

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

**REPORT ON THE INQUIRY INTO THE
COMPETITION POLICY REFORM BILL 1995**

Report of the Select Committee on Competition Policy Reform

APRIL 1996

Resolution of Appointment

That—

- (1) a Select Committee on Competition Policy Reform be appointed to inquire into and report on the Competition Policy Reform Bill 1995 to assess the impacts, whether positive or negative, of the introduction of the Bill on the ACT community and in particular to:
 - (a) determine the impact on the ability of the Assembly and the Government of the ACT to pursue policies and protect the interests of the Territory in relation to:
 - (i) legislation and policies relating to protection of the environment, including fostering environmentally sustainable practices;
 - (ii) social welfare and equity objectives;
 - (iii) maintenance of basic wage and work conditions, including legislation and policies relating to matters such as occupational health and safety, and access and equity;
 - (iv) the interests of consumers;
 - (v) the economic wellbeing of the local community;
 - (vi) the efficient allocation of resources; and
 - (vii) any other services provided by or on the behalf of the ACT Government;
 - (b) determine and assess:
 - (i) alternative options for achieving any benefits which may be achieved through enactment of the Bill;
 - (ii) options for preventing or reversing any adverse impacts which may occur as a result of the enactment of the Bill; and
 - (c) other relevant matters as determined by the Committee;
- (2) Ms Follett, Mr Kaine and Ms Tucker be appointed as the members of the Committee;
- (3) the Committee shall report by the first sitting day in April¹ 1996; and
- (4) the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

ACT Legislative Assembly Hansard, (1995), Week 8a, 24 October 1995, pp 1950–1.

¹ Amended from March to April on 29 February 1996, Minutes of Proceedings, No. 40, p 277.

Committee Membership

Ms Rosemary Follett MLA (Chair)

Mr Trevor Kaine MLA

Ms Kerrie Tucker MLA

Secretary: Ms Beth Irvin (*until 15 January 1996*)

Mr Russell Keith (*from 15 January 1996*)

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Glossary

- community service obligation The Steering Committee on National Performance Monitoring of Government Trading Enterprises defines community service obligations as arising “when a government specifically requires a public enterprise to carry out activities relating to outputs or inputs which it would not elect to do on a commercial basis, and which the government does not require other businesses in the public or private sector to undertake, or which it would only do commercially at higher prices.”²
- Competition Code According to subsection. 150C.(1) of the *Trade Practices Act 1974* (Cth) (TPA), The Competition Code consists of:
- (a) *the Schedule version of Part IV [of the TPA];*
 - (b) *the remaining provisions of [the TPA] (except sections 2A, 5, 6 and 172, so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV;*
 - (c) *the regulations under [the TPA], so far as they relate to any provision covered by paragraph (a) or (b).*
- Participating jurisdiction A jurisdiction that is a party to the Conduct Code Agreement and applies the Competition Code as a law of the State, either with or without modifications (s. 150A, TPA)
- fully participating jurisdiction A participating jurisdiction that has not been Gazetted by the Commonwealth Minister as having made significant modifications to the application of the Competition Code. (s. 4 TPA)

² Steering Committee on National Performance Monitoring of Government Trading Enterprises, *Community Service Obligations: Some Definitional, Costing and Funding Issues*, April 1994, p 8.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACF	Australian Conservation Foundation
ACOSS	Australian Council of Social Service
ACTCOSS	Australian Capital Territory Council of Social Service
ACTEW	Australian Capital Territory Electricity and Water
ACTION	Australian Capital Territory Internal Omnibus Network
ACTU	Australian Council of Trade Unions
COAG	Council of Australian Governments
COSBOA	Council of Small Business Organisations Australia
CPRA	<i>Competition Policy Reform Act 1995 (Commonwealth)</i>
CPSU	Community and Public Sector Union
CSO	community service obligation
GBE	government business enterprise
IC	Industry Commission
NCC	National Competition Council
NCP	National Competition Policy
TPA	<i>Trade Practices Act 1974 (Commonwealth)</i>

Summary of Recommendations

Recommendation 1

5.3. The Committee recommends that the Assembly enact the Competition Policy Reform Bill 1995.

Recommendation 2

5.12. The Committee recommends that the Government reports to the Assembly on the identification and costing of each community service obligation provided by a government service before exposing that service to competition. The Committee also recommends that the Government develop explicit community service obligations for ACTEW in consultation with the community and report to the Assembly by the August sittings.

Recommendation 3

5.13. The Committee recommends that the Government directs agencies to include a process of community consultation when identifying and assessing community service obligations.

Recommendation 4

5.14. The Committee recommends that Annual Reports for all areas of government business activity include a report on the consultation process for and the fulfilment of community service obligations.

Recommendation 5

5.15. The Committee recommends that the Government reviews its provision of community service obligations at least every two years.

Recommendation 6

5.22. The Committee recommends that, when implementing competitive neutrality principles, restructuring public monopolies, and reviewing legislation for anti-competitive effects, the process for addressing the matters referred to in clause 1. (3) of the Competition Principles Agreement be open to public scrutiny and include provision for public input.

Recommendation 7

5.23. The Committee recommends that the Government consider the matters in clause 1. (3) of the Competition Principles Agreement when considering outsourcing or competitive tendering.

Recommendation 8

5.24. The Committee recommends that the Government establish a forum to provide ongoing monitoring and advice on the implementation of competition policy. Such a forum should include representatives of community, environmental, consumer, union, business and academic organisations

Recommendation 9

5.27. The Committee recommends that the Assembly gives consideration to developing mechanisms to increase its involvement in the making of intergovernmental agreements.

Chapter One: Background to the Bill & the Inquiry

National Competition Policy

1.1. Following discussions on microeconomic reform at a Special Premier's Conference, the then Prime Minister established the National Competition Policy Review Committee (Hilmer Committee) in October 1992. The Committee was guided by principles agreed to by Premiers and Chief Ministers which are outlined in Box 1.

Box 1: Agreed Principles for a National Competition Policy

- (a) No participant in the market should be able to engage in anti-competitive conduct against the public interest;
- (b) As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;
- (c) Conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed;
- (d) Any changes in the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms;
 - (i) to develop an open, integrated domestic market for goods and services by removing unnecessary barriers to trade and competition; and
 - (ii) in recognition of the increasingly national operation of markets, to reduce complexity and administrative duplication.³

1.2. The Hilmer Committee reported in March 1993 and recommended a framework for a national approach to competition policy. The Committee considered competition policy in terms of six specific elements as outlined in Box 2.

³ *National Competition Policy: Report by the Independent Committee of Inquiry*, p 17.

Box 2: Elements of Competition Policy	
Policy Element	Example
1. Limiting anti-competitive conduct of firms	Competitive conduct rules of Part IV of the Trade Practices Act
2. Reforming regulation which unjustifiably restricts competition	Deregulating of domestic aviation, egg marketing and telecommunications
3. Reforming the structure of public monopolies to facilitate competition	Proposed restructuring of energy utilities in several States
4. Providing third-party access to certain facilities that are essential for competition	Access arrangements for the telecom network
5. Restraining monopoly pricing behaviour	Prices surveillance by Prices Surveillance Authority
6. Fostering “competitive neutrality” between government & private business when they compete	Requirements for government business to make tax-equivalent payments ⁴

1.3. Included in the Hilmer Committee’s program for reform were recommendations that:

5.6 *Current limitations in the application of competitive conduct rules [in the TPA] arising from constitutional factors be removed.*

5.7 *Current limitations in the application of competitive conduct rules arising from the shield of the Crown doctrine be removed from the Crown in right of the Commonwealth, the States and Territories in so far as the Crown in question carries on a business or engages in commercial activity in competition (actual or potential) with other businesses.⁵*

1.4. The Council of Australian Governments (COAG) agreed in principle to the Hilmer Report’s recommendations in February 1994 and referred the matter to the Industry Commission (IC) to consider the growth and revenue implications of Hilmer

⁴ *National Competition Policy: Report by the Independent Committee of Inquiry*, p xvii.

⁵ *National Competition Policy: Report by the Independent Committee of Inquiry*, pp 121–2.

and related reforms. The IC reported in February 1995 and concluded that the proposed reforms would generally benefit consumers, industries and governments.⁶

1.5. A national draft legislative package to implement the Hilmer recommendations was circulated for public comment in September 1994 and submissions were considered by the Commonwealth, States and. The Commonwealth *Competition Policy Reform Act 1995* which was then introduced into the Senate in March and was granted Royal Assent on 20 July 1995.

1.6. At the COAG meeting on 11 April 1995, all jurisdictions signed the “Conduct Code Agreement”, “Competition Principles Agreement” and the “Agreement to Implement the National Competition Policy and Related Reforms”. The Conduct Code Agreement provides for consistent and complementary laws which apply to all businesses, whether public or private or incorporated bodies or individuals. The other Agreements set out the policy framework for the implementation of the national competition policy, including a promise of Commonwealth funding for compliance with the Agreements.

