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National Competition Policy Report by the Independent Committee of Inquiry (Hilmer Report)

by

Jan Newby

Briefing Paper No 001/94

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Contents

1.0 Introduction

This *Briefing Note* summarises the Report, with particular emphasis on the legal and transitional issues which will have the most impact on the States and thus will be of particular interest to NSW. Part One of this Summary comprises an overview which discusses why the Committee of Inquiry was convened, the composition of the Committee, the perceived need for a competition policy, a brief definition of competition policy, the Committee's approach and its process. Part Two of this Summary outlines the Committee's key findings and recommendations, while Part Three gives an overview of the structure of the Report. Part Four contains a summary of the main findings of the Committee's Report, and Part Five outlines the additional policy elements considered by the Report. Part Six of this Summary outlines the institutional arrangements recommended by the Hilmer Report for implementing competition policy in Australia, and Part Seven gives a summary of the main changes recommended by the Hilmer Report. This summary concludes with a selection of responses by various interest groups to the Hilmer Report.

1.1 Overview

The aim of this committee, established in October 1992 was to undertake an independent inquiry into a national competition policy, following the agreement by Australian Governments on the need for such a policy.

The Prime Minister, the Hon P Keating foreshadowed the establishment of this Committee of Inquiry in his 'One Nation' Statement [1]. In his press release[2] of 4 October, 1992 the Prime Minister stated 'I have today established a major independent inquiry into competition policy in Australia with specific emphasis on areas currently outside the Commonwealth Trade Practices Act. This inquiry is an important step in continuing the vital task of micro economic reform in Australia. It will examine a number of significant areas of economic activity not now subject to competition policy, such as many government instrumentalities and the professions'.

The terms of reference for a national competition policy review are attached to this summary as Appendix 1.

The Committee appointed consisted of Professor Fred Hilmer, Dean of the Australian Graduate School of Management (Chairperson), Mr Mark Rayner, CRA Ltd and Mr Geoff Taperell from the law firm, Baker and McKenzie.

It was widely recognised that Australia is now a single integrated market increasingly exposed to domestic and international competition. A national competition policy aims to promote and maintain competitive forces to increase efficiency and community welfare while recognising other social goals.

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[1] 'One Nation', Statement by the Prime Minister, The Hon. P. J. Keating. 26 February, 1992. P. 15.

[2] Statement by the Prime Minister, the Hon. P. J. Keating. National Competition Policy. 110/92

At the time of the establishment of the Committee several concerns were raised and expressed in the press[3] by State Premiers, through their spokesperson, Mr John Bannon, the Premier of South Australia. These concerns centred around the issues of whether 'a single national policy or law can be formulated to deal sensibly with all cases of competition' and the effect upon State budgets in the current straightened economic situation, without 'any suggestion of compensation by the Commonwealth'.

1.2 Why a Competition Policy was Developed

The need to develop a national competition policy stems from three main factors:

1 There is increasing acknowledgment that Australia is for all practical purposes, a single integrated market.

2 While trade policy reforms have markedly increased the competitiveness of the internationally traded sector, many goods and services provided by public utilities, professions and some areas of agriculture are sheltered from international and domestic competition. The Trade Practices Act has limited application to these sectors, with its applicability dependent on ownership or corporate form rather than considerations of community welfare.

3 Domestic pro-competitive reforms implemented to date have all occurred on a sector-by-sector basis, without the benefit of a broader policy framework or process.

According to the Executive Summary of the Report, these considerations resulted in Commonwealth, State and Territory governments agreeing on the need for a national competition policy which would reflect the following principles:

- No participant in the market should be able to engage in anti-competitive conduct against the public interest.

- As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership.

- Conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;

- Any changes in the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:

  (i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition

  (ii) in recognition of the increasingly national operation of markets, to

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[3] 'Inquiry Targets State cartels' Australian Financial Review, 5 October, 1992, page 5.

reduce complexity and administrative duplication.

1.3 What is Competition Policy?

Competition policy is not about the pursuit of competition. It aims to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives.

In its broadest sense, "competition" encompasses all policy dealing with the extent and nature of competition in the (domestic) economy.

1.4 The Committee's Approach

The Committee saw its task as proposing the most effective form, content and implementation approach for a national competition policy that will support an open, integrated domestic market for goods and services.

