Briefing Paper

Update on the Hilmer Report

by

Jan Newby

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EXECUTIVE SUMMARY

This update is a chronological account of events arising from the Hilmer Committee's Report 'National Competition Policy' from August 1993, when the Hilmer Report was finished and released, to April 1995 when the Council of Australian Governments (COAG) met and agreed upon the implementation of the reforms recommended by the Hilmer Committee. Earlier developments are discussed in Briefing Note 001/94, National Competition policy: report by the Independent Committee of Inquiry (the Hilmer Report).

In August 1993 the National Competition Policy, a Report by the Independent Committee of Inquiry, commonly known as the Hilmer Report, was released.

The key findings of this report were as follows. The Committee recommended a national competition policy, supported by laws, policy and/or government actions covering the following six main policy elements:

1. Limiting anti-competitive conduct of firms

2. Reforming regulation which unjustifiably restricts competition

3. Reforming the structure of public monopolies to facilitate competition

4. Providing third-party access to certain facilities that are essential for

5. Restraining monopoly pricing behaviour

6. Fostering 'competitive neutrality' between government and private businesses when they compete. [1]

Since the release of this report, the following developments have taken place.

FEBRUARY 1994

In February 1994, the Council of Australian Government (COAG) met and agreed on a national agenda for micro-economic reform which included the Hilmer recommendations. The mains points of this program included:

- any recommendation or legislation arising from the Hilmer report would be applicable to all bodies including Commonwealth and State government agencies and bodies

- The Trade Practices Commission and the Prices Surveillance Authority should be merged to form the basis of the Australian Competition Commission

- State, Territory and Commonwealth Governments will work jointly on new legislation, with the aim of considering it in August, 1994

- State, Territory and Commonwealth Governments will establish by report to the next COAG meeting, the practicalities of applying the recommendations of the Hilmer report

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[1] For a much more detailed exposition on the contents of the Hilmer Report see 'National Competition Policy'. Report by the Independent Committee of Inquiry (The Hilmer Report) by Jan Newby. Briefing Note No. 001/94. NSW Parliamentary Library and 'National Competition Policy. Report by the Independent Committee of Inquiry. 1993.

- The Commonwealth should consider assistance to the States and Territories to compensate for monopoly rents

- The broadened application of the Act will require changes to some existing State and Territory regulatory arrangements and business practices.

AUGUST 1994

At the Darwin meeting of the COAG in August 1994, it was agreed in principle to implement the following reform package:

- the Hilmer recommendations for revision of Part IV of the Trade Practices Act (or 'conduct rules') and their extension to cover State and local government business enterprises and unincorporated business;

- application by individual jurisdictions (that is State governments) of agreed principles of structural reform of public monopolies, competitive neutrality between the public and private sector where they compete and a program of review of regulations restricting competition;

- establishment in each jurisdiction of a system to carry out surveillance of charges by utilities and other corporations with high levels of monopoly power and a scheme to provide access to essential facilities such as electricity grids, gas pipelines, etc. The approach agreed upon is that participating State/Territory regimes are to be taken as effective if they meet agreed principles; and

- the establishment of the Australian Competition Commission and the National Competition Council to exercise recommendatory powers in relation to access and pricing surveillance issues and advisory powers on matters determined by the government.

Also at the Darwin meeting of COAG, the meeting agreed in principle to the package of reform measures and agreed to release this draft package of reform measures for public comment. This package was released in September 1994 and is detailed below.

However, there was strong disagreement between Federal Government and the State Governments over money - specifically the States and Territories arguing that they would lose out over the implementation of the Hilmer report. The Federal Government offered the States $700 million compensation over 5 years; the States claimed $5 billion.

To break this deadlock, it was decided to ask the Industry Commission to prepare a report on the benefits to economic growth and tax revenue from implementing the Hilmer report.

SEPTEMBER 1994

The draft package was released in September 1994 for public comment. More than 60 submissions were received from the public.