1.7. The three Agreements substantially implement the recommendations of the Hilmer Report, except that:

- activities between government agencies which are internal to the Crown are exempt from coverage of Part IV of the *Trade Practices Act 1994 (Cth)* (TPA);
- the broader definition of “public benefit” which has evolved through TPA case law has been maintained; and
- States’ and Territories’ capacity to rely on Section 51 of the TPA for exemptions from anti-competitive conduct has been maintained where it is in the public interest so long as the jurisdiction is a “participating jurisdiction”.⁷

Competition Policy Reform Bill 1995

1.8. Under the Conduct Code Agreement, all Premiers and Chief Ministers have undertaken to enact legislation giving force to the Competition Code, which comprises the Schedule version of Part IV of the TPA and the corresponding sections of the TPA and regulations. The Schedule is the substantially the same as Part IV but reworded to apply to “persons” instead of “corporations”.

1.9. NSW, in consultation with the States, Territories and Commonwealth, enacted template legislation to give effect to the Competition Code. Victoria has enacted similar legislation. The ACT Bill is based on the NSW legislation with no substantial changes.

⁶ Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, March 1995, pp 83–4.

⁷ ACT Government, Submission No. 6, pp 5–6.

1.10. Enactment of legislation giving force to the Competition Code is required in order for the ACT to be a “participating jurisdiction”. Being a participating jurisdiction conveys certain rights under the agreements, including participation in related fora; input into the appointment of members of the Australian Competition and Consumer Commission (ACCC) and the National Competition Council (NCC); the power to legislate exemptions for uncompetitive behaviour; and additional funding from the Commonwealth.

The Select Committee

1.11. The Competition Policy Reform Bill 1995 (the Bill) was introduced into the Legislative Assembly on 24 August 1995. On the motion of Ms Tucker MLA, the Assembly referred the Bill to the Select Committee 24 October 1995.

1.12. On 3 November, the Committee called for submissions by 29 December 1995, advertising in the *Chronicle*, *Canberra Times*, and *Valley View*. The Committee continued to accept submissions after the original closing date. A list of Submissions is at Appendix A.

1.13. The Committee was briefed by Government officials on 16 November 1995 and again on 21 March 1996. The Committee held public hearings on 12, 13 and 14 February 1996. A list of persons appearing before the Committee is at Appendix B.

1.14. On 29 February 1996 the Assembly amended the Committee’s reporting date to be the first sitting day in April 1996.⁸

⁸ *Minutes of Proceedings*, No. 40, Thursday, 29 February 1996, p 277.

Chapter Two: Impact of the Bill on the Ability to Govern

The Legal Context

2.1. The effect of the Bill is to give force to Part IV of the Commonwealth *Trade Practices Act 1974* (TPA) in relation to business activity which is under the jurisdiction of the ACT.

2.2. To date, the TPA has not applied to the Crown in the right of any of the States or Territories or their instrumentalities or agents.⁹ However, s. 81 of the Commonwealth *Competition Policy Reform Act 1995* (CPRA), which commences in July 1996, makes the TPA bind the Crown in right of the States and Territories in relation to business activity.

2.3. Although the TPA has not applied to unincorporated bodies trading within a state, the TPA, by force of s. 6, has always applied to natural persons trading in the ACT. Section 6 of the CPRA suspends the relevant reference in s. 6 of the TPA to trade or commerce within a Territory in its application to Part IV of the TPA so long as that Territory is a participating jurisdiction. In other words, the Commonwealth has suspended the application of Part IV of the TPA in the ACT in relation to natural persons so long as the ACT has applied Part IV of the TPA through its own legislation.

2.4. Consequently, if the Assembly does not enact the Bill, the TPA will apply to all business activity in the ACT, whether it be by a natural person or, after July 1996, a government agency.

2.5. Section 51 of the TPA, as amended by the CPRA, allows the ACT to exempt anything done in the ACT from Part IV of the TPA by legislation so long as the ACT remains a participating jurisdiction. Such legislation may be overridden by Commonwealth regulation (s. 51(1C)(f)).

2.6. In summary, due to the Commonwealth's ultimate sovereignty in the ACT, already given effect in the TPA, Part IV of the TPA will apply to all business activity in the ACT regardless of whether the Bill is enacted. Enactment of the Bill would allow the ACT to be a participating jurisdiction which would enable the ACT to legislate or regulate exemptions to Part IV.

The Political Context

2.7. The enactment of the Bill is necessary for the fulfilment of the Chief Minister's commitments under the Competition Policy Intergovernmental Agreements and for the ACT to be a participating jurisdiction. In addition to the legislative powers

⁹ Russell Miller, *Annotated Trade Practices Act*, 15th ed, The Law Book Company Ltd, 1994, pp 18 & 19.

outlined at paragraph 2.5. above, being a participating jurisdiction conveys other benefits to the ACT, as outlined in Box 3.

Box 3: Benefits from Competition Policy Intergovernmental Agreements	
Conduct Code Agreement	<p>Commonwealth must put any proposed amendments to Part IV of the TPA to the vote before fully participating jurisdictions before presenting such amendments to Parliament.</p> <p>Fully participating jurisdictions may nominate persons for appointment to the ACCC. The Commonwealth will then notify participating jurisdictions of proposed appointments and those appointments may only be made if a majority of participating jurisdictions do not object</p>
Competition Principles Agreement	<p>Parties to the Agreements may nominate persons for appointment to the NCC. The Commonwealth will then notify participating jurisdictions of proposed appointments and those appointments may only be made if a majority of participating jurisdictions do not object.</p>
Agreement to Implement the National Competition Policy	<p>The Commonwealth has undertaken to provide additional funding to participating jurisdictions, estimated to be worth \$184m (at 1994–95 prices) to the ACT over 9 years, subject to compliance with the Competition Principles Agreement, Conduct Code Agreement, and COAG agreements in relation to reform of electricity, gas, road transport and water industries.</p>

The Competition Code

2.8. According to subsection. 150C.(1) of the TPA, The Competition Code consists of:

- (a) *the Schedule version of Part IV;*
- (b) *the remaining provisions of [the TPA] (except sections 2A, 5, 6 and 172, so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV;*
- (c) *the regulations under [the TPA], so far as they relate to any provision covered by paragraph (a) or (b).*

2.9. The Code prohibits the following anti-competitive trade practices:

- *anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts (s. 45);*
- *misuse of market power (s.46);*
- *exclusive dealing (s. 47);*
- *resale price maintenance (ss. 48, 96–100); and*
- *mergers which would have the effect of likely effect of substantially lessening competition in a substantial market (ss. 50, 50A).¹⁰*

The Administration of the Competition Code

2.10. The Competition Code is administered by the ACCC. The ACCC can provide exemptions to the application of the code through its authorisation and notification procedures.

Authorisations

2.11. Authorisation of anti-competitive conduct may be sought from the ACCC if it can be shown that that conduct, despite its anti-competitive nature, is in the public benefit.

Notifications

2.12. Exclusive dealing may be exempted by notifying the ACCC of that dealing if that dealing is not nor likely to be anti-competitive. Third line forcing may be exempted by notification if it is the public interest.

2.13. The decisions of the ACCC are subject to review by the Australian Competition Tribunal (formerly the Trade Practices Tribunal).

“Public Benefit”

2.14. The notion of “public benefit” is central to the determination of exemptions. Public benefit is not defined under the TPA. The Trade Practices Tribunal has discussed public benefit in the following terms:

Public benefit has been, and is, given a wide ambit by the Tribunal as, ... ‘anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress’. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society’s resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass ‘progress’;

¹⁰ Australian Competition and Consumer Commission, *Summaries of the Trade Practices Act and the Prices Surveillance Act*, p 23.

and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.¹¹

2.15. The emphasis of public benefit assessment is primarily on efficiency considerations, although that does not exclude intangible benefits relating to such matters as the environment and health being regarded as public benefits.¹²

2.16. The Commission and Tribunal have recognised the following as public benefits:

- *fostering business efficiency, especially when this results in improved international competitiveness;*
- *industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;*
- *expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;*
- *promotion of industry cost saving resulting in contained or lower prices at all levels in the supply chain;*
- *promotion of competition in industry;*
- *promotion of equitable dealing in the market;*
- *growth in export markets;*
- *development of import replacements;*
- *economic development, for example of natural resources through encouraging exploration, research and capital investment;*
- *assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;*
- *industry harmony;*
- *improvement in the quality and safety of goods and services and expansion of consumer choice; and*
- *supply of better information to consumers and business to permit informed choices in their dealings.¹³*

Legislative Exemptions

2.17. As mentioned at paragraph 2.5. above, exemptions to the Code may also be legislated by participating jurisdictions, although any such enactment may be overridden by Commonwealth regulation and the exempting effect of any ACT regulation expires after 2 years.¹⁴

¹¹ Victoria Newsagency (1994) ATPR 41–357 at 42,677, quoted in Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, pp 19–20.