It approached this task at a broad policy level, looking for common themes and issues rather than developing detailed prescriptions for each individual sector of the economy.

The Committee utilised lessons from co-operative economic reform in areas such as mutual recognition, electricity, rail and gas. However, these precedents were regarded by the Committee as steps towards more effective national reform rather than desirable models in and of themselves.

1.5 The Inquiry Process

In October 1992, the Committee invited written submissions from interested persons and organisations. In February 1993, the Committee published an issues paper and invited comment. 150 submissions were received.

The Committee also met with Premiers, Chief Ministers, Ministers and senior officials of each State and Territory and senior representatives of several Commonwealth Departments and agencies. The Committee also consulted with a number of business, industry, professional and consumer organisations.

The Committee looked at relevant overseas approaches, particularly other countries with Federal systems of government and the European Community. New Zealand approaches were considered particularly relevant because of the similarity of anti-competition laws, the desirability of harmonising practices in accordance with the Australia/New Zealand Closer Economic Relations Trade Agreement (CER) and also because of New Zealand's recent experiences with pro-competitive reforms.

2.0 Key Findings and Recommendations

The Committee has 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 competition

5 Restraining monopoly pricing behaviour

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

3.0 Overview of the Structure of the Report

The Committee's findings and recommendations are in three parts.

3.1 Part One: Competitive Conduct Rules

Part One of the Report deals with competitive conduct rules, including the content of those rules, the extent of their application and aspects of the enforcement regime.

3.2 Part Two: Additional Policy Elements

Part two outlines the specific policy proposals and mechanisms for five additional policy elements which the Committee proposes should form part of a national competition policy, namely:

1 Principles and processes governing the reform of regulatory restrictions on competition

2 The structural reform of public monopolies

3 Competitive neutrality between government and private business

4 A general access regime

5 A more focused prices oversight mechanism

3.3 Part Three: Implementation

Part three outlines issues associated with the implementation of the Committee's policy proposals, including institutional, legal, transitional and resource matters. The committee proposes two new institutions:

1 A National Competition Council, formed jointly by Australian Governments to assist in introducing co-operative reforms

2 An Australian Competition Commission, which would administer the competitive conduct rules and some other aspects of the new policy.

4.0 Summary of the Main Findings of the Committee's Report

4.1 Part One: Competitive Conduct Rules

Most modern market economies have rules to ensure that the competitive process is not undermined by the anti-competitive behaviour of firms, whether acting in concert or individually. In Australia, these rules are contained in Part IV of the Commonwealth *Trade Practices Act 1974.*

The Committee found two misconceptions about the TPA which were addressed in its recommendations:

1 The extent to which particular entities or activities were exempt from the Act

2 The impact of applying the Act to currently excluded sectors.

The Committee found that the most pressing issue is to ensure that unjustified gaps in the application of the Act are filled in a way that promotes a nationally consistent legal framework for business activity.

4.2 Contents of the Competitive Conduct Rules

The rules contained in Part IV of the Trade Practices Act are intended to protect the competitive process by prohibiting:

- Anti-competitive agreements
- The misuse of market power
- Re-sale price maintenance
- Certain mergers and acquisitions

The Committee's main recommended changes to the current rules are:

4.2.1 Strengthening the prohibition on price fixing arrangements, by removing the distinction between goods and services which potentially allows agreements relating to services to be authorised, thus sending an unambiguous signal about the undesirability of collusive price-fixing;

4.2.2 Relaxing the prohibition on third-line forcing by requiring that it substantially lessen competition, thus bringing it into line with the Act's treatment of other forms of exclusive dealing. (Third line forcing is a type of non-price vertical agreement which involves a requirement that a third party's product be bought in conjunction with the seller's product);

4.2.3 Permitting authorisation of resale price maintenance where it can be demonstrated to offer net public benefits;

4.2.4 Repealing the specific prohibition on price discrimination, with any anti-competitive conduct in this area addressed under the prohibition on the misuse of market power;

4.2.5 Removing unjustified distinctions between goods and services in the Act.

4.3 Exemptions from the General Conduct Rules

Gaps in coverage of market conduct rules can allow firms to engage in anti-competitive conduct and thus impair efficiency and equity. On the other hand, there are cases when application of market rules should be suspended or adjusted on public interest ground, when the activity in question outweighs the anti-competitive detriment.

