. This results in the loss of social capital from the rural area. These changes have occurred because of direct policy decisions and microeconomic reforms. They have nothing to do with National Competition Policy *per se*.

Mr Ian Mickel, Shire President, Country Shire Councils Association advised the Standing Committee that -

The major concern in many of our rural communities ... is the cumulative effect of National Competition Policy. They are forced to take on issues such as contracting out their major works and that work then being centralised by large operations based in Perth. There is the effect of flow-out of people out of those communities. In the event that the council ceases doing its refuse collection and these people lose their jobs, it does not affect only three people, it has the potential to affect a school teacher or someone else down the line.⁵⁹

Finding 16

The Standing Committee found that downsizing, contracting out and tendering has sometimes had dramatic effects in some rural communities. It has had an affect on the social fabric of communities. As people once employed by the local shire leave the town there are spill over effects in the schools, sporting clubs as well as the local businesses.

The Western Australian Municipal Association expressed concerns that there is a need to balance the social costs. Contactors can tender to do certain work at a cheaper cost because such companies have the ability to cross-subsidise in the short term. The contractors develop a monopoly position by taking away the work from the local workforce with the result that people have to leave the area.

Mr Ian Mickel, Shire President, Country Shire Councils Association advised the Standing Committee that -

The promotional material from Main Roads Western Australia on the contracting system has inferred that the contractor should be able to pick up a great deal of local government work in addition to the work from Main Roads.⁶⁰

Recent reports have indicated that the privatisation of road building services increased the costs of road construction. It has been reported that the Main Roads of Western Australian annual report shows that the average cost of metropolitan road construction has risen from just over

⁵⁹ Ian Mickel, Shire President, Country Shire Councils Association, Evidence, Perth, Thursday, 17 December, 1998, p 3.

⁶⁰ *Ibid*, p 4.

\$400,000 per lane kilometre in 1992-93 to just under \$1.2 million in 1997-98.⁶¹

As well as the questioning the costs of outsourcing reports have also indicated that the proliferation of “commercial in confidence” clauses in contracts for government services have raised questioned about accountability.

Local Government expressed a view that local councils are not merely managers of contracts. Ratepayers expect services from their councils -

The Western Australian Municipal Association is embarking on a program of bench marking everything in local government as a way of getting best practice activities in local government. That is its way of ensuring that local government can test to see whether it is providing the best services for its communities at the best possible rates.⁶²

8.7 Accountability

The Standing Committee found that the trend towards governments commercialising, corporatising and privatising government services has raised the debate of how such corporatised government service providers and private contractors should be made accountable for their operations, in so far as they relate to the delivery of services provided by the public sector.

Outsourcing has had the effect of placing the conduct of providers beyond administrative law and public sector accountability processes. Sprott states -

A public interest test and public sector levels of accountability should be applied to those private operators who are being permitted to benefit from the opening up of what have previously been public monopolies.⁶³

There have been calls for an appropriate inquiry -

Whether the executive branches of government can outsource their functions without referral to statute, leaving minimal scope for either parliamentary or judicial scrutiny of their contracting decisions or adequate treatment of issues of accountability for both the decision to contract out and the functions performed by non-governmental service providers.⁶⁴

⁶¹ Matin R., “Road costs soar under State privatisation push”, *The West Australian*, Tuesday, March 2, 1999, p 27.

⁶² Ian Mickel, Shire President, Country Shire Councils Association, Evidence, Perth, Thursday, 17 December, 1998, p 14.

⁶³ Sprott J., *Op Cit*, 1998, p 226.

⁶⁴ Sprott J., *Op Cit*, 1998, p 231-32.

Finding 17

The Standing Committee found that there existed a public perception about the lack of accountability, as well as questions, about whether governments should outsource their community service obligations through contractual arrangements, thereby switching to private law accountability mechanisms.

8.8 Privacy

The Standing Committee found that as the trend towards privatisation of community services progresses, the area of privacy protection has arisen as a pressing issue of concern for recipients of community services who do not have rights under the *Privacy Act 1988* (Commonwealth) in relation to activities undertaken on behalf of a government agency by an independent contractor to that agency. Sprott states -

The Administrative Review Council and the Australian Law Reform Commission have reacted to these concerns by recommending that the *Privacy Act 1988* (Commonwealth) be amended to make the private sector directly liable for observance of its provisions.⁶⁵

8.9 Freedom of Information

The *Freedom of Information Act 1992* enables individuals to gain access to, and correct inaccurate information about themselves and about how decisions are made. The *Freedom of Information Act 1992* promotes open government and allows parliamentary scrutiny of government actions. Where government services are carried out by a contractor many personal records and information is held by the contractor. The *Freedom of Information Act 1992* only covers documents that are in the government's possession. Access to information under the *Freedom of Information Act 1992* does not extend to instances where governmental functions are carried out by private parties.

Government outsourcing and privatisation of community services has restricted the scope of Freedom of Information legislation. There have been calls for the expansion of Freedom of Information legislation to ensure that recipients of privately provided community services enjoy comparative levels of accountability as would exist if those services were supplied by the government.

The Information Commissioner of Western Australia stated -

Increasingly, public administration today is characterised by downsizing of agencies, contracting out of functions, increasing corporatisation of agencies, and the privatisation of services and utilities. It seems to me, therefore, that whilst the design of the public sector has changed, the design of FOI as

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Sprott J., *Op Cit*, 1998, p 228.

an accountability tool has not changed to match a redesigned public sector.⁶⁶

Finding 18

The Standing Committee found that it was commonly believed that there has been a tendency towards restricting information to the public since the outsourcing of services, owing to the private sector's reliance on confidentiality.