¹² Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, p 21.

¹³ Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, p 20.

¹⁴ *Trade Practices Act 1974* (Cth), section 51.

2.18. Under the Competition Principles Agreement, parties have agreed that legislation should not restrict competition unless it can be demonstrated that:

- (a) *the benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) *the objectives of the legislation can only be achieved by restricting competition.*¹⁵

2.19. Parties have also agreed to review all such legislation every 10 years.¹⁶

Australian Competition & Consumer Commission

2.20. The ACCC is a statutory authority responsible for ensuring compliance with Parts IV, IVA, V and VA of the TPA and the provisions of the Conduct Code and for administering the *Prices Surveillance Act 1983* (Cth).¹⁷ Its members are appointed by the Governor-General on advice from the Commonwealth subject to the support of the majority of parties to the Conduct Code Agreement.¹⁸

2.21. The objectives of the ACCC are to:

- *improve competition and efficiency in markets;*
- *foster adherence to fair trading practices in well-informed markets;*
- *promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective;*
- *inform the community at large about the Trade Practices Act and the Prices Surveillance Act and their specific implications for business and consumers; and*
- *use resources efficiently and effectively.*¹⁹

National Competition Council

2.22. The NCC comprises a President and up to four other Councillors. Councillors are appointed by the Governor-General on advice from the Commonwealth, subject to the support of the majority of parties to the Competition Principles Agreement.²⁰

2.23. The NCC's functions are to make recommendations on access declarations under Part IIIA of the TPA and to maintain prices oversight of State and Territory Government businesses. It may also conduct, or provide assistance with, reviews

¹⁵ Competition Principles Agreement, clause 5.(1).

¹⁶ Competition Principles Agreement, clause 5.(6).

¹⁷ Australian Competition and Consumer Commission, *Summaries of the Trade Practices Act and the Prices Surveillance Act*, p 14.

¹⁸ *Trade Practices Act 1974* (Cth), section 7.

¹⁹ Australian Competition and Consumer Commission, *Summaries of the Trade Practices Act and the Prices Surveillance Act*, pp 15–6.

²⁰ *Trade Practices Act 1974* (Cth), section 29C.

under the Competition Principles Agreement. Its review program is determined by participating jurisdictions.²¹

²¹ Australian Competition and Consumer Commission, *Summaries of the Trade Practices Act and the Prices Surveillance Act*, p 17.

Chapter Three: Competition Principles Agreement

From the perspective of those whom ACTCOSS represent the more significant component of the NCP is the Competition Principles Agreement in so far as it provides a market framework for the restructuring of public utilities and other government business activities and requires an extensive program of regulatory review.²²

ACTCOSS regards this Inquiry:

- as an opportunity for public debate and discussion on the social justice implications of NCP as a whole; and*
- as a forum in which the community can express views on the complex issues which are raised by its proposed implementation.²³*

3.1. The Competition Principles Agreement sets the policy framework for competition policy reform. A number of witnesses saw this inquiry into the Bill as an opportunity, to date the only opportunity, for public comment on these Principles.²⁴ In fact, few submissions directly addressed the Bill but rather competition policy more generally or more specific related concerns such as the competitive tendering of government services. As the Competition Principles Agreement sets the framework for competition policy reform of which the Bill forms a part and was so clearly an area of community concern, the Committee thought that it was important that the views of witnesses were placed on the public record and included in the Committee's deliberations. The views of witnesses are summarised in Chapter Four.

Summary of the Competition Principles Agreement

3.2. The Agreement sets out principles for:

- Prices oversight of government business enterprises (GBEs);
- Competitive Neutrality;
- Structural reform of public monopolies;
- Legislation review;
- Access to services provided by means of significant infrastructure facilities; and
- the National Competition Council.

Prices Oversight

3.3. The Agreement sets out principles for the prices oversight of all Government business enterprises that are monopoly or near monopoly suppliers of goods and services. The Principles require that such oversight should be independent from the

²² ACTCOSS, Submission No 11, p 3.

²³ ACTCOSS, Submission No 11, p 4.

²⁴ eg, ACTCOSS, Submission No. 11, p 4, Fooks, *Transcript of Proceedings*, p 38.

relevant government business enterprise; its prime objective should be efficient resource allocation but with regard to any explicitly identified and defined Community Service Obligations (CSOs) imposed; it should permit submissions by interested persons; and publish its recommendations and reasons.²⁵

Competitive Neutrality

3.4. The objective of competitive neutrality is:

*the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned enterprises, not to the non-business, non-profit activities of these entities.*²⁶

3.5. The Competition Principles Agreement requires corporatisation of significant Government business enterprises classified as “Public Trading Enterprises” or “Public Financial Enterprises” wherever the benefits of doing so outweigh the costs. It also requires the imposition of the same taxes and regulations as are on private sector companies and debt guarantee fees.²⁷ Where an agency that is not corporatised undertakes significant business activity, it should have the same taxes and regulations as private sector companies where appropriate and prices charged should reflect full cost attribution of such activities.²⁸

3.6. Each party is to publish a competitive neutrality policy statement by June 1996, including an implementation timetable and a complaints mechanism.²⁹

Structural Reform of Public Monopolies

3.7. The Agreement requires the removal of any responsibility for industry regulation before introducing competition to a sector traditionally supplied by a public monopoly.³⁰

3.8. Before a Party introduces competition to a market traditionally supplied by a public monopoly, and before a Party privatises a public monopoly, it is to undertake a review into:

- (a) *the appropriate commercial objectives for the public monopoly;*
- (b) *the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;*
- (c) *the merits of separating potentially competitive elements of the public monopoly;*

²⁵ Competition Principles Agreement, 2(4).

²⁶ Competition Principles Agreement, 3(1).

²⁷ Competition Principles Agreement, 3(4).

²⁸ Competition Principles Agreement, 3(5).

²⁹ Competition Principles Agreement, 3(8).

³⁰ Competition Principles Agreement, 4(2).

- (d) *the most effective means of separating regulatory functions from commercial functions of the public monopoly;*
- (e) *the most effective means of implementing the competitive neutrality principles set out in [the] Agreement;*
- (f) *the merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations;*
- (g) *the price and service regulations to be applied to the industry; and*
- (h) *the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including the rate or return targets, dividends and capital structure.³¹*

Legislation Review

3.9. Each Party has agreed to develop, by June 1996, a timetable for the review, and where appropriate reform, of all legislation restricting competition to be completed by the year 2000. After completion of the review, all legislation restricting competition is to be reviewed at least every 10 years.

3.10. The guiding principle of the review is to be that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community outweigh the costs; and the objectives of the legislation can only be achieved by restricting competition.

Assessment of benefits, costs, merits and effectiveness

3.11. Where the Agreement calls for the assessment of benefits, costs, merits or effectiveness of a policy or course of action, the following matters are, where relevant, to be taken into account:

- (d) *government legislation and policies relating to ecologically sustainable development;*
- (e) *social welfare and equity considerations, including community service obligations;*
- (f) *government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
- (g) *economic and regional development, including employment and investment growth;*
- (h) *the interests of consumers generally or of a class of consumers;*
- (I) *the competitiveness of Australian businesses; and*

³¹ Competition Principles Agreement, 4(3).

(j) *the efficient allocation of resources.*³²

³² Competition Principles Agreement, 1(3).

Chapter Four: Impact of Competition Policy on the ACT Community—A Summary of Issues Raised by Witnesses

The Aim of Competition Policy

There are a number of line managers within the ACT Government who are attempting to restructure programs on the basis of the competition policies agreement without, in my view, having read it. That sounds harsh, but I am of the view that these principles have gained a cultural value within Government services and are being implemented at a micro-level with, frankly, quite horrendous consequences, particularly when you look at the human services in the community sector. We seem to have a problem in that one level of Government is putting one position on the matter, but at another level you can clearly see changes in the way programs are being delivered and administered.³³

4.1. According to the Hilmer Report:

Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interests of economic efficiency while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives.³⁴

4.2. Competition policy is driven by the belief that competition will yield substantial economic benefits. Estimates of that benefit nationally have varied from 6% of GDP to an easily lost 0.5%.³⁵ None of the witnesses to the inquiry said they were against competition policy *per se* and most made statements, in general terms, in its support. However, nearly all witnesses had some concerns about adverse side effects.

4.3. Competition is not a panacea. There are instances where competition does not lead to public benefit. The natural end of competition if left unregulated is a monopoly.³⁶ In recognition of the limits and dangers of competition, the competition policy agreements and the TPA contain provisions for exceptions to the application of competition where it can be shown that the application of competition policy would not be in the public benefit.

Corporatisation and Privatisation

The Bill does not necessitate or encourage specific changes to the ownership or management of government business ownership or management such as

³³ ACTCOSS, *Transcript of Proceedings*, p 101.

³⁴ *National Competition Policy: Report by the Independent Committee of Inquiry*, p 6.

