

## **PART III: IMPLEMENTATION**



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## 14. Institutional Arrangements

The institutional framework for implementing a national competition policy is critical to its success and, ultimately, to the efficient operation of markets in Australia.

This Chapter outlines proposals for two institutions that would play key roles in implementing the Committee's recommended policies.

A **National Competition Council** would be created jointly by Commonwealth, State and Territory Governments to assist in coordinating cooperative reform and provide independent and expert policy advice on issues arising from the policy proposals contained in Part II of this Report. It would provide guidance on issues associated with transition to more competitive markets, and act as a check on unilateral Commonwealth action in the few cases where that is possible.

An **Australian Competition Commission** would be the key administrative body under the new national policy. It would assume the administrative responsibilities currently performed by the Trade Practices Commission (TPC) and the Prices Surveillance Authority (PSA) and also undertake some new administrative responsibilities in relation to the additional policy elements.

**Section A** reviews the key tasks required to be performed under the Committee's policy proposals, and the proposed institutions to perform those tasks.

**Section B** examines the roles of the Commonwealth, State and Territory Governments in the proposed institutional arrangements.

**Section C** presents the Committee's recommendations.

### A. KEY TASKS & PROPOSED INSTITUTIONS

Achieving the most appropriate institutional framework for a national competition policy is at least as important as the detail of the

policy itself, and the Inquiry received a number of thoughtful submissions on this question.

The PSA put forward a proposal for a “Monopolies Commission” that would provide an administrative approach to issues dealing with public and private firms with substantial market power.<sup>1</sup> The TPC proposed a merger with the PSA and suggested that the combined body be responsible, *inter alia*, for settling access disputes through arbitration.<sup>2</sup> The Industry Commission (IC) proposed that the Trade Practices Tribunal (TPT) be given an enlarged role and that a new agency be established to advise on access issues.<sup>3</sup> The Business Council of Australia (BCA) proposed the establishment of a National Competition Authority and an independent agency reporting to the Council of Australian Governments to advise on structural reform and pricing and access issues.<sup>4</sup> Some submissions suggested enlarging the role of the TPT,<sup>5</sup> and others argued that industry-specific regulators should play a role in relation to some matters or in particular circumstances.<sup>6</sup>

While these proposals assisted in illuminating some of the key considerations involved, the Committee’s recommendations on the most appropriate institutional arrangements were ultimately shaped by the tasks required to be performed under its particular policy proposals. In this regard the Committee distinguished between tasks associated with the generally applicable conduct rules outlined in Part I — where existing institutional arrangements were found to be operating satisfactorily and extending the coverage of the rules would not raise any substantial new tasks — and implementation of the additional policy elements outlined in Part II — which would involve a number of new and challenging tasks, as well as presenting opportunities to streamline current institutional arrangements.

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1 PSA (Sub 97).

2 TPC (Sub 69).

3 IC (Sub 6).

4 BCA (Sub 93).

5 Eg, Prof R Baxt (Sub 18); Mr P Argy (Sub 60).

6 Eg, AUSTEL (Sub 41); DOTAC (Sub 58); DOF (Sub 61); Treasury (Sub 76); Optus Communications (Sub 87); ESAA (Sub 89); SECV (Sub 92); DITARD (Sub 101); Qld Govt (Sub 104); ATUG (Sub 111); Communications Law Centre (Sub 116).

## 1. Competitive Conduct Rules

The Committee has recommended universal application of a set of competitive conduct rules that are a slightly modified version of those contained in Part IV of the *Trade Practices Act 1974* (TPA). The Committee has also proposed streamlining the exemption processes.

Key tasks relating to the rules involve both policy advice and administration. In both cases, the present institutional arrangements appear to be operating satisfactorily, although there is scope for providing for greater participation by State and Territory Governments.

### (a) Policy Advice

Policy questions relating to the content of the rules and legislated exemptions are currently a matter for the Commonwealth Parliament; regulated exemptions and appointments to the TPC are a matter for the Commonwealth Government; and the relevant Commonwealth Minister has some discretions over enforcement actions and the giving of directions to the Commission. Legislative changes are typically the subject of wide community consultation.

As discussed in Section B, the Committee considers that cooperation by the States in ensuring a fuller application of the conduct rules would make it appropriate to provide them with a greater role in these processes. Beyond that, however, the Committee does not see any need to revise current arrangements.

### (b) Administration of the Rules

Administrative functions relating to the rules are currently entrusted to the TPC, an independent body. It is responsible for enforcing the rules and, subject to appeals to the TPT, administering the authorisation process. It also has more general functions in relation to public education on competition matters, has undertaken some reviews of regulatory restrictions on competition, notably in relation to the professions, and administers some other Parts of the Act.

The Committee found broad support for the current institutional arrangements for administering the general conduct rules, in particular for the rules being administered by a single, economy-wide

body.<sup>7</sup> Apart from reduced administrative costs, this approach promotes consistency in application between different industries and regions and overcomes concerns over particular interests "capturing" this regulatory process.

One profession argued that its registration bodies should deal with any alleged contraventions of the rules by its members.<sup>8</sup> However, the Committee agrees with the observation of the Swanson Committee that "no section of the community is entitled to be the judge in its own cause".<sup>9</sup> In this respect, the Committee is satisfied that an authorisation process of the kind currently administered by the TPC provides ample opportunity for interested persons, including representative bodies, to present relevant material. Where conduct is not authorised, alleged non-compliance with the rules is a serious matter and should be subject to adjudication before the courts in the usual way.

There were also suggestions that experts from particular industries might be appointed to the competition authority, possibly as Associate Commissioners, to assist in considering authorisation matters relevant to those industries.<sup>10</sup> The Committee is not persuaded that any particular sector raises issues of the kind that could not be dealt with through existing processes. It is also mindful that special treatment for one sector could create pressure for many sectors to insist on similar treatment, with moves in this direction having the potential to erode the independence and the economy-wide perspective of the Commission. Nevertheless, the Committee does not rule out the appointment of persons with particular industry knowledge where such an appointment is appropriate.

As discussed in Part B, the Committee considers that cooperation by State and Territory Governments in extending the operation of the rules would make it appropriate for them to be consulted on appointments to the Commission. The Committee is firmly of the view, however, that the rules should continue to be administered

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<sup>7</sup> Eg, VLRC (Sub 2); IC (Sub 6); Trade Practices Committee of the LCA (Sub 65); TPC (Sub 69); Treasury (Sub 76); BCA (Sub 93); PSA (Sub 97); Australian Consumers' Assn (Sub 131); BHP (Sub 133).

<sup>8</sup> AMA (Sub 20).

<sup>9</sup> Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) at 88.

<sup>10</sup> NFF (Sub 90).

through a single, national body, rather than through separate agencies in each State or Territory. A fragmented regime of that kind would introduce risks of inconsistent approaches between jurisdictions and arid jurisdictional disputes and be far less "national" than the current regime.

## Conclusions

The Committee considers that the current institutional arrangements relating to the general conduct rules are operating satisfactorily and are appropriate for the competitive conduct rules of a national competition policy. Opportunities to increase the involvement of the States and Territories in some decision-making processes can be accommodated without modifying the existing institutional structure.

The Committee proposes that the TPC be renamed the Australian Competition Competition. As discussed below, it is also proposed that the Commission assume some new responsibilities under the additional policy elements.

## 2. Additional Policy Elements

The Committee has recommended that a national competition policy should include additional elements to deal with the reform of regulatory restrictions on competition; the structural reform of public monopolies; the guarantee of access to certain essential facilities; the oversight of certain pricing behaviour; and questions of competitive neutrality.

These policy elements differ from the competitive conduct rules in significant ways. While prohibitions on market conduct can be defined with some precision, and then administered through administrative bodies or the courts, the additional elements typically involve more difficult policy assessments. The application of relevant measures may also have more significant impacts for particular businesses and industries and will typically raise more important transitional issues. In a number of areas there are also important State and Territory interests involved. The key institutional tasks under these policy elements were shaped accordingly.

**(a) Policy Analysis & Advice**

In broad terms, the Committee's recommendations in relation to the additional policy elements follow one of three models.

First, in relation to matters of regulatory review, structural reform of public monopolies, competitive neutrality and many issues associated with monopoly pricing by government businesses, the Committee has recommended cooperative and decentralised approaches. Governments would agree on core principles and work together in progressing particular reforms, but leave final decisions on matters such as the modification of a restrictive law with the government in question. To facilitate this process the Committee sees substantial benefits in creating an institutional mechanism that would facilitate the policy dialogue through independent analysis and advice and provide a vehicle for coordinating or undertaking certain cooperative projects.