8.10 Ombudsman

Under the *Parliamentary Commissioner Act 1971* the Ombudsman can only investigate complaints that relate to a “matter of administration”.⁶⁷ As a result the Ombudsman cannot play a role in maintaining accountability once a service is outsourced or privatised. Where a contractor is not part of the government, complaints cannot be made to the Ombudsman about service delivery and members of the public and service recipients cannot seek information held by the contractor unless specific legislation provides for such access.

8.11 Fairness and Equity

The Standing Committee found that there was confusion about competition policy and other government policies. For example, the suggestion that National Competition Policy required the privatisation of government services. As well as the belief that governments would no longer subsidise services and the provision of community service obligations. There was a belief that National Competition Policy was only concerned with markets and competition and had no regard for equity, the environment and social policy.

The Standing Committee found that the concerns about competition policy stemmed from limited awareness that National Competition Policy did not require privatisation, contracting out, or cuts in subsidised community services.

The National Competition Council (NCC) in its 1998 Annual Report stated -

... competition reform and equity are not only compatible but in many ways complementary.⁶⁸

The NCC further stated -

If the benefits of reform outweigh the costs, including the cost of the loss of equity, it is incumbent on governments, to ensure that appropriate adjustment assistance is available for those adversely

⁶⁶ Office of the Information Commissioner, Western Australia, Fifth, *Annual Report*, 1998, p 7.

⁶⁷ Section 14(1) of the *Parliamentary Commissioner Act 1971* (Western Australia).

⁶⁸ Samuel G., *Op Cit*, 1998, p 1.

affected by the implementation of reform.⁶⁹

The public interest test is built into the National Competition Policy Agreements. It requires that equity be weighed-up against other matters when a particular reform option is being reviewed.

The Standing Committee is of the view that the delivery of community service obligation is not compromised by National Competition Policy. It is a matter for the government to decide the nature of such community service obligations, which sections of the community should be targeted and the level of service that should be provided through community service obligations. It is the method of delivering such community service obligations that has been raised within the context of National Competition Policy. The Standing Committee agrees that community service obligations should be funded through a transparent process of direct public funding.

Community service obligations, have in the past been delivered by means of hidden cross-subsidies. The Western Australian Treasury in its submission to the Standing Committee advised that -

This approach leads to pricing signals being distorted, and consequently distorting demand. Cross-subsidies do not provide any incentive to lower costs or improve service and because they are hidden, neither governments nor consumers are able to scrutinise the costs to determine whether value for money is being obtained.⁷⁰

8.12 Change and Local Government

The Standing Committee was informed by the Productivity Commission that evidence they had been given was that some of the consequences in regional areas of competitive tendering for significant local government services has been that if the tender goes to a non local bidder, the local workforce can be dispersed. It has been argued that tenderers sometimes price load to get the business, once the local workforce is dispersed, the price for the service increases. This is a concern of local governments.

The Productivity Commission also suggested that bigger regional centres are growing at the expense of the small regional towns and National Competition Policy is being blamed. As regional activity is diminished rural towns experience the resultant social problems of unemployment, rising crime etc. The decline of economic activity is a result of people moving away, the closure of schools, banks and services.

8.13 Rural Sector

The Standing Committee sought the views of a wide variety of groups and organisations on the effects of the implementation of National Competition Policy. The rural sector was concerned

⁶⁹ Samuel G., *Op Cit*, 1998, p 8.

⁷⁰ Submission by the Western Australian Treasury, November, 1998, p 29.

with the withdrawal of services in the community, Mr Mickel, Shire President of the Country Shire Councils Association stated -

The biggest effect rural communities have seen and the biggest effect they fear is the corporatisation and privatisation of what has been government services to them in the past ... [and] reductions in services in the rural areas.⁷¹

He further stated that -

The fears of the country people are being realised by the fact that they believe that if the true cost of supply must be shown for every service in the community, they will be totally without services.⁷²

The Standing Committee observed that regional and rural towns and shires are often reliant on a single industry or limited range of industries to generate a large proportion of local income and employment. In its submission to the Standing Committee the Western Australian Chamber of Commerce stated -

The disproportionately large contribution of export-oriented agriculture, mining and tourism to Australia's regional and rural areas means that they are particularly exposed to changes in the international economy and also to government policies which harm or benefit exporters.⁷³

The Standing Committee notes that mining and, more especially, agriculture have historically been amongst the most heavily regulated industry sectors. They have been subject to production and marketing regulation and, in some cases, protection from direct competition from imports.

Finding 19

The Standing Committee found that local authorities in regional and rural areas have with the implementation of contracting out and tendering initiatives been more adversely affected because the impact is much greater if jobs are lost in the local community.

8.14 Change and National Competition Policy

The Standing Committee found from its discussions with experts and with the Senate Committee that there was some confusion about the concept of National Competition Policy. It appeared that National Competition Policy was being blamed for changes whether they were public or private sector policy decisions and for structural change which may have resulted from

⁷¹ Ian Mickel, Shire President, Country Shire Councils Association, Evidence, Perth, Thursday, 17 December, 1998, p 1.

⁷² *Ibid*, p 2.