This draft package comprised :

1. The National Competition Reform Bill

   This bill will:

   Enact amendments to the Trade Practices Act, Part IV;

   Constitute the Australian Competition Commission to replace the Trade Practices Commission and the Prices Surveillance Authority;

   Constitute the National Competition Council;

   Apply the conduct rules to States and Territories according to an implementation timetable, and ensure that double jeopardy does not arise through parallel operation of Commonwealth and State conduct rules; and

   Establish the essential facilities access regime (new Part IIIA of the TPA)

   (This Bill, the Competition Policy Reform Bill, 1995, was introduced into the Senate on 29th March, 1995 by Senator Crowley[2]. It is discussed in more detail below.)

2. The Conduct Code Agreement, setting out what the States and Territories propose to do.

3. The Competition Principles Agreement

   This agreement would involve the Commonwealth enacting the Competition Policy Reform Act, which inserts a new part - (essential facilities principles - Part IIIA) into the Trade Practices Act and through industry specific Commonwealth legislation such as the Telecommunications Act. Because the Commonwealth Constitution does not allow the Commonwealth to legislate for non-incorporated entities, States and Territories may enact State/Territory wide access regimes incorporating access principles specified in the Competition Principles Agreement (that is, enact mirror legislation), allow the Commonwealth regime to apply (that is adopt the referral of powers option) or introduce State industry specific legislative applications.

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[2] For further information, see Parliament of the Commonwealth of Australia, Parliamentary Research Service: Bills Digest No. 76.1995 *'Competition Policy Reform Bill 1995'*.

The aim of using some or all of these strategies is to increase the coverage of competition policy by blocking legal loopholes.

The (draft) Competition Principles Agreement covers five areas:[3]

i. With respect to State government business enterprises, States agree to consider establishing independent mechanisms for price oversight, where these do not exist. A State is not required to institute a prices oversight mechanism. But if it does not do so, another jurisdiction, which considers itself to be adversely affected, may bring the matter to the attention of the Australian Competition Council

ii. The Competitive neutrality principle

iii. Agreement that before public monopolies are privatised, that a review of how to regulate each sector should take place and that industry regulatory functions should be separated from newly competitive monopolies

iv. That existing legislation restricting competition be reviewed over the next 5 years

v. That States agree to a comprehensive list of principles that a State or Territory access regime must incorporate if it is to exclude the Commonwealth regime.

COAG was meant to finalise the legislative package at the April 1995 COAG meeting, so that the new arrangements could take effect from 1 July 1995.

6 FEBRUARY 1995

The draft Industry Commission Report 'The Growth and Revenue Implications of Hilmer and Related Reforms' was leaked. This report argued that State governments stood to gain $2 billion from Hilmer reforms because revenue benefits remain largely within State boundaries and are caught by various State indirect taxes. It was estimated by the draft report, that the Federal government is likely to lose money, particularly from greater competition to Telecom. These losses are estimated to be between $200m, assuming full tax indexation, and $500m per year under the worst case scenario.

The release of this report, commissioned by COAG, caused the States some embarrassment, as they had rejected the Federal Government's $700 million compensation offer at COAG in August 1994, expecting that the Industry Commission Report would support their claim for a more generous payout. Several

[3] This section is derived from 'National Competition Policy - The Story So Far' Peter Lenard. Sydney 1994. Paper presented to the IIR Implications of the New Competition Policy Conference, Held 23 and 24th February, 1995 at Sydney.

objections were raised by the States about the methodology of the Industry Commission report e.g. The NSW Treasury was critical of the Industry Commission Report assumption that State Governments would abandon all rail subsidies[4].

At the same time, concern about Hilmer reforms was raised in Federal Caucus by six Labor backbenchers. Their concerns were that Liberal State governments would use Hilmer to push through privatisation agendas, to the detriment of consumer interests.

13 FEBRUARY 1995

Federal Cabinet finalised Hilmer legislation and decided that reforms would start on 1 July, 1995 as planned, even if April's COAG meeting failed to resolve the issue. The Federal Government cut back its compensation offer in light of its own budget problems and the results of the Industry Commission Report.

As a result of consumer group lobbying the following changes were agreed to:

- The merger of the Trades Practices Commission and The Prices Surveillance Authority will go ahead under a new name Australian Competition and Consumer Association.