The current situation in Australia involves the interaction of up to seven overlapping exemption mechanisms, many of which are unrelated to any question of public benefit. The Committee identified a need for substantial reform in this area, with few and more rigorous and transparent exemption processes.

Thus, the committee concluded that the general conduct rules should apply to all business activity in Australia, with exemptions for any particular conduct only permitted when a clear public benefit has been demonstrated through an appropriate and transparent process.

The committee considered each of the current exemption processes and recommended as follows:

4.3.1 Authorisation by an independent body

The Committee concluded that the main basis for permitting exemption from the rules should be an authorisation process such as that currently administered by the Trade Practices Commission. The Australian Competition Commission, as the TPA's successor, should be directed to give priority to economic efficiency considerations when determining questions of public benefit.

4.3.2 Specific Exemptions Set out in the TPA

The current exemptions covering:

- Labour Agreements
- Standards
- Restrictive Covenants
- Export contracts

- Consumer boycotts.

should be retained. The current exemption for certain intellectual property should be separately reviewed. The current exemption for overseas shipping is subject to a separate inquiry.

4.3.3 Exemptions by regulations under the TPA

Current provisions cover

- primary commodity marketing bodies
- Commonwealth businesses
- Contracts or conduct engaged in pursuant to international agreements

4.3.4 Exemption by State or Territory Statute or Regulations

Current provision permits State or Territory Statute or Regulations to specifically authorise or approve conduct otherwise in breach of the Act. The Committee reports that there has been some misunderstanding that the removal of this provision would see a large number of anti-competitive regulations being over-ridden, particularly in agricultural marketing and professional regulation, this assumption is not borne out by an examination of the laws in question.

The Committee held that the current exemption mechanism permitting States and Territories to specifically authorise conduct which otherwise contravenes the Act, is inappropriate, as it discourages the development of nationally consistent rules.

4.3.5 Exemption by other Commonwealth Statutes or Regulations

Commonwealth exemptions differ from State and Territories in two respects

1 This provision does not impede national consistency

2 This provision provides greater certainty as to the interaction of Commonwealth statutes.

This provision should be amended to:

- improve the transparency of any specific exemptions

4.3.6 Shield of Crown Doctrine

This doctrine provides that a statute will only be found to bind the Crown by express words or necessary implication. Since 1977 the Trade Practices Act has expressly bound the Crown in right of the Commonwealth insofar as it engages in business.

The Act's silence on the question of whether it is intended to bind the Crown in right of the States and Territories led it to be interpreted as not binding these entities.

This uncertainty should be removed by amending the TPA to ensure that the Act applied to State and Territory businesses to the same extent it applies to Commonwealth businesses.

4.3.7 Constitutional Limitations

A final gap in application of the Act flows from the constitutional limitations on the Commonwealth Parliament. At present a business may escape the operation of the act by virtue of its non-corporate status unless it engages in interstate or overseas trade or commerce. The Report argues that exemptions of this kind cannot be justified in policy terms and thus have no place in a national competition policy.

5.0 Part Two: Additional Policy Elements

The rules contained in the TPA do not address the full range of issues associated with an effective competition policy. Other measures are required including:

- Regulatory restrictions on competition may need to be removed or modified
- The structure of public monopolies may need reforming
- Competitors may need access to certain facilities which cannot be duplicated economically
- Concerns over monopoly pricing need to be addressed
- The inherent advantages some governments businesses have when competing with private businesses

5.1 Policy Measures Addressing These Issues have Important Implications for Government, Namely,

- Issues surrounding the prerogatives of various Governments within the Federal structure.
- The potential impact on profits from government monopolies
- The impact on the delivery of some non-commercial functions by government businesses.

5.2 The Committee Has Recommended

A co-operative approach between governments, rather than national laws. Where national laws are essential, the Committee recommends that the interests of the States and Territories be safeguarded by various measures, the most important of which is the establishment of a *National Competition Council.* This body would be established jointly between the Commonwealth, State and Territory Governments and each would play a key role in each of the additional policy areas.