⁷³ Submission, Chamber of Commerce and Industry, Western 31 January, 1999, p 9.

technological changes. For example, rural areas are concerned about banks closures and fees, and although these decisions have nothing to do with National Competition Policy, people are concerned about the reduction in services to regional centres.

Finding 20

The Standing Committee found that there was widespread misunderstanding about the National Competition Policy.

The Standing Committee found that the consequences of structural change as a result of microeconomic reform are not being picked up by social services. In some cases the social costs of structural change in rural areas appears to have been higher than the benefits.

The Standing Committee found that National Competition Policy was not the cause of banks closing branches or substituting tellers with ATM's. National Competition Policy was not largely responsible for the demographic shifts from the country to the city. These changes are in fact, a response to factors such as falling commodity prices, technological change and the increasing importance of the service sector as an employer.

Although National Competition Policy reforms will lead to a more effective and efficient economy, evidence to the Standing Committee of its effect at the micro level is reflected in the comments of Mr John Martin, Director of the Western Australian Municipal Association who stated -

They have seen a lack of tangible benefits. They have not seen reduced prices, easier access or ways that small businessmen can get into new markets. All they have seen is a range of additional legislative requirements from the council's perspective.⁷⁴

Submissions to the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy, have indicated that the application of the National Competition Policy has created uncertainty for farmers and industry with the review of anti-competitive legislation. Legislative review has created disharmony between the States. Legislation which was similar in many States is now being reviewed but States have approached the same review differently. The outcome of the reviews has the potential to reduce harmonisation in regulatory systems across Australia.

Small business believe that National Competition Policy benefits big business. Small business had been protected by regulation. However, there are benefits from less regulation, for example cheaper power. Small business must be innovative to deliver services to remote areas.

Concerns have been express about aspects of the implementation of National Competition Policy, in particular, implications for certain groups in the community. The Chamber of Commerce and Industry of Western Australia (CCI) stated -

⁷⁴

John Martin, Director, Western Australian Municipal Association, Evidence, Perth, Thursday, 17 December, 1998, p 3.

We have taken the view that we must simultaneously progress with all aspects of competition policy across a broad front. With any sets of reforms there will be winners and losers.⁷⁵

8.15 Co-operation and Competition

In his submission to the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy, Professor John Quiggin pointed out that societies and economies depend on a mixture of co-operation and competition. He states -

The problem with National Competition Policy is its one-sided nature, focusing exclusively on competition. In the view of the National Competition Council, any co-operative activity is seen as a conspiracy by a select interested minority against the general public. ... Processes such as 'downsizing' are justified by the logic of competition.⁷⁶

He further states -

The effect of National Competition Policy is to require all public sector organisations to abandon implicit contracts with their employees. If a service can be provided more cheaply in the short run by sacking the existing staff and contracting out, then this is the approach that must be adopted. Indeed, there is a presumption in favour of contracting out.⁷⁷

It has been argued that the quality of health care relies on co-operation between health professionals rather than competition. Along similar lines the emergency services require co-operation between the fire brigades, the police, medical services and interstate emergency services.

8.16 Benefits from Competition Reforms

The National Competition Council's Annual Report states that there have been major benefits from competition policy. The report documents evidence of benefits across a range of fields, including electricity, gas, rail freight, professional fees, government businesses, the environment and business licencing. It states that there have been -

Price reductions of up to 40 percent for rail freight and 60 for energy.⁷⁸

The Western Australian Chamber of Commerce and Industry advised the Standing Committee that Western Australia had seen substantial gains as a result of the introduction of National

⁷⁵ Nicola Cusworth, Chief Economist, Chamber of Commerce and Industry of Western Australia, Evidence, Perth, Thursday, 17 December, 1998, p 43.

⁷⁶ Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, Submission, Vol 5, Submission No 92, p 1068.

⁷⁷ *Ibid*, p 1069.

⁷⁸ "Major benefits from competition reform - Council report", *National Competition Council Media Release*, 11 November, 1998.

Competition Policy, particularly in the respect of utilities and gas in particular. There has been substantial reductions in energy prices, particularly in the Pilbara.⁷⁹

8.17 Competitive Reform and the Delivery of Services

There is some confusion about what National Competition Policy represents because it has been complicated by a raft of other reforms, such as competitive tendering, benchmarks and various other federal and State Government reforms.

Most competition systems have common objectives such as seeking to advance the interests of consumers and protect the free flow of goods in a competitive economy. They also seek to protect competitors' access to markets and protect to some extent consumer freedom of choice and seller freedom from coercion.

The globalisation of economic relationships has been the most powerful factor in reducing the sovereign decision-making powers of nation States⁸⁰ -

... the unregulated mobility of finance capital seriously undermines the capacity of national or local governments to intervene in the market so as to promote objectives - such as full employment or alternative environmental policies - that are not in the interests of the global money markets.⁸¹

The Standing Committee is of the view that the implementation of the National Competition Policy with respect to public utilities in Western Australia must accommodate the special circumstances prevailing in Western Australia, in particular, the fact that Western Australia has a low population density and a large land area. This makes it uneconomic to provide infrastructure to many parts of the State and consequently in more remote parts of the State there are few opportunities to develop effective competition. Geographical and population distribution in Western Australia also affects the cost of supplying services to many regional and remote areas.