³⁵ Quiggin, Submission No 7, p 1; cf, Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, March 1995, p 83; John Quiggin, "The Growth Consequences of Hilmer and Related Reforms"

³⁶ Government, *Transcript of Proceedings*, p 14.

*privatisation, corporatisation, outsourcing, competitive tendering or contracting out.*³⁷

4.4. Even though the Bill is theoretically neutral on matters of ownership or management of government businesses, part of its “political baggage” is the furthering of corporatisation and privatisation. That is illustrated by the Minister’s presentation speech for the Bill where he linked the Bill to the Government’s program for corporatisation and outsourcing.³⁸

4.5. The Competition Principles Agreement is “neutral with respect to the nature and form of ownership of business enterprises” and “not intended to promote public or private ownership”.³⁹ It does however require, where appropriate and subject to the public interest, the corporatisation of significant Government business enterprises.⁴⁰

4.6. In its narrowest sense, competition policy requires significant government business enterprises (GBEs) to operate in a more competitive environment. In its widest interpretation, competition policy covers the whole ACT Government micro-economic reform agenda.⁴¹ A number of witnesses were concerned that the National Competition Policy is being used as a justification for the privatisation of government services, through sale of GBEs, outsourcing functions, and the introduction of quasi markets into all government agencies through the purchaser–provider model, while the National Competition Policy Agreements had no such requirement.

Criticisms of Competition Policy

*In summary, a carefully handled program of microeconomic reform based on increases in competition in appropriate areas could yield small, but useful, social welfare benefits to the ACT. An ideological approach in which policies are imposed in the name of competition, without careful analysis of costs and benefits, will almost certainly dissipate these potential benefits and leave the people of the ACT worse off than in the absence of any reform.*⁴²

Consumers or Citizens

...this distinction between customers and citizens is absolutely crucial to understanding how people behave. If you treat people as customers, as clients, as competing with each other to get the maximum that they can for themselves, then unfortunately people will start behaving that way. What concerns me is that we

³⁷ ACT Government, Submission No. 6, p 1

³⁸ Hansard, Week 5c (24 August 1995), p 1392.

³⁹ Competition Principles Agreement, 1(5).

⁴⁰ Competition Principles Agreement, 3(4).

⁴¹ “In its broadest sense, competition policy encompasses all policy dealing with the extant and nature of competition in the economy.”, *National Competition Policy: Report by the Independent Committee of Inquiry*, p 6.

⁴² Quiggin, Submission No 7, p 4.

*are seeing quite a lot of alienation of groups of people in our society from society as such and from the community.*⁴³

4.7. Competition policy was been criticised for viewing the public only in terms of being consumers of services to the exclusion of the public’s wider role as citizens.

*We see the Bill as being an important part of a major shift in the culture of the public sector, with very much a redefinition of the goals of the public sector. This involves a shift away from seeing the public sector as a provider of services to the community to a set of businesses whose purpose is to provide an output to customers.*⁴⁴

4.8. It was put to the Committee that competition policy was by and large premised on the view that society comprised individuals whose welfare was derived principally from the consumption of goods and services and that consequently a well-functioning economy that delivers goods and services in the most effective way will maximise social welfare. According to this view, the role of government is to find the most cost effective method of delivering services, including appropriately regulating markets and addressing market failures.

4.9. Such a view, while useful as far as it goes, fails to take into account individuals’ role as citizens where they, among other things, produce and consume “public value”. Public value comprises all things that are collectively of value to society rather than merely to individuals and include: a secure and stable social structure, a fair and equitable society, a clean environment, a well functioning democracy and the “public goods” of neoclassical economics. Public values are not so much “outcomes” that are produced but processes in which people participate. Thus while a community welfare department may provide a specific service for child protection, that work occurs within a context of public value contributed by neighbours and family members.⁴⁵

4.10. Public value is a similar notion to “social capital” discussed by Eva Cox in her Boyer Lectures.

*Social Capital refers to the processes between people which establish networks, norms and social trust and facilitate co-ordination and co-operation for mutual benefit. These processes are also known as social fabric of glue, but I am also using the term ‘capital’ because it invests the concept with reflected status from other forms of capital.*⁴⁶

⁴³ Australia Institute, *Transcript of Proceedings*, p 54.

⁴⁴ Australia Institute, *Transcript of Proceedings*, p 46.

⁴⁵ Australia Institute, Submission No 3, pp 2–4, ACTCOSS, Submission No. 11

⁴⁶ Eva Cox, *The 1995 Boyer Lectures: A Truly Civil Society*, Lecture 2, “Raising Social Capital”, ABC Radio National.

4.11. It was argued before the Committee that the role of government was not merely to maximise the efficient use of resources to give the greatest output to consumers, but also to maximise the benefit to the public by promoting public value. Consequently, the implementation of competition policy required an examination of the effect of the introduction of competition to government business activity for its effect on public benefit in terms of both its economic efficiency and its effect on public value.

[M]any public services provided directly by the Public Service, or public utilities, ... There is a very important function that [public services] provide and which is rarely talked about but which I think we as citizens implicitly acknowledge; that is, their community-binding functions. Communities the world over have established public enterprises or public organisations to provide services to the citizenry, and there is a sense in which, by providing these services, we collectively are looking after our interests as citizens and, in particular, the interests of disadvantaged citizens. By turning over these sorts of enterprises and these services to the principles of the market, those community-binding functions are in danger of being lost.⁴⁷

Competitive Tendering—Quality and Efficiency

4.12. Numerous witnesses raised concerns in relation to the competitive tendering of services provided by or for government. Concerns raised included:

- failure to identify and specify all aspects, particularly qualitative aspects, of services;
- cultural shifts in service provision, ie, emphasis by service providers on fulfilling contract details rather than serving the community;
- change in role of service recipient from citizen to customer;
- using competitive tendering as a disguised method of cost cutting, ie, reducing quantity or quality of services;
- failures in accountability, privacy arrangements, security, and consumer and worker protection arrangements (also environmental and public safety);
- failure to provide access and equity to services;
- consequences of service interruption arising from contract failure;
- the difficulty of penalising contractors or replacing them for unsatisfactory performance without significantly interrupting service delivery.
- costs to providers of the tender process;
- costs to the government to administer the tender process;
- failure to deliver promised efficiency gains, ie, pain without gain; and

⁴⁷ Australia Institute, *Transcript of Proceedings*, p 47.

- a culture of contracting out without considering whether it is in the public interest.

4.13. On the possibility of contractors failing to meet the service and accountability requirements imposed on public services, the Community and Public Sector Union (CPSU) commented as follows:

The likely impact of such breaches, or of service interruptions, on clients must be taken seriously. A breach of privacy may seriously distress a client, and expose them to discrimination, financial loss or public embarrassment over a long period. Breaches of access and equity, or an interruption to service, may seriously affect the life chances for some clients (in the cases of health, welfare or children's services, for example), and may have long term, or even irreversible effects. Failure to enforce environment or public safety standards may also have irreversible effect. Where the likelihood of failure is assessed as high, or where the impact of potential failure is likely to be serious for the client or the community generally, contracting of services is inappropriate and should not occur.⁴⁸

4.14. The overriding concern of witnesses regarding competitive tendering was that it needs to be done in a systematic rather than an ad hoc manner. It was considered that there were gains to be made through competitive tendering in some areas but that proper examination of the costs and benefits must be made before a service area is identified for tender. It was argued that such an examination must include public consultation as it is beyond the ability of government, without such consultation, to identify all the public benefits provided by a service and the implications of changing the methods of service delivery (see also paragraph 5.18.).

4.15. Considerable concerns were also raised in relation to the specification of services in contracts. Examples were outlined to the Committee where contracts for services failed to specify important elements of a service, resulting in those elements no longer being provided, such as the omission of personal contact requirements from a “meals on wheels” type of service resulting in people no longer being checked on daily.⁴⁹

4.16. Questions were also raised about the effect of contracting out on the contribution of volunteer workers. Volunteers currently make a significant contribution in providing a range of community services. It was claimed that it is likely that, if such services were contracted out to private providers for profit, the contribution of such workers will decrease dramatically.⁵⁰

⁴⁸ CPSU, Submission No 2, pp 5–6.

⁴⁹ ACTCOSS, *Transcript of Proceedings*, p 99.

⁵⁰ ACTCOSS, *Transcript of Proceedings*, p 99.

Tendering Community Services

4.17. A closely related issue is the introduction of competitive tendering in services delivered by the community sector. The Community Information and Referral Service was concerned that the funding of community services by contract instead of by grant impairs the ability of organisations to respond to the needs found at the grass roots level.