5.2.1 Regulatory Restrictions on Competition

The greatest impediments to competition in many key sectors of the economy are the restrictions imposed through Government regulation or government ownership. Compliance by a public or private business with government regulation is not prohibited by the TPA nor is imposition of the regulation.

A new mechanism is required to ensure that regulatory restrictions on competition do not exceed what is justified in the public interest. The Committee recommends that all Australian Governments adopt a set of principles aimed at ensuring that statutes or regulations do not restrict competition, unless the restriction is justified

in the public interest. This would involve:

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

- New regulatory proposals being subject to increased scrutiny with a requirement that any significant restrictions on competition lapse within a period of no more than 5 years unless re-enacted after further scrutiny through a public review process.

- Existing regulations imposing a significant restriction on competition being subject to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than 5 years unless re-enacted after scrutiny through a further review process.

- Reviews of regulations include the taking of an economy-wide perspective as far as possible.

5.2.2 Structural Reform of Public Monopolies

For effective competition to emerge, it is vital to create competitive market and industry structures. The TPA does not address the issue of reform of public monopolies and an effective competition policy must include a mechanism which does so.

The committee recommends that all Australian governments adopt a set of principles aimed at restructuring public monopolies. These principles deal with:

- The separation of regulatory and commercial functions of public monopolies

- The separation of natural monopoly and potentially competitive activities, and

- The separation of potentially competitive activities into a number of smaller, independent business units.

The implementation of these principles will be left largely to individual governments, with the National Competition Council playing an advisory role.

Such structural reforms are vital if a substantial monopoly is to be privatised. While a co-operative approach is favoured, the Committee recommends a process to be followed so that privatisation of a monopoly is preceded by restructuring.

5.2.3 Access to "Essential Facilities"

"Essential Facilities" are defined by the Committee as facilities which exhibit natural monopoly characteristics and hence cannot be duplicated economically. For example, effective competition in electricity generation and telecommunication services requires access to transmission grids and local telephone exchange networks. Thus facilities of this kind are referred to as "essential facilities".

Introducing competition in some markets requires that competitors be assured of access to certain facilities that cannot be duplicated economically - that is, essential facilities.

The Committee recommends that a new legal regime be established under which firms could in certain circumstances be given a right of access to specified 'essential facilities'.

The key features of such a regime include the following:

- The regime could only be applied to a facility without the owner's consent if declaration was recommended by the National Competition Council after a public inquiry.

- The access declaration would specify any other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility

- All access agreements would be required to be placed on a public register; if additional safeguards were considered necessary to protect the competitive process they could be specified as part of the declaration process.

The National Competition Council would play a central role in advising on whether access rights should be created and, if so, on what terms and conditions.

5.2.4 Monopoly Pricing

Where the conditions for effective competition are absent - such as where firms have a legislated or a natural monopoly, firms may be able to charge prices above efficient levels for periods beyond a time when a competitive response might reasonably be expected. Such 'monopoly pricing', the committee considers, is detrimental to consumers and to the community as a whole. The TPA does not address this issue, and the Prices Surveillance Act has a limited reach.

The Committee considers that the main aim of competition policy in these markets should be to increase competitive pressures by such strategies as removing regulatory restrictions, restructuring public monopolies and by providing third party access rights. Where such strategies are not practical some form of price-based response may be appropriate.

The Committee recommends that a national competition policy should include a carefully targeted prices monitoring and surveillance process to apply in such cases. The system would operate by declaration of a designated Commonwealth Minister and include the following features:

- A firm could only be subject to the prices oversight mechanism without its consent if the National Competition Council has recommended declaration after a public inquiry into the competitive conditions in the market and it was found to have substantial market power in a substantial market in Australia.

- Powers would be limited to prices oversight or monitoring - there would be no price control power

- Declarations would lapse automatically after a period of no more than three years unless renewed following a further public inquiry

Pricing issues affecting State and Territory government businesses would be dealt with according to the following principles:

- Governments should generally adopt pricing reform of their businesses through co-operative processes aimed at improving transparency and fostering appropriate and consistent approaches. Governments might consider the establishment of expert pricing bodies like the NSW Government Pricing Tribunal;

- Governments could agree, on a case-by-case basis to subject their businesses with substantial market power to the national prices oversight mechanism.