The Western Australian Treasury in its submission to the Standing Committee stated -

Due to the low population densities in regional areas, and the remoteness of some of the areas, the cost of supplying electricity exceeds the revenue collected by \$150-200 million per year. Without the uniform tariff policy for the supply of electricity, many regional Western Australians would face substantial increases in their electricity costs.⁸²

The Standing Committee notes that this philosophy remains government policy in so far as domestic and moderate commercial users are concerned.

⁷⁹ Nicola Cusworth, Chief Economist, Chamber of Commerce and Industry of Western Australia, Evidence, Perth, Thursday, 17 December, 1998, p 42.

⁸⁰ John Wiseman, *Global Nation? Australia and the Politics of Globalisation*, Cambridge University Press, Cambridge, 1998, p 105.

⁸¹ *Ibid*, p 122.

⁸² Submission by the Western Australian Treasury, November, 1998, p 32.

The impact of National Competition Policy on public utilities in Western Australia has been substantial. Public utilities have undergone significant changes in structure and operational procedures. The need for Western Australian industry to become internationally competitive has meant that a number of utilities now benchmark their performance against counterparts elsewhere.

The Standing Committee is of the view that while efficiency reforms are inevitable to ensure a competitive economy it is important that there are safeguards to ensure that essential public services continue to be delivered to the whole domestic community at substantially the same price.

The Standing Committee believes that the focus should be on public utilities achieving the best practice in the delivery of services and community services obligations with the minimum regulation required to ensure the effective and safe delivery of essential services.

The Standing Committee supports the philosophy of National Competition Policy that requires that implementation should occur only where the benefits to the community outweigh the costs.

APPENDIX ONE**Glossary**

Throughout this report the following terminology has been used:

“Länder”	means the equivalent to a State or Province in the Federal Republic of Germany.
“Member States”	means European countries that are members of the European Community.
“Select Committee”	means the Western Australian Select Committee on Parliamentary Procedures for Uniform Legislation Agreements established by the Legislative Assembly of the Western Australian Parliament on the 4 June 1992.
“Standing Committee”	means the Standing Committee on Uniform Legislation and Intergovernmental Agreements established by the Legislative Assembly of the Western Australian Parliament on 4 August 1993 and re-established on 18 March 1997.
“Hilmer Report”	means the report of the Independent Committee of Inquiry into National Competition Policy which reported in August 1993.

Abbreviations

“ACCC”	Australian Competition and Consumer Commission.
“AG”	Attorney General.
“AIT”	Agreement on Internal Trade.
“ANZCERTA”	Australia-New Zealand Closer Economic Relations Trade Agreement.

“APEC”	Asia-Pacific Economic Co-operation.
“ARTC”	Australian Rail Track Corporation
“ATM”	Automatic Teller Machine.
“CALM”	Department of Conservation and Land Management.
“CBH”	Co-operative Bulk Handling Limited.
“CCI”	Chamber of Commerce and Industry of Western Australia.
“CER”	Closer Economic Relations Agreement.
“CIT”	Committee on Trade and Investment.
“COAG”	Council of Australian Governments.
“CPI”	Consumer Price Index.
“CRTC”	Canada Radio-TV and Telecommunications Commission.
“CSOs”	Community Service Obligations.
“DBNGP”	Dampier to Bunbury Natural Gas Pipeline.
“EC”	European Community.
“ECNZ”	Electricity Corporation of New Zealand Limited.
“EEC”	European Economic Community.
“EFTA”	European Free Trade Agreement.
“EU”	European Union.
“FAA”	Federal Aviation Administration.
“FTA”	Free Trade Agreement (US/Canada).
“FTC”	Federal Trade Commission.

“GATT”	General Agreement on Tariffs and Trade.
“GBE”	Government Business Enterprise.
“GDP”	Gross Domestic Product.
“GRIG”	Gas Reform Implementation Group.
“GRTF”	Gas Reform Task Force.
“GST”	Goods and Services Tax.
“GTE”	Government Trading Enterprise.
“MCRT”	Ministerial Council for Road Transport.
“NAFTA”	North American Free Trade Agreement.
“NCC”	National Competition Council.
“NCP”	National Competition Policy.
“NRTC”	National Road Transport Commission.
“NZ”	New Zealand.
“OECD”	Organisation for Economic Co-operation and Development.
“OFWAT”	Office of Water Services in the United Kingdom.
“SCAG”	Standing Committee of Attorneys-General.
“SEC”	State Electricity Commission.
“SECWA”	State Energy Commission of Western Australia.
“TPA”	Trade Practices Act 1974.
“WTO”	World Trade Organisation.
“US”	United States of America.

APPENDIX TWO

List of Overseas Meetings Held by the Standing Committee

Date	Contact	Organisation	Place
7/7/97	<i>Colin Milner</i>	First Secretary, Australian Embassy and Mission to the European Union.	Brussels - Belgium
7/7/97	<i>Jose Borrell</i>	Head Unit for Relations with Australia, DGI, European Commission.	Brussels - Belgium
7/7/97	<i>Peter Meyer</i>	Foreign Policy Advisor, Central Policy and Planning, External Political Relations DGIA, European Commission - Foreign Policy.	Brussels - Belgium
7/7/97	<i>Matthew King</i>	Administrator dealing with Internal Market, Insurance and Pension Funds and External Aspects of Financial Services, DGXV, European Commission.	Brussels - Belgium
7/7/97	<i>Helmult Schroter</i>	Head of Unit, Legal and Procedural Problems, General Competition Policy and Coordination, DGIV, European Commission.	Brussels - Belgium
7/7/97	<i>Elisabetta Manunea</i>	Unit for Legal and Procedural Problems, General Competition Policy and Coordination, DGIV, European Commission.	Brussels - Belgium
7/7/97	<i>Caroline Walcot</i>	Deputy Secretary General, European Round Table - Competition Policy from the Company Perspective.	Brussels - Belgium
7/7/97	<i>Lothar Kuhl</i>	UCLAF, Secretariat General of the European Commission on Criminal Law Approximation in the European Union, Financial Crime - Antifraud.	Brussels - Belgium
7/7/97	<i>Senator, the Hon. Margaret Reid</i>	President of the Senate - Australian Senate.	Brussels - Belgium