...one of the main benefits of community welfare organisations is that they are able to glean from their clients and the community at the grass roots level, and then feed that to government [through grant applications] and operate that service rather than having it imposed from above.⁵¹

4.18. The ACOSS/ACTU Study Program on Structural Adjustment and Social Change reported that the contracting of community services had a number of unintended side effects:

- *Detailed specification of outputs introduced rigidities that made a more flexible and client-focussed approach difficult, and also usually cut across holistic services or attempts at ‘bundling’ of services.*
- *Performance requirements focussed on the easily measured and reverted to an emphasis on quantity over quality.*
- *Development and preventative activities received little or no priority.*
- *Failure to me[e]t the actual cost of the services contracted for (only a “contribution” was made) increased resentment over the more rigorous (and frequently changing) reporting obligations.*
- *Detailed accountability requirements added costs to service providers that could only be met by diverting funds from service provision.⁵²*

Community Service Obligations

4.19. Most witnesses had significant concerns in relation to the maintenance of “Community Service Obligations” (CSOs). CSOs, loosely defined, are those aspects of a service which the community requires to be carried out for equity, justice or other considerations. They are usually, but not always, aspects of a service which are not market driven.⁵³ The ACT Government has adopted the definition of CSOs put forward by the Steering Committee on National Performance Monitoring of Government Trading Enterprises:

“A Community Service Obligation arises when a government specifically requires a public enterprise to carry out activities relating to outputs or inputs which it would not elect to provide on a commercial basis, and which the government does

⁵¹ Community Information & Referral Service, *Transcript of Proceedings*, p 57.

⁵² ACTU/ACOSS, *Study Program on Structural Adjustment and Social Change*, p 39.

⁵³ An example of a market driven CSO given was concessional fares on transport in instances where such concessions result in the payment for otherwise empty seats.

not require other businesses in the public or private sectors to generally undertake, or which it would only do commercially at higher prices”.

The ACT Government will make the further distinction, as have NSW and Victorian [G]overnments, that the relevant government directive identify a specific public benefit objective.⁵⁴

4.20. CSOs can come in the form of either subsidised services, such as bus routes that do not recover costs, or subsidised consumers, such as fare concessions to pensioners.

4.21. CSOs commonly occur as cross subsidies within an organisation. For example, the uniform cost of posting a letter throughout Australia means that a letter posted to or from a remote region, which costs more than the price of a stamp to deliver, is being subsidised by payments for letters on cheaper routes.

4.22. Under competition policy, CSOs need to be explicitly defined and accounted for. It is considered to be more efficient if the community becomes aware of what CSOs they are paying for and can make rational decisions about whether such CSOs should be maintained.

Identification of CSOs

4.23. Witnesses argued that, for the proper working of competition policy, CSOs need to be explicitly identified. This process requires rigorous examination and consultation because not all CSOs are self evident and organisations may not be aware of all the CSOs they fulfil. In the example of postal services above, an assessment of CSOs that only looked at the price of sending a letter would miss the wider implications of postal services in maintaining remote communities. Removal of costly remote services may not only mean the loss of a convenient mail facility but the loss of a community—an effect that may run counter to other economic and social policies.⁵⁵ Similarly, the removal of unprofitable bus routes may have wider implications for a community than increased transport cost, such as impacts on land values, road infrastructure, development and social services. The Australian City Transit Association Inc. noted that:

It is very important to establish what public transport can contribute and not for public transport to be treated as the poor relation but to actually participate in determining what the objectives of the community and the area are. These benefits are frequently of a much greater nature than those that are contained within the subsidies paid or the contract prices paid for public transport operation. This is not readily apparent to most people because subsidies to private transport are contained within general budgets such as those concerning road construction, the provision of land for parking, the provision of police for

⁵⁴ ACT, “Community Service Obligations: Definitions and Guidelines for Consideration within the ACT Public Sector”, pp 2–3.

⁵⁵ Quiggin, Submission No 7, p 2–3.

*traffic control, the provision of traffic management in the shape of traffic lights and the costs resulting from accidents and pollution and noise and loss of air quality etc.*⁵⁶

4.24. It was claimed that the specification of CSOs tends to be a first step in their elimination. That may be because it becomes apparent that the benefits do not justify the costs but can also be due to CSO costs appearing as part of the budget sector, whereas the earnings of government business enterprises are “off budget”, or because of the failure to exhaustively specify the benefits of a CSO. To enable rational decision making in relation to CSOs, there must be transparency in relation to benefits as well as costs.⁵⁷

4.25. It was put to the Committee that there are serious difficulties in assigning a monetary value to many CSOs. Further, in many human services it may be impossible to separate CSOs from the prime function of the enterprise. There are also CSOs which deal with the nature and quality of a service delivery, including information provision, grievance procedures and physical access, which cannot be “cashed out”.⁵⁸

4.26. Two major concerns raised by witnesses was that they thought that CSOs were a neglected aspect of the Government’s reform agenda and that the community was being excluded from having input into how to address CSOs. The Community Information and Referral Service characterised the Government’s response to questions about CSOs as being:

*“Butt out. This is our concern. The Government will develop the CSOs and then tell you what they are.” I do not think that is an acceptable option, especially when you are talking about ACTION and especially when you are talking about ACTEW. I think ACTEW is a very interesting case in point, given that its objectives actually talk about social responsibility and they talk about maintaining ecological and environmental standards, yet we have had absolutely no indication since it has been corporatised as to how that is going to be undertaken, and that is a major concern.*⁵⁹

The Cost of Competition

*...I wondered whether people really appreciated that competition is about winners and losers. If you introduce a competition policy, there will be some people who will win and some people who will lose.*⁶⁰

4.27. Competition policy works by redistributing resources according to market demand. It is believed that, usually, such redistribution will result in a more

⁵⁶ Australian City Transit Association Inc., Submission No 12, Attachment 1, p 2.

⁵⁷ Quiggin, Submission No 7, p 3.

⁵⁸ ACTCOSS, Submission No. 11, pp 12–3.

⁵⁹ Community Information & Referral Service, *Transcript of Proceedings*, p 56.

⁶⁰ ACTEW, *Transcript of Proceedings*, p. 19.

efficient economy and provide flow on effects that will benefit everybody. However, such redistribution will have adverse short term effects on some people and may have some long term effects which are not to the benefit of all. It is often those most vulnerable in our economy, such as low wage earners, who bear the cost of competition policy.

4.28. Professor Quiggin noted that:

An important feature of microeconomic reform is that many apparent [social] benefits actually reflect transfers of wealth between groups in society. Employees in general, and public employees in particular have been important losers from many reforms. Increasing the intensity of work has been one of the characteristic features of microeconomic reform. Cost savings from increased work intensity are not properly regarded as net increases in social welfare, but simply represent a transfer from workers to employees.⁶¹

Employment

4.29. A number of witnesses argued that many of the “cost reductions” achieved through competitive tendering and privatising government services were not productivity gains but a shifting of costs, often from employers to employees. Such “savings” were often achieved by non-government service providers not needing to comply with various standards government imposes on itself, particularly in relation to wages and employment conditions.⁶² Such cost shifting comes in the form of reduced employment, lower wages, extended hours and reduced conditions. The areas most affected by these costs tend to be those areas dominated by those most vulnerable in the labour market, such as women, employees from a non-English speaking background, relatively unskilled employees and older employees. At a time where there is an increasing division between rich and poor, technological improvements are providing increased potential for leisure and there is high unemployment, it is socially regressive to transfer costs to workers, making those in employment work harder and longer for less.⁶³

“Weak” Consumers

4.30. Not all consumers in a market have equal power. In the water and energy markets, domestic consumers are in the weak position of having little ability to change their need for a service while having little power in the market place compared to large industrial consumers. The market power of large consumers in the contract market can entice providers to discount in order to gain more lucrative contracts while domestic consumers in the tariff market must take

⁶¹ Quiggin, Submission No 7, p 2.

⁶² CPSU, Submission No 2; Australia Institute, Submission No 3; Quiggin, Submission No 7; see also ACTU/ACOSS *Study Program on Structural Adjustment and Social Change*.

⁶³ Quiggin, Submission No 7; p 2.

whatever price is offered. There may be little incentive to keep prices down in the tariff market and, if prices are not regulated, cost in the contract market may be subsidised by the tariff market.⁶⁴

4.31. Concerns were also raised about the effect of flat usage charges on low income families as they result in a very high proportion of income being spent on such utilities:

*Flat usage charges, connection fees and minimum prices are by their nature regressive because of the high level of inelasticity of demand of domestic consumers in energy and water. The regressive nature of these pricing packages has resulted in parallels being drawn with taxation theory, ie. so long as these utilities are owned by government, uniform charges are analogous to a poll tax.*⁶⁵

Environment

*Those who are charged with the implementation of the competition policy might like to think about the terms of reference for their own legislative review. What is concerning about this, too, is that not only do you look at the legislation once, you have to revisit that legislation every 10 years. People who have an economic interest in a particular resource, as they would see it—other people might think it is a national asset that should be preserved for posterity, but there are people who would see that as a resource that has a dollar value, which could be converted at any time—could be very active during the 10-year period, lobbying, making deals with government, seeing that something that had been preserved as something that has business potential and therefor its protection is anti-competitive.*⁶⁶

4.32. Concerns were raised in relation to the possibility that the enforcement of environmental standards may be contrary to the principles of competition as any such enforcement is an intervention in the market.⁶⁷ This was particularly a concern where services previously provided by the government are contracted out or privatised as the private sector lacks many of the constraints upon government to ensure the safety of the environment and does not have the same level of public accountability.⁶⁸

4.33. It was also argued that competition in industries dependent on non-renewable resources, particularly energy and water utilities, could have adverse environmental effects as the profit motive leads providers to encourage more use of those non-renewable resources. ACTEW argued that competition may have the opposite effect (see paragraph 4.48. below) while also citing examples of

⁶⁴ ACTCOSS, Submission No. 11, pp 7–10.