- Application of the national prices mechanism to State and Territory government businesses should generally be by consent; however this may be waived if a government has failed to achieve reform in an area with a significant impact on interstate or international trade.

5.2.5 Competitive Neutrality

In some cases, firms competing in the same market face different regulatory or other requirements, which potentially distort competition and undermine market efficiency. In particular, government business can often be seen to enjoy a unique set of competitive advantages by virtue of their ownership, including exemption from tax. Policies dealing with these kinds of distortions can be described as elements of "competitive neutrality".

As the drive to make Australia more competitive increases in momentum, a new set of issues have arisen for competition policy - particularly where government businesses continue to enjoy net advantages with respect to private competitors. As this competition will increase in the future, there needs to be set in place a mechanism to deal with 'competitive neutrality' issues.

The Committee recommends that Commonwealth, State and Territory Governments adopt a set of principles to ensure that government-owned businesses comply with certain competitive neutrality requirements when competing with private firms. The principles distinguish between governments competing in *traditional markets*, where a period of transition should be permitted and competition in *new markets* where no period of transition should be permitted.

The National Competition Council would be responsible for assisting governments develop principles and processes in this area.

6.0 Part Three: Institutional Arrangements

In recommending appropriate structures to implement a national competition policy, the Committee took into account two main issues:

- The role of industry-specific v.s. more general regulators in the competition policy area.

  The Committee decided upon an economy-wide body so as to maximise expertise.

- The respective roles of the Commonwealth, State and Territory Governments.

- While co-operative models were preferred, the Committee recognised a need to provide streamlined decision making where national interests were involved

- Some elements of the proposed policies impinge upon the prerogatives of State governments

- It appears likely that the Commonwealth could unilaterally implement most of the Committee's recommendations.

Given these considerations, the Committee distinguished between:

- The administrative and policy roles, and

- The general conduct rules (which already apply to most of the economy and have little effect on the prerogatives of the States and Territories) and the additional policy elements where the potential impact is much greater.

6.1 The Following Structures to Administer the Proposed Polices Were Recommended by the Committee

6.1.1 National Competition Council

The Committee recommends that the Commonwealth, State and Territory governments jointly establish a National Competition Council, consisting of a full-time Chairperson and up to four members, with a secretariat of 20 persons, and backup from Commonwealth, State or private bodies and industry specific consultants to:

- Provide a high level and independent analytical and advisory body

- Governments could give references to the body on issues such as regulation review, structure reform of public monopolies, access regimes, monopoly pricing and competitive neutrality.

- While a Commonwealth Minister could act unilaterally in some circumstances, a recommendation of the Council would be a necessary precondition.

- Report on transitional issues associated with its recommendations.

6.1.2 Australian Competition Commission

The Australian Competition Commission will be formed from the existing Trade Practices Commission and Prices Surveillance Authority and its proposed role is to:

- Administer relevant aspects of the proposed competition policy

  eg, enforcement of the general conduct rules administration of the authorisation process under those rules oversight of declarations under the access regime and administration of any pro-competitive safeguards administration of the prices oversight mechanism

- Work in concert with the National Competition Council on regulation review

- Report to governments on alleged instances of non-compliance with agreed competitive neutrality principles

- Report on legislated exemptions from the Act

- Promote public education on competition

6.1.3 Australian Competition Tribunal

The Trades Practices Tribunal, which might be renamed the Australian Competition Tribunal, would continue to provide appellate jurisdiction for authorisations under the competitive conduct rules.

6.2 Legal Issues

Implementing an effective and consistent National Competition Policy gives rise to a number of constitutional and legal issues which vary between the generally applicable conduct rules and the additional policy elements proposed by the Committee.

While the Commonwealth could implement most of the Committee's recommendations through greater use of its constitutional power, a co-operative approach is recommended in the interests of comity, simplicity of legal drafting and certainty.

The Committee raised and discussed a range of options:

6.2.1 Competitive Conduct Rules

The Committee has proposed that a number of current exemptions from the

generally applicable conduct rules be removed or modified

Shield of the Crown doctrine:

The Shield of the Crown doctrine is a presumption that legislation is not intended to bind the Crown. The first step, then, is to determine whether or not this presumption has been rebutted, such as by a clear expression of legislative intent. The relevant statute in this context is the Trade Practices Act 1974. This Act has been interpreted as not being intended to bind the Crown in right of the States or Territories mainly because the Act states that is intended to bind the Crown in right of the Commonwealth in so far as it engages in business but does not refer to the Crown in right of the States and Territories.