Date	Contact	Organisation	Place
8/7/97	<i>Senator Michel Foret</i>	Leader of the Liberal Party in the Belgium Senate and Member of the Parliament Régional Walloon and the Conseil de la Communauté Française.	Brussels - Belgium
8/7/97	<i>Annemie Neyts - Uyttebroeck, MEP</i>	Member of the European Parliament's Institutional Affairs Committee and Rapporteur for the Committee Report on Relations between the European Parliament and National Parliaments.	Brussels - Belgium
8/7/97	<i>Antonio Sacchetti</i>	Director, Legal Service, General Secretariat of the Council of the European Union.	Brussels - Belgium
8/7/97	<i>Roelof Plijter</i>	Deputy Head of Unit, Directorate M, External Economic Relations, Commercial Policy, Relation with North America, the Far East, Australia and New Zealand, DGI, European Commission.	Brussels - Belgium
8/7/97	<i>Don Kenyon</i>	Ambassador of the Australian Embassy and Mission to the European Union.	Brussels - Belgium
8/7/97	<i>Pamela Brumter</i>	Chief of the Directorate General on Industry European Commission, Governments, Protocol and Uniform Legislation.	Brussels - Belgium
8/7/97	<i>Jane Drake-Brockman</i>	Minister, Australian Embassy and Mission to the European Union.	Brussels - Belgium
8/7/97	<i>Justine McPhillips</i>	Counsellor, Australian Embassy and Mission to the European Union.	Brussels - Belgium
8/7/97		Belgium Parliament.	Brussels - Belgium

Date	Contact	Organisation	Place
9/7/97	<i>Dr Uwe Leonardy</i>	Lower Saxony State Office, Bonn, Uniform Legislation, Federalism and the European Union.	Bonn - Germany
10/7/97	<i>Gustav Wabro</i>	State Secretary from the State of Baden-Wurttemberg - Bundesrat.	Bonn - Germany
10/7/97	<i>Mrs Krause-Sigle</i>	Head of Competition Policy Sub-division at the Federal Economics Ministry.	Bonn - Germany
10/7/97	<i>Michael Baron</i>	Head of Division on Competition Policy.	Bonn - Germany
10/7/97	<i>Manfried Steffen</i>	Senior Expert on Asia-Pacific Region at the Federal Ministry of Economics.	Bonn - Germany
10/7/97	<i>Wendy Marth</i>	Projects Officer, Australian Embassy.	Bonn - Germany
10/7/97	<i>Dr Horst Risse</i>	Head of Bundesrat Speaker's Office.	Bonn - Germany
11/7/97		Bundesrat, Upper States House.	Bonn - Germany
14/7/97	<i>Professor Fred Lazar</i>	Professor of Economics, Faculty of Arts, York University School of Business.	Toronto - Canada
14/7/97	<i>Daniel Schwanen</i>	Senior Policy Analyst at the C D Howe Institute.	Toronto - Canada
14/7/97	<i>Sean R Peterson</i>	Policy Analyst at the Canadian Chamber of Commerce.	Toronto - Canada
14/7/97	<i>Peter Kane</i>	Consul-General and Senior Trade Commissioner at the Australian Consulate General and Trade Commission.	Toronto - Canada
14/7/97	<i>Marie Ross</i>	Personal Assistant to the Consul General.	Toronto - Canada

Date	Contact	Organisation	Place
15/7/97	<i>Professor David Cameron</i>	Department of Political Science at the University of Toronto - Uniform Legislation and Intergovernmental Affairs.	Toronto - Canada
15/7/97	<i>William Forward</i>	Assistant Deputy Minister at the Office of Constitutional Affairs and Federal-Provincial Relations, Ministry of Intergovernmental Affairs.	Toronto - Canada
15/7/97	<i>Craig McFayden</i>	Director, Office of Constitutional Affairs and Federal-Provincial Relations, Strategic Issues Group, Ministry of Intergovernmental Relations.	Toronto - Canada
15/7/97	<i>Mark Polley</i>	Executive Assistant to the Assistant Deputy Minister - Uniform Legislation, Intergovernmental Agreements and Treaties.	Toronto - Canada
15/7/97	<i>John D Gregory</i>	General Counsel, Cabinet Office, Immediate Past President of the Uniform Law Conference of Canada.	Toronto - Canada
17/7/97	<i>Dawn Hatzler</i>	Co-ordinator of the Academy for State and Local Government.	Washington DC - USA
17/7/97	<i>Charles Stark</i>	Section Chief, Foreign Commerce Section, Anti-trust Division, Justice Department.	Washington DC - USA
17/7/97	<i>Ed Hand</i>	Assistant Section Chief, Foreign Commerce Section, Anti-trust Division, Justice Department.	Washington DC - USA
17/7/97	<i>Milton Marquis</i>	Senior Counsel to the Assistant Attorney General, Anti-trust Division, Justice Department.	Washington DC - USA
17/7/97	<i>Gregory J Werden</i>	Director of Research, Chief Appellate Liaison Unit, Economic Analysis Group, Anti-trust Division, Justice Department.	Washington DC - USA