⁶⁵ ACTCOSS, Submission No. 11 p 9; also Quiggin, Submission No 7; p 4.

⁶⁶ ACF, *Transcript of Proceedings*, p 118.

⁶⁷ ACF, *Transcript of Proceedings*, p 118.

⁶⁸ CPSU, Submission No 2, pp 4–6.

energy producers who wished to increase market share for profit regardless of the environmental imperative to reduce consumption of non-renewable resources.⁶⁹

4.34. The Institute of Engineers, Australia, had concerns that an emphasis on competitive pricing in project development would reduce the opportunities to develop cost effective and environmentally sensitive designs, leading to increased costs and impact on the environment.

Small Business

4.35. The Council of Small Business Organisations Australia (COSBOA) raised concerns about the paucity of knowledge of the effect of competition policy on small business, particularly in relation to the public benefit. COSBOA argued that large, capital intensive businesses often move into markets created by small labour intensive businesses and, using their superior capital strength, secure the market. In doing so these firms reduce employment and redistribute wealth to their shareholders that tend to be outside the local community or even the country. Sufficient work has not been done to determine the long term effects of such changes, even though there are obvious causes for concern in relation to employment levels and the prosperity of local communities.

4.36. COSBOA claimed that the ACCC was unable to take account of the effect on employment when considering the public benefit in relation to exemptions for anti-competitive behaviour under the TPA. COSBOA argued that the community depends on the small business sector to create employment opportunities, a matter of great significance to the public benefit, and that such issues need to be taken into account when considering matters under competition policy.

*Unfortunately, when we go in and say "collectively we are displacing people and knocking people over in terms of employment", it is almost impossible to factor that employment argument back into the public benefit clauses of the Trade Practices Act. That in itself, is not a reason to toss out the Trade Practices Act, but we must stop pointing to the Trade Practices Act as having the capacity to solve this problem because it cannot do it, and Allan Fels says it cannot do it.*⁷⁰

4.37. COSBOA were also concerned that the meaning of "competition" under the TPA ignored small business as a market was considered competitive merely if it contained two or three major players:

...according to the Trade Practices Act, if you have got four or five players in the market, then competition is effectively occurring. In retail we have three or four major players, but they own a heck of a slice of retail, and, whilst those elephants fight, they are squashing the heck out of the pygmies that really do employ the

⁶⁹ ACTEW, *Transcript of Proceedings*, p 24.

⁷⁰ COSBOA, *Transcript of Proceedings*, p 68.

*nation. Then those pygmies come forward and say, "Look, this is not competition, Woollies or Coles or K-Mart has just squashed us flat here."*⁷¹

Self Regulation

4.38. A number of witnesses were concerned about the preference for self regulation expressed by the IC in its report on the Growth and Revenue Implications of Hilmer.⁷² To illustrate this concern, witnesses referred to the IC's using the meat industry as an example of successful self regulation.

*The [IC] reports cite a number of examples of success in removing government regulation, including the meat industry. Most consumers (and many producers) probably believe that the costs of the recent meat contamination scandals far outweigh any so-called benefits resulting from the deregulation of this industry.*⁷³

4.39. Professor Quiggin's calculations of the economic benefits of self regulation, using the IC's assumption that 10 per cent of the economy would be affected, produced a productivity gain of 0.02 per cent of GDP, compared with the IC's prediction of a 0.1 per cent gain, which converted to 0.28 per cent under the ORANI model. Quiggin concludes that:

*Against this [0.02% GDP gain] must be set any losses associated with declining standards of quality under self-regulation. The examples of the meat industry, airline regulation and banking all suggest the reality of this possibility. Final social gains are likely to be no more than half those computed above [ie, 0.02% GDP], if indeed they are positive.*⁷⁴

4.40. Concerns were also raised in relation to deregulation and the maintenance of standards in relation to the environment, community safety and occupational health and safety, particularly with the de facto deregulation that may occur as services are contracted out of the public sector and the administrative law requirements that apply there.⁷⁵

Exaggerated Benefits

4.41. It was argued by a number of witnesses that the benefits from competition policy had been greatly exaggerated, with the 5.5% of GDP benefit being projected by the Industry Commission⁷⁶ being contrasted with studies by Quiggin

⁷¹ COSBOA, *Transcript of Proceedings*, p 67.

⁷² Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, pp 138–40.

⁷³ CPSU, Submission No 2, p 8.

⁷⁴ Quiggin, "The Growth Consequences of Hilmer and Related Reforms", p 18.

⁷⁵ ACTCOSS, Submission No. 11, pp 13–5,

⁷⁶ Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, March 1995, p 83.

which project benefits of a carefully implemented policy being no more than 0.5% of GDP.⁷⁷

4.42. Similarly, it was said that the projected benefits for contracting out were unrealistic extrapolations from activities that were the most suited to being contracted. Most other activities were less suited; contracting out leading to either smaller gains or losses, particularly when the pitfalls outlined at paragraph 4.12. were considered.⁷⁸ It was argued that careful assessment of the costs and benefits need to be conducted on a case by case basis before activities were contracted out.

4.43. New Zealand, which has undergone a relatively radical microeconomic reform programme over the last few years, has been held out as an example of the benefits that come from such reform. “In terms of such basic indicators as per capita GDP growth, saving, investment, inflation, employment, unemployment, and the current account deficit, the New Zealand economy has performed very well in the 1990’s (both relative to Australia and in terms of its own past history).⁷⁹ However, there are clear indications that there may not have been the net benefits to the community that such figures would suggest.

Taken in isolation, these are impressive economic results, and many commentators see them as clear proof of the superiority of the New Zealand microeconomic reform path relative to Australia’s. On the evidence and analysis presented in the ACTU/ACOSS paper it is premature to draw such a conclusion.⁸⁰

4.44. The ACTU/ACOSS report presented evidence that suggested that New Zealand’s better economic growth:

- appears to be due to a more rapid accumulation of raw factors of production (capital and Labour) rather than to relative improvements in resource utilisation or in the quality of human capital;
- can be attributed to temporary factors; and
- comes at a high, at least short term, social cost

The report suggests that the microeconomic reforms to date have not produced productivity increases and that the losers have been low wage earners.⁸¹

Presumption of goodness of competition

4.45. Competition policy entrenches the presumption that competition will always be in the public benefit. Although that presumption may be countered,

⁷⁷ Quiggin, Submission No 7, p 1.

⁷⁸ Quiggin, “The Growth and Revenue Implications of Hilmer and Related Reforms”, pp 11–3.

⁷⁹ ACTU/ACOSS, *Study program on Structural Adjustment and Social Change*, p i.

⁸⁰ ACTU/ACOSS, *Study program on Structural Adjustment and Social Change*, p i.

⁸¹ ACTU/ACOSS, *Study program on Structural Adjustment and Social Change*, pp i–v.

doing so requires meeting a heavy onus of proof and any exemptions must be reviewed regularly against that heavy onus, in the case of regulations, every 2 years, or enactments, every 10 years.

Any requests for exemptions or authorisations would need to be stringently examined and agencies would need to put forward very strong public interest reasons why the conduct should be exempted from Part IV.⁸²

Why is it that we have a Business Regulation Review Council, that places all things against the measure of its competitiveness? Why do we not have a council of environment regulation review that looks at anti-environment legislation and invites interested parties to rebut the presumption that such regulation is in the greater public interest?⁸³

4.46. Witnesses were concerned about the weight of the onus of proof required to rebuff the presumption of the goodness of competition. Although in most instances competition may be in the public interest, it was thought that, of all the factors relevant when determining the public interest, competition should not be given such priority at the expense of other factors. It was argued that there was little basis for exempting competition from having to prove its case in regard to the public interest when confronted with social or environmental concerns, particularly when those raising such concerns are often the least resourced to research and argue the case in relation to reasonable concerns.

Why is it not necessary for those who think that the legislation interferes with business to have to prove that point? No, the onus is on the community, which is the least resourced to do so, to rebut the presumption that the anti-competitive legislation is not in the public interest.⁸⁴

Specific Consequences of Competition Policy

4.47. Government business activities which are likely to be subject to coverage of Part IV of the TPA from July 1996 include:⁸⁵

Capital Markets

⁸² Letter from Executive Director, Industry Policy and Regulatory Reform to the Secretary, 9 April 1996.

⁸³ ACF, *Transcript of Proceedings*, p 120.