There are no constitutional or other constraints on the Commonwealth removing this exception by simply amending s.2A of the TPA to state clearly that it is intended to bind the Crown in right of the Commonwealth.

The committee considers that an amendment of the Commonwealth statute, after full consultation with the States, is the simplest and most efficacious way to implement its proposal, rather than the introduction of State and Territory legislation which extends the operation of the competitive conduct rules to State and Territory businesses.

6.2.2 Currently Exempt Unincorporated Business

At present, some unincorporated businesses escape liability from the TPA. In the case of government businesses at the State and Territory level that are not trading or financial corporations for constitutional purposes, this exemption requires attention even if the Shield of the Crown immunity is removed.

Possible Options:

There are a number of possible options for extending the rules to cover currently exempt non-incorporated businesses:

- The Commonwealth could act unilaterally, relying on an expanded use of its existing constitutional powers

- The Commonwealth could legislate unilaterally but with a reference of powers from the States (referral of powers)

- The States could enact legislation which applies Commonwealth legislation in their jurisdictions (application acts)

- The States could enact their own legislation, embodying the competitive conduct rules (mirror legislation)

Of the options outlined above, legislation, referral of powers is the preferred option of the Committee.

6.3 Timetables for Implementation and Transitional Arrangements

Immediate implementation is recommended with respect to:

- Establishment of the new institutional arrangements;
- Agreement on principles governing regulatory restrictions;
- Structural reform of public monopolies and competitive neutrality.

Enactment of amendments to Commonwealth legislation relating to:

- Content of conduct rules, other than price fixing modification of provision for regulatory exemptions under the Act;
- Imposition of more rigorous requirements for any new matters to be specifically authorised or approved under other Commonwealth laws; and
- A prices oversight mechanism

Implementation of the new recommendations should be staged with respect to:

- Extension of general conduct rules to areas excluded through constitutional limitations or the shield of the crown doctrine (2 years)
- Extension of general conduct rules to areas specifically authorised or approved by Commonwealth regulations or State and Territory laws and regulations (3 years)
- Removal of administrative authorisation for price fixing (within 4 years)

Implementation should be determined on a case by case basis with respect to

- Reviews of particular regulatory restrictions on competition
- Examination of particular structural reform proposals
- Application of access regime to particular facilities
- Application of national prices oversight mechanism to newly declared firms.

7.0 Summary of the Main Changes Recommended by the Hilmer Report

1 This report extends competition law to government-owned businesses, rural marketing authorities and the professions. These three sectors account for about 15% of Gross Domestic Product.

2 This report ends sovereign immunity experienced by State enterprises and State marketing bodies

3 This report recommends new institutional arrangement between the various competition regulation agencies and an improved process for reviewing the impact of regulation on businesses' competitiveness.

4 The report recommends extending the TPA to cover all government business enterprises, the professions and statutory marketing activities.

5 The report also recommends a set of measures beyond the TPA:

- A comprehensive review of all government rules and policies that protect enterprises from competition
- Separation of government agencies which are potentially competitive from those which are natural monopolies.
- Regulation of natural monopolies so that users of their essential facilities would gain fair access to them
- Regulation of prices charged by natural monopolies
- Measures aimed at discouraging governments from giving their businesses special competitive advantages in the future.

8.0 Responses to the Report

8.1 Responses from the States

NSW

A spokesperson for the Premier of NSW, Mr John Fahey, was quoted in the Australian of 26 August, 1993, as saying that the Hilmer Report's reference to government trading enterprises was essentially in line with that favoured by NSW. The principles say that before competition is introduced into public monopoly markets, the regulatory functions should be removed from the incumbent GTE. There should be a rigorous, open and independent study of the cost benefits with the presumption that potentially competitive elements will be separated. The NSW Government believed that all business enterprises that operated in competitive markets should be subject to nationally uniform rules of conduct. The NSW Government has been a leading force for introducing more competition into the economy and this should be done at a national level.