Date	Contact	Organisation	Place
18/7/97	<i>Jacques Feullian</i>	Asia - Pacific Regional Counsel, International Division, Bureau of Competition, Federal Trade Commission.	Washington DC - USA
18/7/97	<i>Michael O Wise</i>	Advocacy Co-ordinator, Bureau of Economics, Federal Trade Commission.	Washington DC - USA
18/7/97	<i>Mary Michaels</i>	Assistant Advocacy Co-ordinator, Bureau of Economics, Federal Trade Commission.	Washington DC - USA
21/7/1997	<i>Kathy Brennan-Wiggins</i>	Director, International Programs, National Conference of State Legislatures.	Washington DC - USA
21/7/1997	<i>Bill Waren</i>	Convener of the Trade and Agriculture Committees - Product Liability Laws.	Washington DC - USA
21/7/1997	<i>David C Naftzger</i>	Staff Assistant, International Programs, National Conference of State Legislatures.	Washington DC - USA
21/7/1997	<i>Charles R Thomson</i>	Special Agent in Charge, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms Criminal Enforcement.	Washington DC - USA
21/7/1997	<i>James O Pasco Jnr</i>	Assistant Director/Congressional and Media Affairs, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms - Uniform Firearm Laws.	Washington DC - USA
21/7/1997	<i>Andrew Peacock</i>	Australian Ambassador to the USA.	Washington DC - USA
21/7/1997	<i>Glenys Maguire</i>	Secretary to the Australian Ambassador.	Washington DC - USA
9/11/1998	<i>Professor Lewis Evans</i>	New Zealand Institute for the Study of Competition and Regulation Inc. Victoria University.	Wellington - New Zealand

Date	Contact	Organisation	Place
9/11/1998	<i>Mark Steel</i>	Director, Competition and Enterprise Branch, Ministry of Commerce.	Wellington - New Zealand
9/11/1998	<i>Peter Mumford</i>	Manager, Competition and Enterprise Branch, Ministry of Commerce.	Wellington - New Zealand
9/11/1998	<i>Margaret Meskill</i>	Advisor, Competition and Enterprise Branch, Ministry of Commerce.	Wellington - New Zealand
9/11/1998	<i>Geoff Miller</i>	Australian High Commissioner.	Wellington - New Zealand
9/11/1998	<i>Bill Bowen</i>	Economic Counsellor, Australian High Commission.	Wellington - New Zealand
9/11/1998	<i>Ravi Kewalram</i>	Second Secretary, Australian High Commission.	Wellington - New Zealand
9/11/1998	<i>Clare Sullivan</i>	Clerk of Committee, Commerce Committee.	Wellington - New Zealand
9/11/1998	<i>Mike James</i>	Director, Assets & Liability Management Branch, The Treasury.	Wellington - New Zealand
9/11/1998	<i>Andrew Thompson</i>	Financial Analyst, Assets & Liability Management Branch, The Treasury.	Wellington - New Zealand
9/11/1998	<i>Justus Haucap</i>	Analyst, Assets & Liability Management Branch, The Treasury.	Wellington - New Zealand
9/11/1998	<i>Michael Brunton</i>	Analyst, Assets & Liability Management Branch, The Treasury.	Wellington - New Zealand
9/11/1998	<i>Alex Sundakov</i>	Director, New Zealand Institute of Economic Research.	Wellington - New Zealand
9/11/1998	<i>Dr Stephen Gale</i>	Head of Managerial Economics Division, New Zealand Institute of Economic Research.	Wellington - New Zealand
9/11/1998	<i>Ross Tanner</i>	Deputy State Services Commissioner, State Services Commission.	Wellington - New Zealand
9/11/1998	<i>Tom Berthold</i>	Senior Advisor, State Services Commission.	Wellington - New Zealand
10/11/1998	<i>Peter Allport</i>	Chairman, Commerce Commission.	Wellington - New Zealand
10/11/1998	<i>John Feil</i>	General Manager, Commerce Commission.	Wellington - New Zealand
10/11/1998	<i>Geoff Thorn</i>	Manager, Commerce Act Division, Commerce Commission.	Wellington - New Zealand
10/11/1998	<i>Rachel Leany</i>	Manager, Fair Trading Act Division, Commerce Commission.	Wellington - New Zealand

Date	Contact	Organisation	Place
10/11/1998	<i>Dr Geoff Bertram</i>	Senior Lecturer, Economics, Victoria University.	Wellington - New Zealand
10/11/1998	<i>Dr Russell Solomon</i>	Senior Lecturer, School of Political Science & International Relations, Victoria University.	Wellington - New Zealand
10/11/1998	<i>John Martin</i>	Senior Lecturer in Public Policy, School of Business & Public Management, Victoria University.	Wellington - New Zealand