- At least one of its fulltime commissioners will specialise in consumer matters.

- An 'objects clause' would also be inserted into the new legislation outlining its purpose as 'to enhance the welfare of Australians by promoting competition and protecting consumer interests'.

- A new clause would be inserted into the Trade Practices Act spelling out consumer protection and fair trading objectives of the competition reforms

- A new interpretations provision would be included in the inter-government principles agreement (the Competition Principles agreement guiding the implementation of Hilmer reforms in the next five years). This new provision would state that governments should take into account such issues as environmental sustainability, consumer protection, community service obligations, international competitiveness and economic efficiency when implementing reform.

It was proposed that any State that did not agree to the reforms would not be entitled to vote in the deliberations of the Australian Competition Council.

At this stage, the main issue in contention was compensation for the States.

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[4] As reported in the Australian Financial Review, 8th February, 1995.

25 FEBRUARY 1995

The State Premiers met in Adelaide and dropped their demand that they receive Federal compensation for up to $5 billion before implementing the Hilmer reforms.

The main points stated in a Joint Communique from the Leader's Forum were:

- The States strongly supported a co-operative national approach to competition policy
- The States want equal voting rights with the Commonwealth on future amendments to competition legislation
- The States expected a fair share of the economic benefits of reforms.

27 FEBRUARY 1995

A complex legal issue has been raised in light of the recent High Court's striking down of the enforcement powers of the Human Rights and Equal Opportunity Commission on the ground that they infringed judicial powers. This decision has thrown the constitutional validity of a key part of the Hilmer report into doubt. This issue is relevant to the powers of the Trade Practices Tribunal as the body to which appeals would be made from decisions of the new national competition body - The National Competition and Consumer Commission.

2 MARCH 1995

Federal and State officials met in Melbourne to discuss the States' communique of 24/2/95. Federal government is willing to consider the States' request for a direct vote in future amendments to the proposed national competition laws (which itself involves amendments to extend the Trade Practices Act), even though this could involve giving the States a formal role in trade practice law - currently a Federal responsibility under the Constitution. The Federal Government is not prepared to accept a system where one State has one vote but prefers a system (similar to the existing national Corporations law) in which the Federal government's proposals can be vetoed if the states vote in a bloc.

The question of voting rights was one of the last points of contention in Federal/State negotiations. The States have proposed one vote each and the Commonwealth wanted four votes and a casting vote.

The other issue was financial. The States were now arguing not for compensation for the effects of the competition reforms but for a share of the future benefits.

10 MARCH 1995

The final report of the Industry Commission was released. This report took into account State criticisms of the draft report. The States argued that this report

confirmed that more than 80% of the increase in GDP would come from initiatives from the States, yet $6 billion or nearly 70% of the increase in total government revenue would go directly to the Commonwealth.

The States used this report to argue that they should have an equitable share of the revenue flow from the Hilmer report reforms.

17 MARCH 1995

In a landmark decision, the High Court struck down part of the Federal Government's industrial relations reforms. This raises serious doubts about the Federal Government's ability to unilaterally implement the Hilmer reforms, using 'back door extensions' of the Commonwealth's Corporations powers in Section 51(xx) of the Constitution.

The High Court decision[5] in the case Dingjan v Wagner, stripped the Commonwealth's Industrial Relations Court of the power to intervene in contracts between independent contractors - an area which was normally covered by the States rather than the Commonwealth. The Federal Government sought to bring them within its jurisdiction by attempting to extend the corporations power so that they would be covered if their contracts related to the business of a corporation. In the above case, this led to Federal intervention in a contract between an unincorporated subcontractor and an unincorporated contractor. The High Court ruled that the law had only a tenuous link with the corporations power and therefore was invalid.

The implications for the implementation of the Hilmer reforms meant that it will be very difficult for the Commonwealth to unilaterally implement the reforms through the backdoor extension of the Commonwealth corporation power. The better approach was to implement reform through consensus with the States and by the States enacting mirror legislation.

28 MARCH 1995

Federal Caucus debated the Hilmer reform package. A group of six Left M.P's attempted to have the legislation deferred. This was defeated by a vote of 47 to 33.