The second main model relates to the two areas where it was considered the Commonwealth should be in a position to act unilaterally if required: the creation of certain access regimes with a clear national dimension and the application of the national prices oversight mechanism. Both measures are more selective in their application and potentially more intrusive than the general conduct rules, and were found to require special safeguards to provide owners of the assets in question with confidence that the exercise of the power in a particular case is justified. The independent advisory function takes on a new significance in these circumstances, for the Committee has recommended that the Commonwealth Minister not be able to act under these powers without the affirmative recommendation of the advisory body.

The third model is a hybrid of the first two, and applies only where a government is proposing to privatise a substantial public monopoly without appropriate restructuring. In this narrow and exceptional circumstance, the Committee saw the need for a mechanism to provide independent analysis and advice that could be triggered, if need be, without the consent of the privatising government. Unlike the access regime, however, there would be no legal provision permitting the Commonwealth to act unilaterally on the recommendation of that body; the next steps would be a matter for



consideration by governments, although the possibility of the Commonwealth passing a specific law is not ruled out.

There is no existing institution currently performing these roles and, in the Committee's view, the tasks are sufficiently important to warrant the establishment of a new institution, the NCC.

The Council would have six key characteristics:

- its functions would be **purely advisory**: action on the Council's recommendations would be a matter for relevant governments; it would not perform any administrative functions.
- it would be **independent of any government**: this is particularly important when, as in the case of the proposed access and prices oversight regime, its recommendations would be an essential prerequisite to unilateral Commonwealth action.
- it would take an **integrated, economy-wide view** of competition policy matters: in the public monopoly area, for example, each of the five policy elements may be relevant to a single set of pro-competitive reforms. Industry-specific expertise could be drawn on when required.
- it would be directed to take a **pragmatic, business-like approach**: focussing on facilitating practical reforms in the nearer term, rather than solely on longer term or more broad brush prescriptions. It would have a specific mandate to consider transitional issues arising from its recommendations.
- it would operate through **open processes**: allowing all affected interests to present their views.
- it would **not duplicate the skills or resources of other agencies**: rather it would draw on them for expert analytical work.

It is envisaged the Council would comprise a full-time chairperson and up to four other members (some of whom may be part-time) who would be selected for their knowledge of, or experience in, industry, commerce, economics, law or administration. Appointing members of high calibre and independence would clearly be the top priority.

The Council would be supported by a Secretariat of around twenty people, and would contract out analytical work to other agencies where appropriate. For example, the Industry Commission (IC) might be engaged to undertake analytical work on some structural reform issues while the Australian Bureau of Agricultural and Resource Economics might be best placed to provide specialist assistance on regulatory reform in the agricultural sector. State and Territory agencies could also be drawn upon when appropriate, as could private organisations or consultants. The Council's work program would be determined by references from governments.

The NCC would be expected to accelerate current pro-competitive reform efforts in a range of key markets. This will be an intensive task over the medium term, but once the major reforms are underway the need for the NCC should be re-assessed. Accordingly, the Committee recommends that a five year sunset period be placed on the NCC, with a review of its functions and operations to be undertaken during this time.

In developing this proposal, the Committee acknowledges the contributions to competition policy development by existing bodies. The Industry Commission has undertaken important work in sectors such as electricity, gas, rail, water, statutory marketing arrangements, ports and postal services; the TPC has undertaken useful work on the professions; and the PSA has also done important work in a number of areas. Cooperation between Governments has also occurred on a sector-specific basis in areas such as rail, gas and electricity, with endeavours in the electricity sector supported by the National Grid Management Council (NGMC). There has also been important work by a range of other agencies at the Commonwealth, State and Territory level.

While this work has been important, the Committee considers that a new institutional body is required to advance competition policy reform at the national level. Importantly, the Committee considers that the need for Australia to pursue reforms on a broad front indicates that an economy-wide advisory body is required. Such a body would facilitate pooling of expertise, and its broad responsibilities would promote national needs rather than those of industry-specific groups. Where appropriate, the body could appoint technical experts from particular industries, and commission work from outside parties.

The Committee also considers that a single body should advise on all aspects of the additional policy elements, thereby gaining the benefits of an integrated approach to these issues, many of which may be present simultaneously. For example, a single industry (such as electricity) may present issues relating to regulatory restrictions on competition, restructuring of public monopolies, access to essential facilities, monopoly pricing and competitive neutrality. There are obvious benefits from a single body coordinating reform efforts across this spectrum of issues. The capacity of the NCC to contract out work to government and private organisations should address concerns over duplication of resources and ensure that existing expertise can be drawn upon.

It is also important to stress that the Committee's recommendations relate to competition policy issues; it has not addressed questions of, say, technical or safety regulation, which could be dealt with in a variety of ways consistent with the Committee's recommendations.

The role of the NCC can be illustrated in relation to each of the five additional policy elements.

- *Reform of Regulatory Restrictions on Competition*

The Committee has recommended that governments adopt a set of principles aimed at improving the scrutiny of regulations that restrict competition, but leaving the decision on whether or not to repeal or modify particular regulations to individual governments. The primary role for the NCC in this area is to provide independent and expert advice on further refinement of these principles, and to undertake or coordinate reviews of regulatory restrictions common to more than one jurisdiction.

- *Structural Reform of Public Monopolies*

The Committee has recommended that governments adopt a set of principles aimed at ensuring public monopolies are appropriately restructured as part of other pro-competitive reforms. While the monopoly in question remains in public hands, the decisions in this area are left to owning governments. The primary role for the NCC in this case is to provide an independent and expert source of advice

on further elaboration of these principles, and to undertake or coordinate inquiries by reference from individual Governments.

If a public monopoly is being transferred to private ownership, the Committee has recommended that a mechanism be established to allow any government to trigger an independent review of any competition issues arising from the structure of the privatised monopoly. The inquiry would be completed before privatisation, or if insufficient notice of the privatisation had been given, within a reasonable period after privatisation. The NCC would be the appropriate body to undertake such reviews. Inquiries of this kind may be of some sensitivity to the privatising and other governments, reinforcing the importance of ensuring that the NCC enjoys the confidence of all Governments as well as the wider community. Decisions on what action should follow from the report of this body would be for relevant governments.

- *Access to Essential Facilities*

The Committee has recommended that a special access regime be established which, in appropriate circumstances, could be applied to assets irrespective of their ownership. Access regimes have the potential to intrude into the prerogatives of owners and must be subject to safeguards to ensure that application in any particular case is clearly justified in the public interest. Ultimately, decisions of this kind should be made by an elected Minister, rather than an independent body. However, as an additional safeguard on the exercise of this power, the Committee has proposed that the Minister not be able to apply the regime to a particular asset without the consent of the owner unless application was recommended by the NCC after a public inquiry.

- *Prices Oversight Mechanism*

The Committee's proposals in the prices oversight area reflect two main concerns. First, the Committee considers that the national prices oversight mechanism needs to be applied sparingly, and only when other pro-competitive reforms are not practicable or sufficient. The ultimate decision to apply the mechanism should rest with a Commonwealth Minister. As with the access regime, however, the Committee considers that the Minister's discretion should be conditioned by express criteria and the requirement for an affirmative

recommendation by the NCC. The emphasis on other pro-competitive reforms would be reinforced by the NCC also being responsible for advising on the other additional elements of the national policy.

The second concern is to preserve, to the extent consistent with the national interest, the autonomy of State and Territory governments on pricing issues relevant to their businesses and to encourage cooperative approaches in this area. The NCC would be well-placed to facilitate cooperative reforms of this nature. In the one limited circumstance when the Committee considers it may be appropriate for the Commonwealth to apply the national prices oversight mechanism to a State or Territory business without the owning government's consent, this again would be conditional on a positive recommendation being made by the NCC.

- *Competitive Neutrality*

The Committee has recommended that governments adopt a set of principles aimed at addressing competitive neutrality concerns when government businesses compete with private businesses. Implementation of the reforms to comply with these principles is left to individual governments. The primary role for the NCC in this area is to provide independent and expert advice on the development and further elaboration of these principles.

The key functions of the council are summarised in Box 14.1.

**Box 14.1: National Competition Council — Key Functions**

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

## (b) Administrative Tasks

The administrative tasks arising under the proposed additional policy elements are relatively modest and often left to arrangements within individual governments. This is particularly so in respect of matters where the proposed policy element involves adoption of principles. There are potentially more significant administrative tasks associated with the access regime and the national prices oversight mechanism, although the content of these policy elements has been designed to avoid substantial regulatory intervention. There are also some supporting roles in relation to other policy elements.

- *Access Regime*

The Committee considered two main issues: whether the proposed access regime should be administered by an economy-wide or industry-specific regulator; and whether this function should be integrated with other competition matters.