⁸⁴ ACF, *Transcript of Proceedings*, p 118.

⁸⁵ ACT Government, Submission No. 6, Attachment E

Community Nursing—for that part of its operation which provide services to other governments

Analytical Laboratory—for that part of its operation which competes with private providers for private activities

Pathology—for that part of its operation which compete with private providers for private activities

National Exhibition Centre—rental of facilities

ACT Milk

Totalcare Industries

ACTTAB

CIT Solutions—fee for training and related commercial activities

Australian International Hotel School

ACTEW

ACT Housing—loan retailing, rental housing and tenancy management, property development

ACTION

ACT Forests

Yarralumla Nursery

Canberra Public Cemeteries Trust

ACT Capital Works

ACT Landscape

ACT Fleet

Land Development

Joint Ventures

Land Information Office

Environment Protection Service

Hazardous Chemicals and Wastes Section

Agriculture and Landcare Section

EPIC

Sport and Recreation Facilities

Bruce Stadium

Canberra Theatre Trust

Public Trustee

Australian International Hotel School

Full Fee Paying Overseas Students

Canberra Institute of Technology

ACT Accredited Agency

Private patients in public treatment

ACT Ambulance Service

ACT Electricity & Water

4.48. ACTEW argued that competition policy should enhance ecologically sustainable development objectives in relation to electricity as:

- it would lead to spot purchasing for half hour periods from a variety of sources instead of current averaged bulk purchasing which would make renewable sources of electricity more economical during peak periods;
- the reduction of cross subsidies to remote users would improve the economics of remote area power systems such as solar power;
- it will result in improved customer information on more efficient use; and
- the market will reward good environmental practices.

4.49. ACTEW also considered that, while competition policy should lead to an overall benefit to consumers, some consumers will be disadvantaged, particularly those consumers who currently enjoy cross subsidies. ACTEW claimed that where such cross subsidies meet community service obligations, such obligations should be addressed by government rather than ACTEW.

4.50. As outlined from paragraph 4.19. above, a number of witnesses raised concerns in relation to the meeting of CSOs by energy and water utilities. Particular concerns were raised in relation to the failure of responsibility for CSOs to be determined between ACTEW and the government prior to corporatisation. As a result, changes were occurring within the organisation, for example its billing procedures, without thought going into CSOs as responsibility for them has not been allocated. Decisions were made affecting CSOs without full consideration of their implications on CSOs. As the Government had not addressed the issue of CSOs in ACTEW, it was left to organisations such as ACT Council of Social Services (ACTCOSS) to put them on the agenda.⁸⁶ Such a process was falling short of the aims of competition policy in making transparent and deliberate choices in relation to the CSOs the community wishes to maintain.⁸⁷

If enterprises in critical areas such as water and energy are to be corporatised, it is necessary that the impact of their activities on the environment should be controlled by regulatory bodies with teeth, in the form of a clear mandate to protect the environment, and power to direct the activities of corporatised firms and penalise them for breaches of regulations.⁸⁸

4.51. The Australian Conservation Foundation (ACF) argued that the extent to which competition theory and market forces can resolve problems in the management of natural systems and structures must be questioned. In particular, it claimed that competition reforms in the electricity sector were focussed on the supply side, rather than an integrated approach which incorporated demand management. There was also a supply over-capacity in most states, and that strengthened the need for a integrated approach to ensure that demand-side and supply-side options for the provision of energy services were considered on an equal basis in the planning process. ACF considered that the processes for achieving competitive markets in the electricity sector were failing the regulatory intervention needed to bring about an integrated approach to energy management.⁸⁹

⁸⁶ ACTCOSS, *Transcript of Proceedings*, pp 100–1.

⁸⁷ cf, Quiggin, Submission No 7, p 3.

⁸⁸ Quiggin, Submission No 7, pp 3–4.

⁸⁹ Australian Conservation Foundation, “Case Study on Potential Implications of National Competition Policy for the Water Industry”.

Technical and Further Education

4.52. Mr Fooks raised concerns about the application of “contestable funding” and “user choice” to Technical and Further Education (TAFE).

4.53. Mr Fooks was concerned that, if TAFE was funding by of contestable funding, whereby the Canberra Institute of Technology would compete for its day-to-day funding by competitive tender against other potential providers, the non-commercial education services of TAFE would fall under the TPA. It was feared that this could happen without the full consideration of its costs and benefits, CSO implications, and effect on the public interest as required under the Competition Principles Agreement.

4.54. Attention was brought to the National Board of Employment, Education and Training’s report, *Making the Future Work*, and its comments on tendering for labour market programs. The report said that “the tendering process for the delivery of labour market programs is having a number of unintended and unwanted consequences”, including:

- unproductively rivalry and waste through duplication of services and facilities;
- needs of clients becoming “secondary to the never-ending process of chasing funds;
- claims that TAFE colleges being awarded tender for expensive courses while private providers win the tenders for courses cheaper to run;
- consumption of time and resources in preparing tender bids; and
- lack of security resulting from single year contracts.⁹⁰

4.55. The Minister for Education considered that the Bill would have little impact on the non-commercial aspects of CIT and that “the linking of reform of TAFE in Australia and Hilmer style reforms is unfortunate.”⁹¹

ACT Milk Authority

4.56. The Milk Authority noted that, prior to regulation in 1971, ACT’s milk had the highest price in Australia. Today, the ACT and the other two remaining regulated jurisdictions have the lowest price, with major supermarkets being the de facto price regulators elsewhere. The Milk Authority claimed that, while under its aegis, the ACT has maintained a reliable supply with a broad range of products, being the only jurisdiction to still offer milk in refillable glass bottles, with a home vending system catering for the needs of many of the less mobile.

⁹⁰ National Board of Employment, Education and Training, *Making the Future Work*, October 1994, AGPS, p 67.

⁹¹ Mr Bill Stefaniak MLA, Minister for Education, Letter to the Chair, 26 March 1996.

4.57. As the *Milk Authority Act 1971* does not provide any explicit shield from the TPA, it has been unclear whether the Milk Authority has been subject to the TPA. “The direct impact of the Competition Policy Reform Bill on the Milk Authority is essentially to formalise what has until now been the subject of debate as to whether or not the authority has the shield of the Crown...”⁹² The Milk Authority is shortly to review its practices with a view to determining their position under the TPA.⁹³ Activities whose position is not clear under the TPA include:

- price fixing;
- home vending licensing
- retail licensing
- processing and packaging and wholesale distribution tendering (third line forcing?)

4.58. The Competition Principles require that the regulatory and business functions of the Milk Authority be separated.

⁹² ACT Milk Authority, *Transcript of Proceedings*, p 87.

⁹³ ACT Milk Authority, *Transcript of Proceedings*, p 87.

Chapter Five: Options for Achieving Benefits

Competition Policy Reform Bill 1995

5.1. The Committee notes that the enactment of the Bill:

- has little practical effect on the application of the TPA in the ACT;
- enables the ACT to enact exemptions to Part IV of the TPA; and
- is necessary to enable the ACT to enjoy the benefits of being a party of the Competition Policy Agreements, notably: additional Commonwealth funding; participation in the appointment processes for membership of ACCC and NCC; and participation in discussions between parties.

5.2. The Committee considers that the implementation of competition policy may provide some economic benefits to the ACT and consumers, although this has not been shown conclusively, and that the costs and negative impacts have not been adequately investigated. The Committee notes there is little choice but to enact the Bill but believes there must be serious considerations given to developing mechanisms for the protection of social and environmental concerns .

Recommendation 1

5.3. The Committee recommends that the Assembly enact the Competition Policy Reform Bill 1995.

National Competition Policy

A key policy tool in [regard to accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives] is that notion that the costs and benefits of alternative policy options should be evaluated in an open and rigorous way.⁹⁴

[The Bill] will allow the opportunity for a whole range of changes that we would argue must be very closely monitored, and we would argue that that monitoring will require some degree of transparency and public accountability. I think, if there is any message we would like to present to you, it is the fact that these are concerns in which the community has a significant interest. They must not occur on an ad hoc basis, and they must not occur exclusively within the sphere of government.⁹⁵

5.4. As noted at 3.1., the majority of submissions focussed on the wider implications of the National Competition Policy rather than merely the Bill. The Committee considered that it should respond to these concerns as far as practicable within its inquiry.

⁹⁴ *National Competition Policy: Report by the Independent Committee of Inquiry*, p 7.

⁹⁵ ACTCOSS, *Transcript of Proceedings*, p 96.

5.5. The Committee noted that, while there was widespread concurrence with the belief that economic efficiency was generally to be gained through the maintenance of competitive markets by such mechanisms as Part IV of the TPA, there were significant concerns in the community in relation to:

- the failure to adequately address Community Service Obligations when restructuring government services;
- activity where the cost of introducing competition outweighed the benefits; and
- the National Competition Policy Agreements being used as a justification for restructuring government service provision where it was not directly relevant and without the safeguards written into the Agreements.