Victoria

The Victorian Treasurer, Mr Stockdale, was quoted in the Australian on 26 August, 1993 as welcoming the report, saying it was crucial because the State Coalition was striving to introduce effective competition into a range of business enterprises. Development of national competition and regulatory policy was critically important to the State and national economy. The Victorian Government is supportive of the broad thrust of the Hilmer Report and recognises that increased competition and a sensible pro-investment regulatory environment is vital for the future of the Australian economy. Victoria will be seeking to ensure that there is proper consideration of policy proposals and their consequences and that Victoria's interest will be preserved in any co-operative national framework.

Queensland

The Treasurer of Queensland, Mr De Lacy, said that while the State was giving guarded support, it would seek legal and other advice on four areas raised in the report.

- The role of the National Competition Council, including legal issues and the status and role of the states.
- The effectiveness of the proposed Federal-State consultative process
- The impact of the fixed time frame for implementing trade practices laws
- The safeguards against unilateral Federal action.

To summarise the State's views, the main point of contention with the recommendations of the report for the States is how the provisions of the Trade

Practices Act will be extended to (State) government businesses such as State gas, electricity and water, the transport sector and other State trading enterprises. These businesses provide a significant contribution to State revenues and with greater competition, governments cannot rely on profits to generate income.

8.2 Responses from the Professions and Industry Groups

The Medical Profession

In the Sydney Morning Herald of 26 August, 1993, The Federal President of the Australian Medical Association (AMA), Dr Brendon Nelson, said increased competition in the medical profession was dangerous and would lead to overservicing by doctors. He was quoted as saying "the idea assumes medicine is the same as buying a car, but it is something which needs professional regulation to best serve the public interest." Although the AMA opposed price fixing it did not oppose restricting entry because it believed excessive competition threatened the integrity of doctors.

In the Australian of 27 August, 1993, Dr Nelson said "If the Government is interested in looking at monopolies and behaviours, they should look at Medicare and how it impacts on provision of health services".

The Legal Profession

In the Sydney Morning Herald of 26 August, 1993, an Executive of the NSW Law Society, Mr Mark Richardson stated that lawyers were in favour of increased competition and ridding the profession of restrictive practices.

The Electricity Supply Association of Australia

In the Australian of 26 August, 1993, the Executive Director of the Electricity Supply Association of Australia, Mr Keith Orchison said: "The report is a substantial contribution to the debate on electricity supply industry reform - but it raises some major Federal/State issues".

Communications Industry

In the Australian of 26 August, 1993, The Chairman of Austel, Mr Robin Davy, representing the communications industry said that the Hilmer report might have neglected the need for a specific industry regulator by assuming the telephone duopoly will have ended by 1997. He was quoted as saying that the problems of marrying technology and commerce could escalate if regulation was spread across separate watchdogs. "If you have a competition umbrella that divorces technology from other key competition factors, leaving it to separate regulators, you could end up with a situation in which you're fighting with one hand behind your back".

The Australian Chamber of Manufacturers

The principal director of the Australian Chamber of Manufacturers, Mr Graeme Wheeler, was quoted in the Australian Financial Review of 26 August, 1993 as saying he would not welcome a situation which imposed so many restrictions and controls that it stifled entrepreneurial spirit. "It requires very much that all players be constrained by similar rules to ensure that businesses - be they unincorporated, incorporated or government business units - are all subject to the same effective, simple but practical constraints so they're able to compete very much in a market place on an equal level."

Larger incorporated businesses would have the financial and other resources to monitor prices and comply with the new regulations but smaller businesses might find compliance more difficult. "There is a danger that we could upset the balance in business by imposing regulatory constraints that increase the cost of running that business," he said.

The Australian Chamber of Commerce and Industry

The Australian Chamber of Commerce and Industry favours the Hilmer recommendations, and has encouraged its State Chambers to fulfil their obligations in terms of the new policy.

The ACCI's Canberra executive director, Mr John Martin, was quoted in the Australian Financial Review of 26 August, 1993, as saying he believed competition policy should apply to all businesses whether incorporated or unincorporated, but that he shared Mr Wheeler's concerns about compliance issues and wanted to see how the recommendations would be implemented.