### Industry-Specific vs Economy-Wide Administration

At present, access issues relating to the telecommunications network are administered by an industry-specific regulator, the Australian Telecommunications Authority (AUSTEL), although these arrangements are scheduled to be reviewed before 1997. So far, arrangements for the inter-state transmission of electricity have been progressed on an industry-specific basis, although no final decisions have been made concerning administrative arrangements for access issues. There are also a number of other network industries, such as gas, rail and postal services, where similar issues may arise in the near future.

Overseas experience illustrates both ends of the industry-specific/economy-wide spectrum. In the United Kingdom, separate industry-specific regulators have been established for sectors including electricity, gas, water and telecommunications.<sup>11</sup> In New Zealand, the introduction of competition into the telecommunications market has relied on application of the general conduct rules

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<sup>11</sup> For a critical review see Veljanovski C, *The Future Of Industry Regulation in the UK* (1993).

administered by the general competition body.<sup>12</sup> Both models have their strengths and weaknesses.

Proponents of industry-specific arrangements argue that they are necessary to “nurture” competition in newly competitive markets. There may be concerns that technical issues associated with access are beyond the capacity of generalist bodies, and that a general body may be less well-placed to guard fledgling competitors against the substantial market power of incumbents. Submissions favouring industry-specific regulatory arrangements came from some interests associated with the telecommunications<sup>13</sup> and electricity<sup>14</sup> industries. The difficulties experienced under the general arrangements governing telecommunications in New Zealand were often cited in support of this position.<sup>15</sup>

Proponents of more general models argued that industry-specific bodies are more prone to “capture” by the industries they regulate;<sup>16</sup> that they risk inconsistent and potentially inequitable treatment between industries; that they create possible problems of “regulatory overlap”; and that there are unnecessary administrative costs in maintaining numerous industry-specific regulators.<sup>17</sup> There is also concern that industry-specific regulators established as a transitional measure face incentives to prolong their existence beyond that which is justified in the public interest.<sup>18</sup>

A number of submissions distinguished between technical regulation — which might be administered on an industry-specific basis — and

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12 For a critical review see NZ Commerce Commission, *Telecommunications Industry Inquiry Report* (1992).

13 AUSTEL (Sub 41); Optus Communications Pty Ltd (Sub 87); ATUG (Sub 111); Communications Law Centre (Sub 116).

14 ESAA (Sub 89); SECV (Sub 92).

15 Eg, Mr B Akhurst (Sub 94).

16 The “capture theory” of regulation predicts that regulatory agencies gradually adopt a posture of serving and defending the regulated group, rather than the public interest. See Berry WD, “An Alternative to the Capture Theory of Regulation : The Case of State Public Utility Commissions”, *American Journal of Political Science* 28 (1984) 524-558; and Wenders, J “Commentary” in Nowotny K, Smith B & Trebing H M, *Public Utility Regulation*, (1989) at 78-83. This argument was advanced by: Dr R Albon (Sub 8); Dept of Finance (Sub 61); TPC (Sub 69); Treasury (Sub 76); PSA (Sub 97); Qld Govt (Sub 104); Mr H Ergas (Sub 129).

17 TPC (Sub 69) at 16-17.

18 This concern was raised during a number of meetings with the Committee and by the TPC (Sub 69) and Mr H Ergas (Sub 129).



economic or competition regulation — which should or need not.<sup>19</sup> Others suggested that industry-specific approaches may be appropriate as a transitional measure only.<sup>20</sup>

In assessing these arguments, the Committee started from the proposition that competition policy across all Australian industries should desirably be administered by a single body. In particular, the Committee considers that there are sufficient common features between access issues in the key network industries to administer them through a common body. As well as the administrative savings involved, there are undoubted advantages in ensuring regulators take an economy-wide perspective and have sufficient distance from particular industries to form objective views on often difficult issues.

While every industry involves its own set of unique technical or other issues, the Committee is not persuaded that these cannot be taken into account by an economy-wide body. The Committee's proposed access framework provides the flexibility to adapt to the requirements of individual industries. Technical issues that do not have a significant competition element can be addressed in a number of ways consistent with the Committee's recommendations, including industry-specific regulation and industry codes, with or without industry-specific technical regulators. In the Committee's view, no case has been made to establish industry-specific bodies to administer the access and related arrangements of its proposed policy.

While there are undoubtedly important technical issues associated with introducing competition into infrastructure areas traditionally dominated by public monopolies, many of the key technical issues bearing on access arrangements would be considered by the NCC in framing recommendations on the terms and conditions of access. The NCC will rely on a public inquiry and will have access to whatever industry-specific expertise is required. Thereafter, issues associated with enforcement of the access declaration can be resolved through binding arbitration under the auspices of the competition regulator, which can include the appointment of industry experts if required.

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<sup>19</sup> AOTC (Sub 44); DOTAC (Sub 58); Optus Communications (Sub 87); ESAA (Sub 89); PSA (Sub 97); Communications Law Centre (Sub 116).

<sup>20</sup> Eg. AUSTEL (Sub 41); AOTC (Sub 44); DPIE (Sub 50).

As emphasised in Chapter 11, the Committee does not envisage access issues in most infrastructure industries raising the types of concerns that would warrant imposition of additional pro-competitive safeguards such as those currently in place in the telecommunications sector. However, where safeguards are declared as part of an access declaration, the Committee is confident that a general regulator would be able to develop and apply the necessary expertise.

The Committee is less impressed by arguments that industry-specific bodies inevitably lead to "regulatory capture". While this risk is greater with industry-specific bodies, recent empirical work shows that the capture theory is over-simplistic and overlooks, inter alia, the goals and incentives of regulatory personnel and the resources available to the regulator.<sup>21</sup> Recent experience in the UK appears to confirm this more sceptical view.<sup>22</sup> Nevertheless, risks in this area are reduced by reliance on a more general body.

The Committee also considers that the establishment of a range of industry-specific bodies would fragment Australian expertise and experience in this area, and represent lost opportunities to ensure that lessons learned in introducing competition in one industry were applied in other sectors.

#### Integration with Other Competition Matters

The Committee considered there would be considerable advantages in locating administration of the general access regime with the broader competition responsibilities of the Australian Competition Commission. Under the Committee's proposed access model, there will usually be limited need for intensive regulatory intervention, and a separate access agency may not be viable unless or until a relatively large number of access declarations were in force. Integration of these functions should foster a "pro-competition" culture among administrators, may assist in coordinating regulatory activity in

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<sup>21</sup> See for example, Quirk P J, *Industry Influence in Federal Regulatory Agencies* (Princeton 1981); Berry W D, "An Alternative to the Capture Theory of Regulation: The Case of State Public Utility Commissions", *American Journal of Political Science* 28 (1984) 524-558. See also Wilson J Q, *Bureaucracy: What Government Agencies Do and Why They Do It* (1989).

<sup>22</sup> One observer of the industry-specific regulators in the UK has pointed to the adversarial nature of many of the relationships between regulators and their charges, and the influence of the personal styles of heads of the regulatory agencies: see Veljanovski C, *The Future of Industry Regulation in the UK* (1993).

relation to particular industries and may also present administrative savings.

The Committee therefore recommends that the access regime of a national competition policy be administered by the Australian Competition Commission.

- *National Prices Oversight Mechanism*

As with access, the Committee considered two main issues: whether the proposed prices oversight mechanism should be administered by an economy-wide or industry-specific regulator; and whether this function should be integrated with other competition matters.

#### Industry-Specific vs Economy-Wide Administration

The Commonwealth PSA oversees pricing decisions in relation to prescribed private firms and Commonwealth businesses. Pricing of State government businesses is performed by a general price regulator in New South Wales and on a sector-by-sector basis in other States and Territories.

The PSA has an economy-wide, rather than industry-specific, focus, although State- and Territory-owned businesses are specifically excluded. In conjunction with the industry-specific access arrangements, telecommunications prices are overseen by Austel.

Although the Committee envisages a reduced role for pricing oversight across the economy, it considers that where any national measures are applied they are most likely to maintain their broad focus if administered by an economy-wide rather than industry-specific body. This proposition was not challenged in submissions.

#### Integration with Other Competition Matters

The Committee's proposals for a national prices oversight mechanism brings it more closely into line with competition concerns, rather than wider social or political goals. In principle, amalgamating this function with the administration of the general conduct rules of a national competition policy would reinforce this

orientation. Several submissions supported the amalgamation of the two functions into a single competition body.<sup>23</sup>

The PSA and two other submitters expressed concerns over such a merger, noting that information obtained through the prices surveillance function should not be able to be used as a basis for prosecutions under the competitive conduct rules.<sup>24</sup> The Committee is not satisfied that these concerns constitute an insuperable obstacle. It has been observed that the type of information gathered through a prices oversight function is different in kind to that obtained for the purposes of trade practices litigation, and therefore there will usually be little practical overlap, particularly if the prices oversight function is carefully targeted to markets where the conditions for effective competition do not exist.<sup>25</sup> It has also been argued that information which relates to a breach of the general conduct rules should be used to enforce the law, whichever power it is obtained under.<sup>26</sup> If there were a desire to limit the use of information between the two functions, appropriate safeguards could be implemented through legislation governing the combined body's information gathering powers and/or through internal organisational arrangements.