A range of concerns were raised and amendments sought.

Amendments sought included:

- ACTU demanded that the draft principles be amended to include guarantees that opening public sector monopolies to competition would not reduce employment opportunities, pay and conditions for workers.

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[5] As reported in the Financial Review, 17/3/95.

- Quarantine education, health, welfare and community services and labour market programs from the reform process

- Ensure the onus is on those who want to deregulate to prove the need for review

- Prohibit private business using new rules giving guaranteed access to essential national infrastructure to 'cherry pick' profitable sections of public sector operation

- Ban State vetos over appointments to the new national competition Commission and Council

Concerns were raised: that occupational health and safety provisions should be protected in the new competitive regime, with the onus on deregulators to justify changes; and concerning the considerable scope for abuse of the reform process.

29 MARCH 1995

The Competition Reform Bill, 1995 was introduced into the Senate by Senator Crowley. It has been read a second time.

In the Second Reading Speech, Senator Crowley said[6] 'the main elements of the bill take the form of amendments to the Trade Practices Act and the Prices Surveillance Act. The Trade Practices Act will be amended so that, with State and Territory application legislation, the prohibitions against anti-competitive conduct can be applied to all businesses in Australia. A new legal regime will be created which facilitates businesses obtaining access to the services of certain essential infrastructure facilities. The Trade Practices Commission and the Prices Surveillance Authority will be merged to form the Australian Competition and Consumer Commission and a new advisory body, the National Competition Council, will be established. Price surveillance processes will be streamlined and their jurisdiction extended to State and Territory government businesses.

The bill is complemented by two draft inter-governmental agreements. The first of these agreements, the Conduct Code Agreement, sets out processes for amendments to the competition laws of the Commonwealth, the States and the Territories and for appointments to the Commission.

The Competition Principles Agreement sets out arrangements for appointments to, and deciding the work program of, the National Competition Council. It also sets out the principles governments will be agreeing to follow in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulations, access to services provided by means of essential facilities and elimination of net competitive advantages enjoyed by government businesses where they compete with the private sector.'

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[6] Current Senate Hansard (Proof) Page 2433.

A detailed analysis of the Bill and the issues raised by it are set out in the Commonwealth Parliamentary Library's Bills Digest 76/1995, *Competition Policy Reform Bill 1995*.

11 APRIL 1995

COAG met in Canberra and agreement was reached on adopting competition policy. In return for the States implementing the competition regime and utility reforms, the Federal government offered a payment, to be made in three instalments on a per capita and inflation indexed basis over the next 10 years, of $4.2 billion.

The first instalment is to be paid by 1996-98 and rises from $200 million in each of the first two years, to $400 the next two, and $600 million a year from then on. NSW's share is to be $1.4 billion.

In return for this payment of proceeds from the Hilmer reforms, the States have agreed to, among others, the following initiatives:

- Begin work on enacting template legislation, mirroring the Commonwealth Competition Policy Reform Bill which was introduced into the Senate on 29 March, 1995

- Sign agreements to extend trade practices legislation to:

  - State and local government business organisations and statutory rural marketing authorities (excluding the labour market, postal services, ports and shipping)

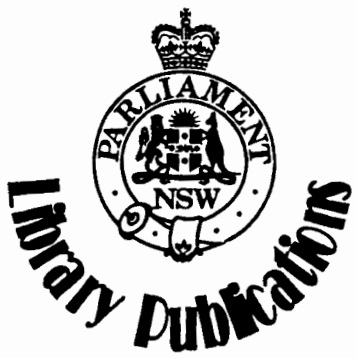
  - Unincorporated businesses (including the professional practices of lawyers, doctors, dentists, optometrists and pharmacists)

  - Set up arrangements giving private firms access to 'essential facilities' or monopoly infrastructure owned by the public sector

  - Review all State legislation that may unjustifiably impede competition.

The States have a deadline of June 1996 to provide a detailed timetable for their own competition reforms and a deadline of the year 2000 to review and dismantle all legislation that restricts competition.

List of NSW Parliamentary



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(D) STATISTICS

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