APPENDIX THREE

List of Interstate Meetings Held by the Standing Committee

Date	Name	Organisation	Place
2/11/1998	<i>Linda Lavarch MLA</i>	Chair, Scrutiny of Legislation Committee.	Brisbane - Queensland
2/11/1998	<i>Chris Garvey</i>	Research Director, Scrutiny of Legislation Committee.	Brisbane - Queensland
2/11/1998	<i>Gary Fenlon MLA</i>	Chair, Legal, Constitutional & Administrative Review Committee.	Brisbane - Queensland
2/11/1998	<i>Judy Garmin MLA</i>	Deputy Chair, Legal, Constitutional & Administrative Review Committee.	Brisbane - Queensland
2/11/1998	<i>Denver Beanland MLA</i>	Member, Legal, Constitutional & Administrative Review Committee.	Brisbane - Queensland
2/11/1998	<i>Kerryn Newton</i>	Research Director, Legal, Constitutional & Administrative Review Committee.	Brisbane - Queensland
2/11/1998	<i>David Thannhauser</i>	Senior Research Officer, Legal, Constitutional & Administrative Review Committee.	Brisbane - Queensland
3/11/1998	<i>David Creed</i>	Secretary, Senate Standing Committee on Regulations & Ordinances.	Canberra - ACT
3/11/1998	<i>Prof Davies</i>	Legal Consultant, Senate Standing Committee on Regulations & Ordinances.	Canberra - ACT
3/11/1998	<i>Janice Paull</i>	Executive Assistant, Senate Standing Committee on Regulations & Ordinances.	Canberra - ACT

Date	Name	Organisation	Place
3/11/1998	<i>James Warmenhoven</i>	Secretary, Senate Scrutiny of Bills Committee.	Canberra - ACT
3/11/1998	<i>Dr Pippa Carron</i>	Secretary, Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy.	Canberra - ACT
3/11/1998	<i>Robin Hardy</i>	Research Officer, Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy.	Canberra - ACT
3/11/1998	<i>Herb Plunkett</i>	Assistant Commissioner, Productivity Commission.	Canberra - ACT
3/11/1998	<i>Paul Coghlan</i>	Assistant Commissioner, Office of Regulation Review, Productivity Commission.	Canberra - ACT
3/11/1998	<i>Mr Henderson</i>	Inquiry Director, Productivity Commission.	Canberra - ACT
4/11/1998	<i>Allan Asher</i>	Deputy Chairman, Australian Competition & Consumer Commission.	Canberra - ACT
4/11/1998	<i>Hank Spier</i>	General Manager, Australian Competition & Consumer Commission.	Canberra - ACT
4/11/1998	<i>Paul Osborne MLA</i>	Chair, Standing Committee on Justice & Community Safety (ACT Assembly).	Canberra - ACT
4/11/1998	<i>John Hargreaves MLA</i>	Deputy Chair, Standing Committee on Justice & Community Safety (ACT Assembly).	Canberra - ACT
4/11/1998	<i>Trevor Kaine MLA</i>	Member, Standing Committee on Justice & Community Safety (ACT Assembly).	Canberra - ACT
4/11/1998	<i>Harold Hird MLA</i>	Member, Standing Committee on Justice & Community Safety (ACT Assembly).	Canberra - ACT

Date	Name	Organisation	Place
4/11/1998	<i>Tom Duncan</i>	Secretary, Standing Committee on Justice & Community Safety (ACT Assembly).	Canberra - ACT
5/11/1998	<i>Jamie Carstairs</i>	First Assistant Secretary, Economic Development, Department of Premier & Cabinet.	Melbourne, Victoria
5/11/1998	<i>Greg McLeish</i>	Senior Adviser, Cabinet Office, Department of Premier & Cabinet.	Melbourne, Victoria
5/11/1998	<i>Victor Perton MP</i>	Chairman, Victorian Law Reform Committee.	Melbourne, Victoria
5/11/1998	<i>Douglas Trapnell</i>	Director of Research, Victorian Law Reform Committee.	Melbourne, Victoria
5/11/1998	<i>Hon Michael John MP</i>	Chairman, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>Hon Gerald Ashman MLC</i>	Member, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>Leonie Burke MP</i>	Member, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>Kenneth Jasper MP</i>	Member, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>Lilian Topic</i>	Executive Officer, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>Nicole Papal</i>	Office Manager, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>Patrick Emerton</i>	Research Officer, Federal-State Relations Committee.	Melbourne, Victoria
5/11/1998	<i>P Ryan MP</i>	Chair, Scrutiny of Acts & Regulations Committee.	Melbourne, Victoria
5/11/1998	<i>Murray Thompson MLA</i>	Deputy Chair, Scrutiny of Acts & Regulations Committee.	Melbourne, Victoria
5/11/1998	<i>Hon D Nardella</i>	Member, Scrutiny of Acts & Regulations Committee.	Melbourne, Victoria

Date	Name	Organisation	Place
5/11/1998	<i>A Plowman MP</i>	Member, Scrutiny of Acts & Regulations Committee.	Melbourne, Victoria
5/11/1998	<i>Andrew Homer</i>	Senior Legal Adviser, Scrutiny of Acts & Regulations Committee.	Melbourne, Victoria

APPENDIX FOUR

List of Briefings

Date	Contact	Organisation
17/11/1997	Janos Peter Tiborc, Principal Policy Officer	Department of Transport
17/11/1997	Klaus Peter Kolf, Senior Manager	Office of Energy
17/11/1997	Dr Leslie Arthur Farrant, Co-ordinator	Energy WA
17/11/1997	Mark Hands, General Counsel	Western Power
17/11/1997	Nenad Ninkov, General Manager, Corporate Strategy	Western Power
17/11/1997	Phillip John Harvey, Chief Executive Officer	Alinta Gas
17/11/1997	Darren John Grondal, Legal Officer	Alinta Gas