Accordingly, the Committee proposes that the national prices oversight function be administered by the Australian Competition Commission.

- *Regulatory Restrictions on Competition, Competitive Neutrality & Structural Reform of Public Monopolies*

The remaining policy elements do not involve significant new administrative responsibilities, and are considered below.

### Regulatory Restrictions on Competition

Scrutiny of new regulatory proposals would be left to individual governments — existing regulation review bodies in each jurisdiction may be well-placed to fulfil this function. The more systematic and rigorous review of existing regulatory restrictions on competition, including through use of public inquiries, may be conducted in a

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<sup>23</sup> Eg, TPC (Sub 69); BCA (Sub 93); ACTU (Sub 113).

<sup>24</sup> Trade Practices Committee of the LCA (Sub 65); PSA (Sub 97); BHP Ltd (Sub 133).

<sup>25</sup> TPC (Sub 69).

<sup>26</sup> TPC (Sub 69).

number of ways. Individual governments may pursue their own programs or, particularly when a regulatory issue is common to more than one jurisdiction, references may be given to the NCC to undertake or coordinate economy-wide reviews.

At present, a number of Commonwealth agencies also undertake reviews of regulatory restrictions on competition, including the TPC, the PSA and the IC. The Committee favours more rather than less activity of this kind, and thus recommends that the successor to the TPC and the PSA — the ACC — continue to play a role in this area as a complement to its wider responsibilities in the competition policy area. Relevant agencies could agree on a work program to avoid possible duplication, with the NCC well placed to provide coordination.

### **Competitive Neutrality**

The implementation of the proposed principles would be left largely to individual governments, with the NCC supporting policy development in this area. There are no administrative functions as such. Nevertheless, submissions to the Inquiry suggest a need for a more effective mechanism for responding to alleged non-compliance by government businesses' with any existing or new norms. The Committee proposes that this issue be addressed by the ACC being tasked with reporting on allegations of non-compliance with agreed principles to owning governments and the NCC. The envisaged role is one of receiving complaints and initiating preliminary investigations rather than a more pro-active enforcement function.

### **Structural Reform of Public Monopolies**

There are no administrative functions arising from the Committee's recommendations in this area.

### **Conclusions**

The Committee concludes that, in addition to its administrative role in relation to the general conduct rules, the ACC should be tasked with administering relevant aspects of the additional policy elements. Its combined functions are summarised in Box 14.2.

The ACC would be based on the TPC with functions drawn from the PSA.

Appeals on authorisations would be heard by the TPT, which could be re-named the "Australian Competition Tribunal".

**Box 14.2: Australian Competition Commission — Key Functions**

- **Competitive Conduct Rules**
  - Enforce and monitor compliance with the conduct rules;
  - Administer the authorisation process;
  - Monitor and report annually on legislated and regulatory exemptions.
- **Regulation Review**
  - Undertake reviews of regulatory restrictions on competition.
- **Access Regime**
  - Oversee the general administration of the national access regime;
  - Provide arbitration facilities to parties subject to an access declaration;
  - Oversee the implementation of any pro-competitive safeguards.
- **Prices Oversight**
  - Administer the prices oversight function of the national policy.
- **Competitive Neutrality**
  - Report on allegations of non-compliance with agreed principles to owning government and the NCC.
- **Public Education**
  - Provide public education on the conduct rules and the role of competition in the community.
- **Other**
  - Administer other specified Parts of the Act.

## **B. ROLES OF GOVERNMENTS**

This Section examines the roles of the Commonwealth, State and Territory Governments in the proposed institutional arrangements of a national competition policy.

The Committee's proposals support cooperative models where appropriate, particularly where government interests are directly affected. However, this view must be tempered by the need to provide streamlined decision-making processes where important national interests are at stake, and by the importance of ensuring competition regulators operate independently to the extent appropriate.

The Committee was also influenced by the extent to which the various parts of its proposed policy would affect the prerogatives of individual governments. While the general conduct rules would have negligible impact on those prerogatives, the impact of the additional policy elements may in some cases be more significant. The consideration that substantially all of the Committee's proposals could be implemented unilaterally by the Commonwealth was also a factor, although the Committee has looked beyond questions of constitutional law to take account of comity considerations in a federal system.

The roles for the various levels of Government can be considered in relation to the ACC and the NCC.

### **1. Australian Competition Commission**

The Committee proposes that the ACC would administer both the general conduct rules and parts of the additional policy elements. These are considered in turn in relation to the roles of the Commonwealth, State and Territory Governments.

#### **(a) General Conduct Rules**

At present, matters relating to the TPA are within the Commonwealth's exclusive domain. In considering the extent to which the States and Territories might play a formal role in the ACC, the Committee was mindful that the rules already cover most of the economy, and that their application could be extended further — including to most State and Territory businesses — by amendments to the Act that would not raise substantial constitutional questions.

The Committee also took account of the consideration that the extended application of the rules would have negligible effect on the prerogatives of State and Territory Governments. In particular, they would not restrict the capacity of Governments to achieve policy objectives (such as creating legislated monopolies or licensing regimes, or conferring special benefits on particular sectors) by legislating for that result directly. Similarly, application to State and Territory government businesses that are not already subject to the rules would not threaten government budgets or prevent the delivery of CSOs. The primary impact of extending the coverage of the rules

would be to prevent currently excluded businesses from engaging in behaviour of the kind few governments would be likely to condone.

The Committee has already argued that it would not be appropriate for the general conduct rules to be administered by separate institutions in each State and Territory. The question remains of the extent to which the States and Territories might participate more fully in the ACC or other aspects of the Act's administration. These questions relate to the content of the Act; the scope of its application; enforcement proceedings; and other matters.

- *Content*

At present, the Commonwealth Parliament is the sole decision-making body responsible for determining the content of the rules. Amendments to the legislation typically follow a period of wide community consultation, with opportunities for State and Territory Governments to present their views.

The Committee considers that the interests of State and Territory Governments do not require substantial additional protection in this regard. The currently excluded sectors would comprise only a relatively small part of the Act's jurisdiction, and extension of the Act to those sectors would have a negligible impact on the prerogatives of State and Territory Governments. These considerations, and the need to ensure economic legislation can be amended quickly if required, led the Committee to conclude that it was neither necessary nor desirable for all governments to have a veto over proposed amendments to the rules. Nevertheless, the Commonwealth should ensure the State and Territory Governments are consulted and given adequate opportunity to comment on any proposed amendments. Where particular proposed amendments are considered to be of special significance to the States and Territories, Governments might wish to seek the views of the NCC, although this need not be an inflexible requirement.

- *Scope of Application*

The primary source of exemptions from the rules would be authorisation by the ACC. As the currently excluded sectors would comprise a relatively small proportion of the ACC's jurisdiction, the Committee is not persuaded that State and Territory Governments



should have a veto over appointments to the ACC. Nevertheless, the Commonwealth should consult State and Territory Governments on proposed appointments.

Under the current regime, States and Territories can specifically authorise or approve conduct otherwise in breach of the Act, subject to the Commonwealth's capacity to over-ride particular exemptions. The Committee proposes removing this basis for exemption from the Act. As discussed in Chapter Five, the significance of this provision was found to be widely over-estimated, and State and Territory Governments would retain the capacity to achieve similar results without a provision of this kind.

As the Commonwealth Parliament cannot, under the principle of sovereignty of Parliament, bind itself, the Committee decided in the interests of transparency that the Act continue to allow the Commonwealth to specifically authorise or approve conduct under other Commonwealth laws, albeit subject to more rigorous requirements than at present. The Commonwealth would also retain a power to make exemptions by regulation, although these would be intended primarily as an emergency measure and be limited in duration.

The Commonwealth should consult State and Territory Governments on proposed actions under these powers that would have a significant impact on State or Territory Governments or their businesses. The Commonwealth should also respond constructively to proposals from State and Territory governments for exemptions of these kinds, providing those exemptions would not have the effect of fragmenting the operation of the rules according to State and Territory borders and are otherwise consistent with the public interest. It may be appropriate for the views of the NCC on particular proposals to be sought on some occasions, although this should not be an inflexible requirement and could be dealt with through an arrangement between the governments.

- *Enforcement*

The general conduct rules would be enforced by the ACC or, in most cases, private action. Possible involvement of the States and Territories in appointments to the ACC was discussed above.