5.6. One of the aims of introducing the principles of competitive neutrality to GBEs is to enable the government to know what it is paying for when it provides services at less than market value. The separation of the cost of CSOs from business activity enables the government to make rational choices about whether the community should be spending that money for that community benefit or whether the community's money is better spent elsewhere. Competition Policy is to be neutral to the question of whether a CSO should be provided but is to make such subsidies explicit. The Government's guidelines on CSOs state that:

It is imperative for the improvement in the commercial performance of GBEs and other government business activities that commercial and non-commercial activities are identified and separated. This separation will give management clear and non-conflicting objectives, thus enabling it to be accountable for both commercial performance and the delivery of the Government's social objectives.⁹⁶

5.7. Competition Policy makes CSOs vulnerable to definite Government policy rather than existing as a hidden expense. That is of benefit to the community if the Government is actively addressing the question of whether such CSOs should be provided. If CSOs are separated out in the absence of Government policy on whether they should be provided, they will be lost by default rather than by choice. Adopting the explicit rational approach to CSOs required by competition policy requires that Government actively examines every CSO provided and considers whether it wishes to continue to provide that CSO and if so, how to provide it within a competitive environment.

5.8. It was of concern to the Committee that the Government had not adequately addressed the question of CSOs in its restructuring of ACTEW, with instances of both the Government and ACTEW denying responsibility for the provision of a CSO resulting in it not being fulfilled.⁹⁷ ACTCOSS also noted an instance where ACTEW reorganised its billing system and only after the event sought advice on whether those

⁹⁶ ACT Government "Community Service Obligations: Definition and Guidelines for Consideration within the ACT Public Sector, p 1.

⁹⁷ *Transcript of Proceedings*, pp 30–1.

changes might have any adverse effects on customers.⁹⁸ Such occurrences fail to meet competition policy's aim of rational and transparent handling of CSOs.

5.9. It is essential that the Government have in place a comprehensive CSO policy to ensure that it actively addresses the fulfilment of CSOs prior to restructuring services.

5.10. The Committee also notes concerns raised by witnesses⁹⁹ that Government may not always be aware of the extent of the CSOs it fulfils or the full implications of restructuring on the community (see 4.23. above). The Committee considers that any Government CSO policy must include a mechanism for community consultation.

5.11. The Committee notes that the Government's CSO guidelines allocate policy responsibility for CSOs to sponsoring departments.¹⁰⁰ The Committee believes there must be a system for public monitoring of CSOs.

Recommendation 2

5.12. The Committee recommends that the Government reports to the Assembly on the identification and costing of each community service obligation provided by a government service before exposing that service to competition. The Committee also recommends that the Government develop explicit community service obligations for ACTEW in consultation with the community and report to the Assembly by the August sittings.

Recommendation 3

5.13. The Committee recommends that the Government directs agencies to include a process of community consultation when identifying and assessing community service obligations.

Recommendation 4

5.14. The Committee recommends that Annual Reports for all areas of government business activity include a report on the consultation process for and the fulfilment of community service obligations.

Recommendation 5

5.15. The Committee recommends that the Government reviews its provision of community service obligations at least every two years.

5.16. The National Competition Policy has a number of public interests tests in recognition of the fact that the application of competition policy may not always be in the public interest. As outlined in paragraphs 2.10. to 2.19., the TPA allows

⁹⁸ ACTCOSS, *Transcript of Proceedings*, p 100.

⁹⁹ ACTCOSS, Submission No. 11; Australia Institute, Submission No 3.

¹⁰⁰ ACT Government "Community Service Obligations: Definition and Guidelines for Consideration within the ACT Public Sector, p 6.

exemptions to Part IV if they would result in a benefit to the public. Similarly, the Competition Policy Agreement requires an assessment of the public interest when governments are implementing competitive neutrality principles, restructuring public monopolies and conducting legislation reviews.

5.17. A key to competition policy is maximising efficiency by making decisions regarding the form of Government service provision on the basis of a rational assessment of all the costs and benefits of different options.

5.18. A number of witnesses expressed the view that Government needs to seek public input when assessing the benefit to the public of different ways of delivering services. ACTCOSS commented on determining the public interest as follows:

Our fear is, and our experience would suggest this, that we may find that those decisions are being made internally within government without reference to the public. The public interest cannot by definition be determined by Government; we must be crystal clear about that. Government is not the only decider or arbitrator of the public interest and to take on that role, in many respects, would fly in the face of the competition principles agreement because they have explicitly indicated the range of interests that ought to be canvassed. I fail to see how they could canvass them but not communicate with the players who hold those interests.¹⁰¹

5.19. The Committee notes the concern of a number of witnesses that moves towards competitive tendering and outsourcing may be occurring as a result of ideological commitments or the momentum for change rather than a reasoned consideration of the public interest in every instance. The Committee considers that, in line with the competition policy agreements, such changes should, in every instance, be subject to a determination of the costs and benefits to the public. The Committee notes that public benefit under the TPA includes “anything of value to the community generally”¹⁰² and under the Competition Principles Agreement includes the wide list of matters in clause 1(3).

5.20. The Committee notes that the Competition Principles Agreement focuses on significant GBEs while contracting out, outsourcing and the introduction of quasi markets are being considered at all levels of Government activity. The Committee considers that full consideration of the public interest is required whenever such changes are being considered.

5.21. The Committee was frustrated by the lack of detail about the implementation of competition policy in the ACT. The Committee was greatly concerned that the range of reforms which were being pursued under the banner of competition policy were occurring with an apparent absence of: an understanding of the full implications of the

¹⁰¹ ACTCOSS, *Transcript of Proceedings*, p 103.

¹⁰² Victoria Newsagency (1994) *ATPR* 41–357 at 42,677, quoted in *Guide to authorisations and notifications*, ACCC, p 19.

reforms; a policy on the details of the reforms; or a strategy to address the problems raised by the reforms.

Recommendation 6

5.22. The Committee recommends that, when implementing competitive neutrality principles, restructuring public monopolies, and reviewing legislation for anti-competitive effects, the process for addressing the matters referred to in clause 1. (3) of the Competition Principles Agreement be open to public scrutiny and include provision for public input.

Recommendation 7

5.23. The Committee recommends that the Government consider the matters in clause 1. (3) of the Competition Principles Agreement when considering outsourcing or competitive tendering.

Recommendation 8

5.24. The Committee recommends that the Government establish a forum to provide ongoing monitoring and advice on the implementation of competition policy. Such a forum should include representatives of community, environmental, consumer, union, business and academic organisations

Intergovernmental Agreements

5.25. The experience of the Committee raised questions in relation to the process by which intergovernmental agreements are made. As noted above, a number of witnesses commented that they saw this inquiry as their only opportunity to comment on the Intergovernmental Agreements on Competition Policy. If the Agreements did not require the introduction of the Bill the matter need not have come before the Assembly at all, apart from reference in the Chief Minister's report on the relevant COAG meeting. The Committee was concerned that the process through which intergovernmental agreements are made, agreements which often have a significant effect on the ACT, may often be rushed and occur behind closed doors with little opportunity for input from or accountability to the Assembly or the community.

5.26. The Committee notes that the Legislative Assembly of Western Australia has established a Standing Committee on Uniform Legislation and Intergovernmental Agreements, who's terms of reference include:

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

Recommendation 9

5.27. The Committee recommends that the Assembly gives consideration to developing mechanisms to increase its involvement in the making of intergovernmental agreements.

Rosemary Follett
Chair
15 April 1996

Appendix A: Submissions

1. Mr Des Fooks
2. Community and Public Sector Union ACT Branch
3. The Australian Institute Ltd
4. Community Information and Referral Service of the ACT Inc
5. ACTEW Corporation
6. ACT Government
7. Prof John Quiggin
8. Milk Authority of the ACT
9. The Institution of Engineers, Australia - Canberra Division
10. Council of Small Business Organisations of Australia Ltd
11. ACT Council of Social Services
12. Australian City Transit Association
13. The Business Women's Network

Appendix B: Public Hearings

Monday, 12 February 1996

ACT Government

Vlad Aleksandric Dept of Business, The Arts, Sport & Tourism
(DBAST)
Colin Thomas DBAST
Colin Adrian Chief Minister's Department (CMD)
Robyn Sheen CMD
Peter Quinton Attorney-General's Department

ACTEW Corporation

Alan Morrison
David Graham

Mr Des Fooks

Tuesday, 13 February 1996

The Australia Institute Ltd

Clive Hamilton

Community Information and Referral Service of the ACT Inc

Adam Stankevicius

Council of Small Business Organisations Aust.

Rob Bastian

Small Business Council

Norman Henry

Aust Institute of Engineers, Canberra Division

Frank Wilkinson

Allan Johnson

Wednesday, 14 February 1996

Milk Authority

Clinton White

ACTCOSS

Lyn Morgain
Ian De Landelles

John Hyndes

Community & Public Sector Union ACT Branch

Cath Garvan

Australian Conservation Foundation

Di Dibley