APPENDIX FIVE

List of Submissions

Date	Name	Organisation
30/9/1998	Peter Robertson, Convenor Beth Schultz, Vice-president	WA Forest Alliance Conservation Council of WA
15/10/1998	D Figliomeni, General Manager	Bunbury Port Authority
20/10/1998	S Edwards	
22/10/1998	Peter V Jones, Chairman	Water Corporation
30/10/1998	Geoff Calder, General Manager	South West Irrigation
2/11/1998	Frank O'Connor, General Manager	Capricorn Society Limited
5/11/1998	Kevin McMenemy, General President	Western Australian Farmers Federation (Inc.)
20/11/1998	J L Langoulant, Under Treasurer	Treasury
24/11/1998	Albert Millard, Divisional President WA	National Institute of Accountants
17/12/1998	Peter V Jones, Chairman	Water Corporation

Date	Name	Organisation
21/1/1999	Ross McLean, Deputy Chief Executive, Director Policy & Parliamentary Liaison	Chamber of Commerce & Industry

APPENDIX SIX

List of Witnesses

Date	Name	Organisation
17/12/1998	John Martin, Director	WA Municipal Association
17/12/1998	Ian Stanley Mickel, Shire President	Country Shire Council Association
17/12/1998	Shaheen De Souza, Principal Research Officer	WA Municipal Association
17/12/1998	Paul Carter, Economics Executive Officer	WA Farmers Federation (Inc.)
17/12/1998	James William Ferguson, Executive Director	WA Farmers Federation (Inc.)
17/12/1998	Peter V Jones, Chairman	Water Corporation
17/12/1998	Frank D O'Connor, General Manager	Capricorn Society Limited
17/12/1998	Nicola Claire Cusworth, Chief Economist	Chamber of Commerce and Industry
17/12/1998	William Stephen Sashegyi, Manager, Industry & Policy Services	Chamber of Commerce and Industry
17/12/1998	Anne Nolan, Assistant Under Treasurer	Treasury
17/12/1998	David Anthony Morrison, Economist	Treasury
17/12/1998	Garry Wayne James, Acting Commissioner	Westrail
17/12/1998	John William Leaf, Financial Controller	Westrail
18/12/1998	Imre Mencshelyi, Chief Executive Officer	Co-operative Bulk Handling

Date	Name	Organisation
18/12/1998	Robert Douglas Grant, Manager, Corporate Affairs	Co-operative Bulk Handling
18/12/1998	Kevin Swan, CEO	Grain Pool of WA
18/12/1998	Robert Ian Sewell, Chairman	Grain Pool of WA
18/12/1998	Lyn McKay, Manager, Corporate Affairs	Grain Pool of WA
18/12/1998	John Joseph Woolfe, Manager Group Strategy Integration	Australian Wheat Board Ltd.
18/12/1998	Gregory Lloyd Harvey, Regional Manager	Australian Wheat Board Ltd.
18/12/1998	Lindsay David H Williams, General Counsel	AlintaGas
18/12/1998	Darren Grondal, Co-ordinator Regulation & Legal Officer	AlintaGas
18/12/1998	Ninad Ninkov, General Manager, Corporate Strategy	Western Power Corporation
18/12/1998	Peter Aaron Eddy, Business Analyst	Western Power Corporation
18/12/1998	Dr Les Arthur Farrant, Co-ordinator of Energy WA	Office of Energy
18/12/1998	Derek Peroz, Principal Economist	Office of Water Regulation
18/12/1998	Michael Andrew Harold, Principal Industry Adviser	Office of Water Regulation

APPENDIX SEVEN**Intergovernment Agreements and Legislation*****Intergovernmental Agreements***

Agreement to Implement National Competition Policy and Related Reforms (April 1995)

Competition Principles Agreement (April 1995)

Conduct Code Agreement (April 1995)

Heavy Vehicles Agreement (July 1991)

Light Vehicles Agreement (May 1992)

Natural Gas Pipelines Access Agreement (November 1997)

Legislation

Competition Policy Reform Act 1995 (Commonwealth)

Competition Policy Reform Act 1995 (Western Australia)

Electricity Corporations Act 1994 (Western Australia)

Freedom of Information Act 1992 (Western Australia)

Gas Pipelines Access (Western Australia) Act 1998

Government Railways (Access) Act 1998

National Road Transport Commission Act 1995 (Commonwealth)

Parliamentary Commissioner Act 1971 (Western Australia)

Petroleum Pipelines Act 1969 (Western Australia)

Port Authorities Bill 1998

Rail Freight Systems Bill 1999 (Western Australia)

Trade Practices Act 1974 (Commonwealth)

Water Corporations Act 1995

Water and Rivers Commission Act 1995

Water Services Co-ordination Act 1995

APPENDIX EIGHT**Previously Identified Structures for Uniform Legislation**

The Standing Committee has so far identified and classified eight legislative structures relevant to the issue of uniformity in legislation. A brief description of each is provided below. (A fuller account of these models can be found in Annexure 1 to the Standing Committee's Censorship Bill Report, tabled 28 November 1995).

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's Constitutional powers.

Structure 2: *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division, of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the others passing Acts which do not replicate, but merely adopt that Act, and subsequent amendments, as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51(xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other States and Territories. Mutual Recognition enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* Where one jurisdiction may choose to recognise the decision

making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

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