At present the Commonwealth Minister also has a discretion to initiate enforcement proceedings under the Act.<sup>27</sup> The Committee was not persuaded that it would be appropriate to extend this discretion to State and Territory Ministers, or to make the Commonwealth's exercise of its discretion contingent on approval by the State and Territory Governments. Nevertheless, the Commonwealth Minister might give an undertaking not to exercise his or her discretion to initiate enforcement proceedings against a State or Territory government business. The discretion of the ACC should remain unfettered, however, as it is in relation to Commonwealth businesses.

• *Other Matters*

At present, the Commonwealth Minister may direct the competition authority to give special consideration to certain matters in determining applications for authorisations, or in connection with the exercise of certain of its powers.<sup>28</sup> The Commonwealth should consult the States and Territories before issuing such a direction where the interests of the States or Territories are particularly affected.

(b) Administration of Additional Policy Elements

The ACC's principal administrative responsibilities under the additional policy elements relate to the access regime and the national prices oversight mechanism.

The proposed access regime and prices oversight mechanism could only be applied to assets owned by State and Territory Governments in limited circumstances, requiring either their consent or the recommendation of the NCC, in which all governments will participate. Once a declaration under either regime is made, any ongoing administrative involvement will usually not be substantial and would focus on implementation, rather than policy, issues. The Committee has proposed that the Commonwealth consult the States

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<sup>27</sup> Eg, s.77(1) – pecuniary penalties; s.80(1) – injunctions; s.81(1) – divestiture. This discretion has only been used twice: *Fife v Seaman's Union of Australia Ltd & Ors* (1977) ATPR 40-045, 40-049; and *Attorney-General v Davids Holdings Pty Ltd & Ors* (1993) ATPR 41-226.

<sup>28</sup> See s.29(1). Note that the Minister is specifically precluded from directing the Commission how to exercise its powers in an authorisation proceeding in relation to individual cases.

and Territories on appointments to the ACC, and is not persuaded that any greater involvement in the administration of these arrangements is appropriate.

## **2. National Competition Council**

The Committee's proposals in relation to the additional policy elements may impact on a number of sectors of the economy, some of which are of particular importance and interest to governments. The Committee proposes that the NCC provide advice to governments on these matters. As declaration of a business under the access or prices oversight mechanisms requires the recommendation of this body, the independence and expertise of that body is critical to safeguarding legitimate interests, including those of State and Territory governments.

In recognition of these interests, it is vital that Commonwealth, State and Territory governments participate fully in the establishment and oversight of the independent body, including by agreeing on appointments to the body, accountability arrangements and other matters. While the Committee has not made recommendations on the detail of these matters, the success of the proposal clearly depends on full and effective participation by all Australian Governments.

Before arriving at this proposal, the Committee considered a number of alternative means of balancing comity considerations with the need to ensure that reforms that could be demonstrated to be in the national interest could be advanced expeditiously. This was particularly so with respect to the creation of access rights to declared essential facilities.

The Committee considered that the option of allowing the owner of a facility to veto the creation of an access right when a clear national interest had been demonstrated was unacceptable, whether the owners of that facility were private shareholders or the citizens of a particular jurisdiction. Decision-making through a Ministerial Council arrangement was considered but seen as inappropriate for dealing with situations where the facility in question was located in a single jurisdiction; appropriate voting arrangements in this setting would be problematic, and run the risk of inaction. Use of Ministerial Council arrangements would also create a distinction between public and private assets, which is difficult to justify in light of the

increasingly commercial operation of government businesses. Court- or Tribunal-based approaches were also considered but found to be less appropriate for dealing with complex economic issues of this kind, and the Committee saw advantages in ensuring the body involved in access issues was also able to draw on wider competition policy perspectives.

The Committee's preferred decision-making structure is thus to confer the ultimate decision-making authority on whether or not to create an access right on a Commonwealth Minister, but to condition that power on various criteria, including, significantly, the affirmative recommendation by the NCC.

The Committee has recommended that when assets owned by State or Territory governments are involved, primary reliance should be placed on the consent of the owning Government. Informal inter-governmental processes may be best placed to facilitate agreement on these questions, and are not inconsistent with the Committee's proposals. However, processes of this kind, even formalised as a Ministerial Council, would not overcome the need for a mechanism to guide the exercise of the Commonwealth's power where it is sufficiently demonstrated to be in the national interest.

As well as their participation in establishing the NCC, State and Territory Governments should be consulted on legislation required to implement the access regime and prices oversight mechanism and on subsequent amendments to those regimes of potential significance to the States and Territories.

### **C. RECOMMENDATIONS**

The Committee recommends that:

14.1 A National Competition Council be established to advise Australian Governments on:

- (a) regulatory restrictions on competition;
- (b) the restructuring of public monopolies;
- (c) the declaration of access rights to essential facilities;
- (d) pricing matters;
- (e) competitive neutrality matters;
- (f) issues associated with the transition to competitive markets; and

- (g) other matters as directed.
- 14.2 Commonwealth, States and Territories participate fully in the establishment and oversight of the Council, including by agreeing on appointments, accountability arrangements and other matters.
- 14.3 The Council comprise a Chairperson and up to four other members with knowledge of, or experience in, industry, commerce, economics, law or administration.
- 14.4 The Council be established for a period of five years in the first instance, during which time its role, functions and operation be reviewed by the establishing governments.
- 14.5 An **Australian Competition Commission** be established to:
- (a) enforce and monitor compliance with the general conduct rules;
  - (b) administer the authorisation process under those rules;
  - (c) monitor and report on legislated or regulatory exemptions under those rules;
  - (d) undertake reviews of regulatory restrictions on competition;
  - (e) administer the access regime;
  - (f) administer the national prices oversight process;
  - (g) report allegations of non-compliance with agreed competitive neutrality principles to owning governments and the Council;
  - (h) promote public education on the conduct rules and the role of competition in the community; and
  - (i) administer other specified Parts of the Act.
- 14.6 The Commission comprise a Chairperson and such number of other members as are from time to time appointed with knowledge of, or experience in, industry, commerce, economics, law or administration appointed by the Commonwealth Government in consultation with State and Territory Governments.
- 14.7 The Trade Practices Tribunal, which might be re-named the Australian Competition Tribunal, continue to consider appeals on authorisation decisions made by the Commission.

- 14.8 The Commonwealth consult State and Territory Governments on the proposed legislation giving effect to the new competition policy regime, and on any subsequent amendments of potential significance to them.
- 14.9 In relation to the general conduct rules, the Commonwealth should agree to:
- (a) not initiate enforcement proceedings against State or Territory government businesses;
  - (b) consult with the States and Territories on proposed actions relating to legislated or regulatory exemptions to the Act that would have a significant impact on States or Territory Governments or their businesses;
  - (c) respond constructively to proposals from State and Territory Governments for legislated and regulatory exemptions that would not have the effect of fragmenting the operation of the rules according to State and Territory borders and are otherwise consistent with the public interest; and
  - (d) consult the States and Territories before issuing a direction to the ACC where the interests of the States and Territories are particularly affected.

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## 15. Legal, Transitional & Resource Issues

This Chapter examines the legal, transitional and resource issues which need to be addressed in the implementation of the Committee's proposals.

**Section A** considers the constitutional and legal issues associated with implementing a national competition law and policy in a timely and effective manner. It is proposed that the legal regime of a national competition policy be implemented by combined Commonwealth and State legislation. While the Committee understands that the Commonwealth is likely to be able to implement all, or substantially all, of the Committee's proposals by relying more fully on its existing heads of constitutional power, cooperative approaches to implementation are consistent with the broader thrust of the Committee's proposals and would result in a simpler legislative scheme. The Committee therefore favours a cooperative approach to the legal implementation of a national competition policy and recommends that this be achieved through a referral of powers by the States as required.

**Section B** proposes a set of transitional arrangements for the implementation of the Committee's proposals, and distinguishes between the general conduct rules proposed in Part I and the additional policy elements proposed in Part II.

**Section C** considers the possible resource implications of the Committee's recommendations, concluding that they are relatively modest.

**Section D** presents the Committee's recommendations on these issues.

### A. CONSTITUTIONAL & 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 proposed in Part I and the additional policy elements proposed in Part II.

## 1. Competitive Conduct Rules

Chapters Five and Six proposed that a number of current exemptions from the generally applicable conduct rules be removed or modified. The Committee considers that the most appropriate method for removing the shield of the Crown exception is unilateral legislative action by the Commonwealth. In extending the rules to cover currently exempt unincorporated businesses, the Committee understands that unilateral action by the Commonwealth is possible, but that a cooperative approach offers the prospect of a simpler legislative scheme.

### (a) Shield of the Crown

Removal of the "shield of the Crown" exemption enjoyed by some government businesses can be achieved by express legislative intention on the part of the Commonwealth. Although this approach is not the only one possible, the Committee considers that it offers the best result in terms of national consistency, ease of implementation and legislative simplicity.