Australian Society of Certified Practising Accountants

The Executive Director of the Australian Society of Certified Practising Accountant, Mr Michael McKenna, was quoted in the Australian Financial Review of 26 August, 1993, as saying he did not expect the removal of the exemption to have much impact on smaller businesses because they were "generally pretty competitive".

The impact would come more from the flow-on effect of competition policy on government business units.

But Mr McKenna said it would be difficult to administer the new policy across 700,000 to 800,000 small businesses in Australia, most of which were unincorporated.

8.3 Political Parties

(Federal) Ministry for Primary Industries

A spokesperson for the Minister of Primary Industries, Mr Crean was quoted in the Australian of 26 August, 1993 as stating that he welcomed the report as it was supportive of government reforms already taking place. However, some restrictions should be placed on Statutory Marketing Authorities to "prevent them from engaging in anti-competitive conduct not required by their legislation, such as by misusing their often considerable market power".

The Australian Democrats

The Australian Democrats urged care in the Report's implementation, saying the community service obligations of many government authorities, such as servicing rural Australia could not be ignored.

The Federal Opposition

The Federal Opposition was quoted in the Sydney Morning Herald of 26 August, 1993 as welcoming the Hilmer Report.

Appendix 1

ANNEX A: Terms of Reference
National Competition Policy Review

ANNEX A: Terms of Reference

NATIONAL COMPETITION POLICY REVIEW

1. I, Paul John Keating, Prime Minister of the Commonwealth of Australia, having regard to the agreement between myself and the Premiers of the States of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia and the Chief Ministers of the Australian Capital Territory and the Northern Territory that national competition policy and law should give effect to the following principles:

   (a) no participant in the market should be able to engage in anti-competitive conduct against the public interest;

   (b) as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;

   (c) conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;

   (d) any changes to the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms:

      (i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition; and

      (ii) in recognition of the increasingly national operation of markets, to reduce complexity and eliminate administrative duplication;

   appoint Professor Fred Hilmer to Chair the Committee of Review of the Application of the *Trade Practices Act 1974*, and Mr Geoff Taperell and Mr Mark Rayner as the other two Committee members.

2. The Committee is to inquire into, and advise on appropriate changes to legislation and other measures in relation to:

   (a) whether the scope of the *Trade Practices Act 1974* should be expanded to deal effectively with anti-competitive conduct of persons or enterprises in areas of business currently outside the scope of the Act;

   (b) alternative means for addressing market behaviour and structure currently outside the scope of the *Trade Practices Act 1974*; and

   (c) other matters directly related to the application of the principles above.

3. In conducting the review the Committee should consider, against the background of the nature of markets in Australia and influences upon them:

   (a) whether the authorisation and exemption provisions of the *Trade Practices Act 1974* have sufficient scope, flexibility and transparency;

   (b) the need for, and approaches to, the transition of government regulatory arrangements — including any associated revenue impact on States — to more competitive and nationally consistent structures;

   (c) the best structure for regulation including price regulation, in support of:

      (i) pro-competitive conduct by government business and trading enterprises and in areas currently outside the scope of the *Trade Practices Act 1974*; and

      (ii) the interests of consumers and users of goods and services; and

   (d) the past and present justification for the current exemptions from application of the Trade Practices Act.

4. In performing its functions, the Committee is to:

   (a) take into account:

      (i) the principles stated in paragraphs 1(a) to (d) inclusive;

      (ii) legislation other than the *Trade Practices Act* and other arrangements that affect market behaviour and structure; and

      (iii) the fact that some government business and trading enterprises may operate in industries having aspects, including pricing, of natural monopoly; and

      (iv) current moves to reform government trading enterprises; and

      (v) overseas experience.

   (b) take written submissions; and

   (c) consult interested parties where necessary; and

5. The Committee is to report to me by May 1993.†

† In May 1993 the Prime Minister announced that the Inquiry would be extended until August 1993 to facilitate further consultations with the States and Territories.

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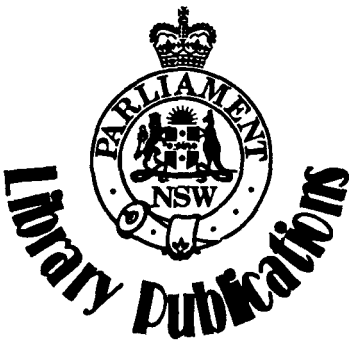

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