The shield of the Crown doctrine is a presumption that legislation is not intended to bind the Crown.<sup>1</sup> 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 competition statute. The *Trade Practices Act 1974* (TPA) has been interpreted as not being intended to bind the Crown in right of the States<sup>2</sup> or Territories,<sup>3</sup> primarily because the Act states that it 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.<sup>4</sup>

Only if the competition statute is found not to bind the Crown is it necessary to consider whether any particular body is entitled to enjoy the Crown's immunity. This may involve a complex investigation of relevant legislation and other matters and has given rise to a great deal

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1 See *Province of Bombay v Municipal Corporation of Bombay* (1947) AC 58.

2 Eg, *Bradken Consolidated Ltd & Anor v Broken Hill Pty Ltd & Ors* (1979) ATPR 40-106.

3 Eg, *Burgundy Royale Investments Pty Ltd v Westpac Banking Corp & Ors* (1988) ATPR 40-835.

4 See s.2A of the TPA.



of uncertainty in recent years.<sup>5</sup> The High Court has also sent a clear signal that it will be less tolerant of the doctrine in contemporary circumstances, stating that:

the historical considerations which give rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country ... where it is common place for governmental, commercial, industrial and developmental instrumentalities and their servants or agents ... to compete and have commercial dealings on the same basis as private enterprise.<sup>6</sup>

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 States and Territories to the same extent as the Crown in right of the Commonwealth.<sup>7</sup>

An alternative to unilateral Commonwealth legislation would be State or Territory legislation which extends the operation of the competitive conduct rules to State and Territory businesses. However, this involves duplication of legislative activity, could involve an unnecessary delay in implementation or inconsistent approaches between the States and Territories, and is not required by constitutional considerations.

The Committee considers that an amendment of the Commonwealth statute is the simplest and most efficacious way to implement its proposal. It would, of course, be appropriate for the Commonwealth to consult fully with the States over appropriate transitional arrangements, which are considered in Section B of this Chapter.

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<sup>5</sup> Submissions expressing concern at the current uncertainty included those of the ESAA (Sub 89) and ACT Govt (Sub 109).

<sup>6</sup> *Bropho v Western Australia* (1990) 64 ALR 374 at 379.

<sup>7</sup> See *Tasmania v Commonwealth* (1983) 158 CLR 1 and Mr M Corrigan (Sub 72). Although the States may enjoy some implied immunities from Commonwealth law, so that the Commonwealth may not "discriminate against or 'single out' the States so as to impose some special burden or disability upon them ... [or] inhibit or impair the continued existence of the States or their capacity to function" (*Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25 at 93 per Mason J), the Committee has been advised that application of generally applicable competition rules to State commercial activity would not offend this principle. The same issue does not arise in relation to the Territories.

(b) Currently Exempt Unincorporated Businesses

At present some unincorporated businesses escape liability from the TPA, although the Committee considers fewer businesses may be exempt than often believed. 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; the States could enact legislation which applies Commonwealth legislation in their jurisdictions; or the States could enact their own legislation embodying the competitive conduct rules.

Unilateral Commonwealth Action

The current competitive conduct rules do not generally apply to unincorporated businesses unless they are located in a Territory, engage in interstate or overseas trade or commerce, or supply the Commonwealth. The Commonwealth has, however, made greater use of its corporations power in s. 45D of the TPA, which applies to any person who causes substantial loss or damage to the business of a corporation, and s. 50, which applies to any person who acquires shares in a corporation or assets of a corporation.

In considering the options for extending the reach of the competitive conduct rules to unincorporated bodies — whether they be partnerships, sole proprietorships, individuals or statutory authorities and the like — it seems that the Commonwealth has not exhausted the constitutional authority provided by existing heads of power.

In particular, the Commonwealth may be able to rely on the corporations power<sup>8</sup> to apply the competitive conduct rules to the conduct of persons in connection with the supply to, or purchase from, trading or financial corporations, and to the conduct of persons

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<sup>8</sup> Section 51(xx) of the Constitution.

competing with such corporations.<sup>9</sup> Extension of the Act to cover all businesses in their dealings or competition with trading or financial corporations would fill a substantial part of the gap in the TPA's coverage. It would cover the arrangements affecting the business-oriented dealings of professions such as lawyers, accountants and engineers, as well as many government businesses, including those in the energy and transportation sectors.

The trade and commerce power<sup>10</sup> also appears capable of supporting unilateral Commonwealth action to extend the operation of competitive conduct rules, possibly to include the supply of goods or services to persons engaged in interstate or overseas trade and commerce, or even to conduct that has economic effects on interstate and overseas trade. The full extent of the Commonwealth's power over interstate and overseas trade and commerce has not yet been fully explored.<sup>11</sup>

If the Commonwealth were to act unilaterally there might be some residual gaps in coverage. State banking and State insurance enjoy a specific immunity from Commonwealth regulation under the Constitution.<sup>12</sup> Some businesses that supply mainly personal services, such as doctors, dentists and hairdressers, might also escape application unless they were incorporated.

Drafting the competitive conduct rules to apply on the basis of several sources of power could result in some added complexity for

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<sup>9</sup> In *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 the High Court upheld the validity of s.45D(1)(b)(i) of the TPA, establishing that the Commonwealth's power over trading and financial corporations is not limited to laws imposing obligations on such corporations, but also supports laws imposing obligations on others *for the protection of those corporations*.

<sup>10</sup> Section 51(i) of the Constitution.

<sup>11</sup> Many of the earlier cases concerning the definition of interstate trade and commerce have concerned s.92 of the Constitution which provides limits on both Commonwealth and State legislative power. Since the decision in *Cole v Whitfield* (1988) 165 CLR 360, s.92 has been interpreted as directed at discriminatory laws of a protectionist nature. Under this interpretation there is less reason for a restrictive interpretation of interstate trade and commerce. This suggests a more expansive operation for the existing provisions of the Act, as well as any future provisions based on the power. See also Zines L, *The High Court & The Constitution* (3 ed, 1991). Other avenues for extension of the conduct rules would be to use the postal, telephonic, telegraphic and broadcasting powers, as has already occurred in relation to the consumer protection provisions of the Act (see s.6(3) TPA). The Commonwealth might also be able to rely on other powers such as those in relation to the Inter-State Commission (see s.101 of the Constitution).

<sup>12</sup> Section 51(xiii) and s.51(xiv) of the Constitution; *Bourke v State Bank of New South Wales* (1990) 170 CLR 276.

businesses, and a degree of uncertainty unless and until any challenges to the legislation were determined. Against this, substantially uniform coverage would be achieved in the areas of greatest impact on Australia's international competitiveness.

### Referral of Powers

One mechanism for ensuring consistent and simple laws of universal application is a referral of powers by the States to the Commonwealth, under s 51(xxxvii) of the Constitution. Under this approach, States might refer the power to enact laws for the protection of competition. The Commonwealth could then draft legislation which applies to all businesses regardless of ownership or legal form. Such an approach would fill any gaps in the application of Commonwealth law and provide an opportunity to substantially simplify the drafting of the current Act, which is already complex because of its reliance on several heads of constitutional power.

States would carefully define the power which is referred to the Commonwealth, and would retain the power to amend or revoke the referral.<sup>13</sup> Reference legislation which is still in force applies in air transport<sup>14</sup> and in relation to the debt conversion agreement.<sup>15</sup> There is also precedent for the referral of powers over trade practices.<sup>16</sup>

### Application Acts

Another mechanism for ensuring consistent national competitive conduct rules is for the States to pass application Acts, applying the Commonwealth legislation as it is amended from time to time. The Commonwealth law would apply in each jurisdiction as a law of that particular jurisdiction. The Commonwealth could pass legislation based on its plenary powers in respect of Territories.

This model would achieve universal coverage and has recently been used in applying the Corporations Law. However, it would result in a

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<sup>13</sup> If there were any doubt about States' abilities to revoke a referral, the initial referral could be qualified by an express reservation of the power to revoke the referral.

<sup>14</sup> *Commonwealth Powers (Air Transport) Act 1950* (Qld); *Commonwealth Powers (Air Transport) Act 1952* (Tas).

<sup>15</sup> *Debt Conversion Agreement Act 1931 (No. 2)* (Vic); *The Commonwealth Legislative Power Act, 1931* (Qld); *Commonwealth Legislative Power Act, 1931* (SA).

<sup>16</sup> See *Commonwealth Powers (Trade Practices) Act 1966* (Tas).

more complex legislative scheme than under a referral of power, involving the mechanics of applying the legislation in different jurisdictions.

### Mirror Legislation

A fourth option for achieving national competitive conduct rules would be for the States to pass legislation which effectively copied the Commonwealth law. This model was used in the cooperative scheme of companies legislation, and is used in relation to consumer protection. It has the significant disadvantage of requiring all Parliaments to act in concert to keep the application of the legislation current and consistent. Experience suggests that delays or failures to make corresponding amendments are an inevitable feature of such a scheme. The Committee considers that the significant potential for differences in legislation would be an unacceptable source of uncertainty for businesses, and that this approach is an unsatisfactory basis for a national legal regime operating in such an important area.

- *Conclusion*

In considering alternative implementation approaches, the Committee places primary emphasis on the need to achieve wide application with minimal delay and uncertainty. Accordingly, it supports a reference of powers as the simplest, cleanest and most effective means of achieving uniform national coverage. If the States could not agree on this approach the Committee would support State application legislation if it could be achieved without unnecessary delay. If the States were not to pass such legislation within a reasonable period (ie not more than two years), the Committee considers that unilateral Commonwealth action without a reference of powers could be justified in the national interest. Mirror State legislation is an unsatisfactory solution.

- (c) **Current Provision For State or Territory Legislation To Specifically Authorise or Approve Particular Conduct**

In Chapter Five the Committee recommended repeal of the provision of the TPA permitting States or Territories to specifically approve or authorise conduct that would otherwise contravene the Act. The current provision does not reflect any constitutional constraint on the

Commonwealth and should be repealed unilaterally, subject to the transitional arrangements discussed in Section B.

## 2. Additional Policy Elements

In addition to the generally applicable competitive conduct rules, the Committee proposes national laws dealing with an access regime and prices oversight mechanism. The other additional policy elements do not involve the application of a national law and do not give rise to legal or constitutional questions of this kind.

### (a) Access Regime

The access regime proposed in Chapter 11 would provide a right of access to certain declared essential facilities. The Commonwealth appears to have the legislative capacity to create such a right of access unilaterally, without any reference of powers from State Governments. It can clearly do so when the facility is owned by a trading or financial corporation or otherwise has a sufficient nexus with interstate or overseas trade. It also seems likely that the Commonwealth could create such a right in any case where, *inter alia*, a denial of access to the facility would prevent a trading or financial corporation from engaging in competitive activity.<sup>17</sup>

As with the competitive conduct rules, there appear to be no special constitutional impediments associated with creating such a right in respect of facilities owned by a State or Territory Government.<sup>18</sup>

The creation of an access right might constitute an "acquisition of property" in terms of s 51(xxxi) of the Constitution, thus requiring the acquisition to be "on just terms". However, this requirement should be met by the proposed requirement that the owner of the facility receive a fair and reasonable access fee.

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<sup>17</sup> See the discussion of the "protective" jurisdiction of the Commonwealth's corporations power, *supra*, note 9.

<sup>18</sup> As noted above, the Commonwealth can over-ride the shield of the Crown doctrine providing the law is otherwise within power, and the Committee has been advised that the implied immunity enjoyed by the States and mentioned in note 7 (above) would not be an impediment to a generally applicable law.

(b) Prices Oversight Mechanism

There seems to be no question that the Commonwealth could validly apply the Committee's proposed prices surveillance and monitoring mechanism to trading and financial corporations, as well as to unincorporated businesses where there is a sufficient nexus with interstate and overseas trade. It also seems likely that the Commonwealth can apply the mechanism to businesses in any case where it operates to protect trading corporations from monopoly pricing behaviour.

As with the other elements discussed above, there appear to be no special constitutional impediments associated with creating such a right in respect of businesses owned by a State or Territory Government.<sup>19</sup>

(c) Conclusion

Based on advice received by this Inquiry, the Commonwealth appears able to implement both of the Committee's proposed new laws unilaterally, without the need for supporting legislative action by the States and Territories. Any residual uncertainties in this area could be addressed through cooperative action, including a reference of powers from the States.

## **B. TRANSITIONAL ISSUES**

The urgent need to improve the competitiveness of the Australian economy provides a strong case for rapid implementation of the competition policy proposed in this Report. Nevertheless, firms have organised their affairs on the basis of the existing regime, and in some cases transitional arrangements will be justified to facilitate adjustment to the new circumstances.

Firms becoming subject for the first time to general conduct rules of the kind proposed in Part I should have a period of transition to the

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<sup>19</sup> As noted above, the Commonwealth can over-ride the shield of the Crown doctrine providing the law is otherwise within power, and the Committee has been advised that the implied immunity enjoyed by the States and mentioned in note 7 (above) would not be an impediment to a generally applicable law, even if it did impact on profits obtained from monopoly businesses, although application of the proposed surveillance and monitoring mechanism would not directly impact on such profits.

new regime. The Committee sees its proposals for price fixing raising special transitional issues, as they will concern firms and commercial practices which have hitherto been largely exempt from competition law and has taken this into account in formulating its transitional proposals.

The Committee's proposals relating to the additional policy elements in Part II are such that individual businesses will not be affected until case-by-case appraisals of public benefit are made. In these areas, the Committee considers transitional arrangements should be determined in the context of individual cases, guided by advice from the National Competition Council (NCC).

### **1. Competitive Conduct Rules**

The Committee was satisfied that, with some modifications, the rules contained in Part IV of the TPA provide an appropriate basis for the competitive conduct rules of a national competition policy. The need for transitional arrangements arises from the new obligations imposed by the extension of the rules to cover currently exempt businesses or modification of existing rules. A transitional period should provide an opportunity for businesses caught by the modification or extension of the rules to modify their behaviour, or to seek authorisation from the Australian Competition Commission. In some very limited cases, businesses might also require time to seek new legislative arrangements to ensure conduct of that kind no longer offends the competitive conduct rules.

#### **Submissions**

A number of submissions noted the importance of a transitional period to provide time for firms to assess and modify their conduct to comply with the new regime, and for the competition authority to examine requests for authorisations.<sup>20</sup>

The Victorian Law Reform Commission (VLRC)<sup>21</sup> examined the impact of applying the existing rules in Victoria, and proposed that

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<sup>20</sup> Eg, Law Reform Commission of Vic (Sub 2); AMA (Sub 20); AERCF (Sub 49); Fremantle Port Authority (Sub 55); TPC (Sub 69); Treasury (Sub 76); SA Govt (Sub 98); Inst of Chartered Accountants/Aust Socy of CPAs (Sub 99); Vic Govt (Sub 122).

<sup>21</sup> Law Reform Commission of Vic, *Competition Law The Introduction of Restrictive Trade Practices Legislation in Victoria* (1992) at 50.



constitutional limits on the application of competitive conduct rules and most exemptions by State legislation be removed immediately. Three years later, all other activities (ie, activities subject to shield of the Crown and remaining State legislative exemptions) would become subject to the rules. After this time, any further exemptions would be by way of authorisation by the competition authority. The VLRC suggested that the competition authority should provide interim authorisations for any current activities, providing exemption until final determination. The VLRC's proposal was supported by the Treasury.<sup>22</sup>

## Consideration & Conclusions

- *Removal of Particular Exemptions*

The Committee considered a range of possible transitional arrangements, including delayed removal of the exemptions or more immediate removal coupled with some form of special transitional mechanism, including interim authorisations from the competition authority, a notification regime and staged implementations through regulations made under the competition statute. Each has their own set of advantages and disadvantages.

In determining appropriate transitional measures the Committee was mindful that application of the general conduct rules would not have the far reaching consequences suggested by some observers. In the case of government businesses, for example, legislated monopolies and other regulatory arrangements would remain intact, and nothing in the rules would have a significant impact on profitability or the delivery of community service obligations. In the case of statutory marketing arrangements, application of the Act will not of itself remove a range of anti-competitive arrangements implemented through regulation in a way that does not involve conduct in contravention of the Act. Similarly, most professional firms are already fully subject to the Act.

The Committee is concerned to ensure that all currently exempt firms have an opportunity to become familiar with the new regulatory requirements, review their behaviour and if need be seek authorisation from the competition authority, the proposed Australian

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<sup>22</sup> Treasury (Sub 76).

Competition Commission. At the same time, this period should be no longer than necessary, and should not create administrative bottlenecks while authorisation arrangements were being pursued.

Reflecting on these considerations, the Committee proposes various arrangements as follows.

In the case of firms currently exempt through constitutional exemptions or the shield of the Crown doctrine, the Committee considered that the legislation removing these exemptions should be passed as soon as possible, but that it not come into effect until a specified date two years later.

In the case of activities currently exempt by virtue of specific authorisation or approval by other Commonwealth laws, all new exemptions must comply with the new transparency requirements. Existing exemptions that did not meet the new requirements would be deemed to lapse three years after the legislation was passed.

In the case of activities currently exempt by virtue of specific authorisation or approval by State or Territory statutes or regulation, no new exemptions would be permitted. Existing exemptions would be deemed to lapse three years after the legislation was passed.

In the last two cases a slightly longer period is permitted to allow current laws or regulations possibly relevant to these exemptions to be reviewed.

The competition authority might issue guidelines prior to the commencement of the relevant legislation to assist sectors currently excluded from the regime. Those guidelines could indicate the type of conduct which is prohibited, how firms can modify their behaviour to comply with the new legislation, and how firms can seek authorisation for their conduct.

- *Amendments to the Competitive Conduct Rules*

Most of the Committee's proposed amendments are permissive, rather than imposing new obligations, and can be applied without the need for any transitional arrangement. This applies, for example, to the repeal of the specific prohibition on price discrimination, the introduction of authorisation for resale price maintenance, and the

application of a competition test to third-line forcing. Other procedural amendments to the Act, such as the proposed clarification that efficiency considerations are paramount in authorisation proceedings, fall within the same category.

New obligations will, however, be created through the removal of authorisation for price fixing agreements relating to services, the change in the treatment of recommended price agreements with 50 or more parties, and the extension of the exclusive dealing and resale price maintenance provisions to transactions involving services. The last three cases present no particular difficulties as authorisation is proposed to be available in respect of these forms of conduct. The Committee considers that these amendments should commence immediately, noting that under the arrangements set out above, currently exempt firms would not be subject to any of the prohibitions during the applicable transitional period. However, it may be appropriate for the ACC to prepare early guidelines on the authorisation process for parties affected by these changes.

The removal of authorisation in relation to price fixing does, however, raise special issues, since under the proposed rules authorisation will not be available for price-fixing in relation to goods or services. In respect of currently covered firms the Committee sees no reason why further authorisations should be granted. Any existing authorisations applying to price fixing agreements in relation to services should lapse after two years, providing affected firms with a suitable period in which to modify their conduct.

Particular issues are raised in connection with the extension of the rules to currently exempt businesses. The transitional regime set out above in relation to such businesses relies on the availability of authorisation, but some of these businesses may currently engage in some form of price-fixing, and thus be unable to take advantage of the normal transitional processes.

In the interests of achieving a smooth transition, the Committee proposes that the Commission be granted a discretion to issue "transitional" authorisations in relation to price fixing. These authorisations would be issued where the Commission is satisfied that the net public benefit is such that the authorisation should be granted and that authorisation is necessary to achieve a smooth transition to the new regime. As they are provided simply for transitional

purposes, they would only be available to currently exempt firms. There may be some questions over whether particular firms are currently exempt. The legislation should ensure that the Commission's discretion is sufficient to resolve such issues without the need for litigation. These authorisations could be sought at any time from the commencement of the new regime, but all such authorisations would expire, at the latest, four years after the commencement of the new regime.

Transitional authorisations of this kind may be applicable to liner shipping conferences if, following the report of the separate Inquiry, the Government decided to repeal Part X of the TPA and rely instead on the authorisation provisions under the general rules. If some additional period of transition was considered appropriate for this sector, it may be that conference arrangements could qualify under the exemption for joint ventures.<sup>23</sup> If need be, an appropriate amendment could be made to s.45A to specifically permit authorisation for price fixing by conferences.

## **2. Additional Policy Elements**

The additional policy elements proposed in Part II of the Report potentially have more significant implications for businesses and governments. For these reasons, the Committee has proposed that there should be specific transitional arrangements for each policy element.

In the case of regulatory restrictions on competition and the structural reform of monopolies, for example, decisions would be for individual governments.

In the case of legislative rights of access, transitional considerations would be determined as part of the process of determining whether to create a right and if so on what terms and conditions.

Application of the prices oversight mechanism does not require any transitional arrangements; indeed, application of such a mechanism may be part of the transition to a more competitive environment.

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<sup>23</sup> See s.45A(2)(a), discussed in Chapter Three.

The proposed principles on competitive neutrality involve their own transitional requirements, although compliance will be a matter for governments rather than the courts.

In respect of each element, an independent advisory body, the NCC, will be available to guide decision-makers on relevant transitional issues and arrangements.

The Committee is aware of arguments that limitations on State and Territory Governments' revenue sources may impede their capacity to implement pro-competitive reforms. The Committee also heard arguments that any budgetary impacts from the adoption of pro-competitive reforms, where they exist, would largely be confined to transfers between individual governments and their residents, and would not involve more than negligible revenue transfers between different levels of government. Matters of this kind are clearly of some sensitivity in a Federal system.

The Committee notes that implementation of the overwhelming majority of its recommendations would not affect the budgetary positions of Commonwealth, State or Territory Governments. Where there may be some potential implications for government budgets — such as through the application of the access regime to certain government-owned assets — the Committee was not presented with any material that would allow these implications to be quantified. However, it observed that most government businesses are not making even commercial returns, let alone monopoly profits, and that introduction of competition could help to drive out inefficiencies without necessarily reducing the returns to governments. Concern over the budgetary implications of applying particular aspects of the proposed regime could be the subject of independent analysis and advice by the NCC, which would have a specific mandate to consider issues associated with the transition to more competitive arrangements.

### **C. RESOURCE CONSIDERATIONS**

The main resource requirements arising from the Committee's recommendations relate to the creation and maintenance of the NCC. The Committee is concerned that this body be adequately resourced as it will only succeed if able to produce and commission high quality

work. However, the Committee does not envisage the creation of a large institution; the Council would comprise a small secretariat of around 20 people, contracting out much of the analytical work it will require for particular references.

As the Council is to be jointly accountable to the Commonwealth, State and Territory governments, the Committee considers it important that all governments are involved in the oversight of this body and commit resources to it.

The Australian Competition Commission will progressively assume a slightly larger jurisdiction through extended coverage of the general conduct rules, and will also assume some new functions. The resource implications will depend on a variety of factors and can be expected to evolve over time.

Possible requirements for resources additional to those currently allocated to the Trade Practices Commission may relate to:

- **Authorisation applications in those sectors being brought within the general conduct rules for the first time:** Existing exemptions would be removed progressively over a period of years following passage of the new competition law, allowing resource implications to be considered in light of experience;
- **Monitoring and reporting on legislated exemptions under s.51(1)(a) and under the new regulation power:** There are very few such exemptions at present and they will be readily identified under the new transparency requirements. This task should not require significant additional resources;
- **Administration of the access regime:** Any demands on the ACC under this regime will depend on the number of declarations and the administrative requirements arising from individual declarations;
- **Administration of prices oversight mechanism:** The Committee envisages fewer declarations under the new regime than at present. Moreover, the ACC's role in the process would be limited to administration of the regime, and would not extend to the conduct of inquiries relating to actual declarations, which would be the responsibility of the NCC;

- **Reviews of regulatory restrictions on competition:** The ACC's role in this area would be shared with State and Territory bodies and the NCC. Subject to the work program settled in consultation with the NCC, this function may not involve significant resources; and
- **Reporting to governments on allegations of non-compliance with agreed competitive neutrality principles:** This task is not a substantial enforcement function and should not involve significant additional resources.

Resources for meeting the tasks of the ACC and NCC could be drawn from the TPC and the PSA.

#### **D. RECOMMENDATIONS**

The Committee recommends that:

- 15.1 The national competition statute clearly state that it is intended to bind the Crown in the right of the States and Territories to the same extent that it binds the Crown in the right of the Commonwealth.
- 15.2 The exemptions from the general conduct rules for certain non-incorporated businesses be removed by a referral of powers from the States to the Commonwealth. If this could not be agreed, the Committee would favour States enacting application legislation to the same effect. If this were not to occur in a timely manner, the Committee considers that the Commonwealth should expand the application of the conduct rules by reliance on existing constitutional heads of power.
- 15.3 The proposed additional policy elements be implemented through Commonwealth legislation, with a referral of powers from the States if and where needed to ensure universal coverage.
- 15.4 Legislation removing exemptions based on constitutional limitations and Shield of the Crown be passed as soon as possible, but not come into force until two years after passage.

- 15.5 Exemptions currently provided by specific authorisation or approval under Commonwealth laws other than the competition statute be deemed to lapse three years after the new competition law is passed unless they comply with the new transparency requirements.
- 15.6 Exemptions currently provided by specific authorisation or approval by State or Territory statutes or regulation be deemed to lapse three years after the new competition legislation is passed.
- 15.7 Any existing authorisations for price fixing in relation to services should lapse two years after enactment of the new competition law.
- 15.8 The Australian Competition Commission should be given the discretion to authorise price fixing agreements for currently exempt firms, on the demonstration of net public benefits, with any such authorisations lapsing no more than four years after the passage of the new competition law.
- 15.9 Transitional arrangements for the additional policy elements proposed in Part II should be considered on a case-by-case basis under each policy element, with the National Competition Council providing advice to governments on issues associated with the transition to a more competitive environment.
- 15.10 Adequate resources be made available to create and maintain the National Competition Council, and to meet any additional resource requirements of the Australian Competition Commission arising from implementation of the Committee's recommendations.