AUSTRALIA

(July 1997 - June 1998)

Executive Summary

1. The major legislative changes associated with the developments of the national competition policy were enacted in 1995-96. During 1997-98, there has been some fine tuning of the law, mainly in relation to industry codes of conduct and the power of the Australian Competition and Consumer Commission (the ACCC) to vary authorisations of market conduct. Several guidelines in relation to regulatory best practices and mergers were also published.

2. The Australian Competition and Consumer Commission (ACCC) continues to treat the enforcement of national competition statute, the *Trade Practices Act 1974*, and the State/Territory counterpart – the Competition Code, as a matter of high priority. The ACCC was successful in bringing its first action under a State Competition Code in 1998. The ACCC has also been involved in a number of 'high profile' enforcement matters in 1997-98, particularly in relation to boycotts on Australia's waterfront and merger proposals in the emerging pay TV industry.

3. Microeconomic reform processes are continuing in key sectors of the economy. A new deregulated telecommunications market commenced on 1 July 1997 resulting in a number of new carriers entering the market over the past twelve months. The second stage of development for the National Electricity Market (established in May 1997) is expected to be completed towards the end of 1998 and a National Access Code for natural gas pipelines has been established.

4. There has also been some significant privatisations over the past year. The Federal Government sold one third of Telstra, the incumbent telecommunications provider, and has indicated an intention to fully privatise it. However, the Federal Government would remain the majority shareholder (i.e. hold at least 51% of shares) in Telstra until such time that an independent inquiry is satisfied Telstra is meeting certain quality of service standards. In addition, all the major metropolitan airports (except for Sydney) have been transferred to private ownership.

Federal Election – 3 October 1998

5. A Federal election will be held in Australia on 3 October 1998. References in this report to the intentions of the Federal Government reflect the policies of the current Government. Implementation of some policies will be dependent of the outcome of the election.

Part I - Changes to Competition Laws and Policies

6. Australia's general competition laws are contained in the *Trade Practices Act 1974* (TPAct) and the Competition Code which has been adopted by all the States and Territories. These laws are

administered by a single independent agency, the Australian Competition and Consumer Commission (ACCC). As indicated in last year's report most of the major legislative changes to implement the national competition policy (established in 1995) were put in place in 1995-96. However, there have been minor amendments to Australia's competition laws during 1997-98 as part of the evolution of the national competition policy package.

Recent amendments to competition laws

Authorisations

7. The ACCC has the power to authorise conduct that would otherwise breach Australia's competition laws where it is satisfied that the public benefit arising from that conduct outweighs any public detriment that would result. The ACCC has recently been given an additional power to vary existing authorisations. Previously, the ACCC could only revoke existing authorisations and parties would have to apply for a completely new authorisation. This amendment will enhance the procedural flexibility of the ACCC's power with respect to authorisations. This is particularly relevant to the Australian gas industry which is subject to several existing authorisations.

Industry Codes of Conduct

8. In April 1998 the Federal Government introduced a mechanism for prescribing industry codes of conduct under the TPAct. Industry Codes may be prescribed by a Federal Minister as either mandatory or voluntary codes of conduct. Prescribed codes will be 'underpinned' by the TPAct in that a breach of the provisions of the code will be treated as a breach of the TPAct itself and will invite a range of remedies available under the Act, including damages. A franchising code of conduct has already been prescribed as a mandatory code and it is anticipated that an 'Oilcode' for the petroleum industry will be similarly prescribed in 1999.

Proposed changes to competition laws

Representative Actions by the ACCC

9. The Federal Government is proposing to give the ACCC the ability to undertake 'representative' or 'class' actions on behalf of small businesses against corporations that may have contravened the competition laws. This will enhance the possibility of small businesses adversely affected by anti-competitive conduct obtaining compensation or other remedial relief (e.g. injunctions).

Competition policy related amendments

Removal of Parallel Importation Restrictions on Compact Discs

10. In July 1998, Parliament removed the parallel importation restrictions on sound recordings, including compact discs.[1] This allows the legal importation into Australia of legitimate copies of sound

recordings for commercial purposes, without further consent from the copyright holder to distribute them locally being required.

11. Parallel import restrictions enable some major recording companies to practise international price discrimination. Like any oligopoly, some major recording companies have raised prices and reduced the availability of sound recordings in Australia. The Government expects that average prices in mainstream CD markets should fall between 10 and 20%, as bargaining power is exercised, efficiencies are realised and demand increases. The expectation is that lower prices will generate higher demand, which will create jobs in the industry.

12. The penalties for piracy have been substantially increased. In civil actions, the onus has been placed on the importer or the dealer to prove that recordings are legitimate and not pirated.

Competition policy related guidelines

Merger Guidelines

13. In October 1997 the ACCC released guidelines which set out its approach to mergers, acquisitions and other collaborative arrangements that aim to enhance exports and the international competitiveness of Australian industry. These guidelines entitled *Exports and the Trade Practices Act* are designed to act as a supplement to the revised *Merger Guidelines* issued by the ACCC in 1996. In addition, the ACCC issued a publication providing a statistical summary and other relevant information about the manner in which it administers the merger provisions of the TPAct.

Competitive Neutrality Guidelines

14. All Australian governments have expressed a commitment to implementation of competitive neutrality principles. Competitive neutrality requires that government business activities do not have any net competitive advantages over their private sector competitors simply as a result of their public ownership. In early 1998, the Federal Government issued *Competitive Neutrality Guidelines* to assist managers of government businesses and/or government tender processes to implement competitive neutrality principles. The Federal Government has also established an independent Competition Neutrality Complaints Office within the Productivity Commission to receive complaints, undertake investigations and provide independent advice to the Treasurer on application of competitive neutrality to Federal business activities.

Regulation-Making Guidelines

15. As part of the ongoing reform process, the Federal Government decided that all future legislative or regulatory proposals that affect business or will restrict competition should be accompanied by a *Regulation Impact Statement* (or RIS). Each RIS is to contain a clear description of the objective of the proposed legislation and regulation, possible alternative options to the proposal, and an assessment of the costs and benefits of each particular option. In October 1997, the Federal Government issued *A Guide to Regulation* to clarify when a RIS is required and the details that need to be included in any RIS. An independent Federal Office of Regulation Review monitors the compliance with the RIS processes by government departments and authorities.

Part II. - Enforcement of Competition Laws and Policies

16. This Part covers the administration of the competitive conduct rules in the TPAct and the Competition Code.

17. The TPAct and the Competition Code prohibit a wide range of restrictive trade practices, such as price fixing, boycotts, misuse of substantial market power, resale price maintenance and arrangements which substantially lessen competition, including exclusive dealing. There are also specific provisions that prohibit mergers or acquisitions that may substantially lessen competition.

18. The ACCC seeks to secure compliance with the rules in the TPAct and the Competition Code by education and bringing suitable cases before the Court in an effort to strike an appropriate balance between the goals of long term improvement in compliance, deterrent effect and achievement of compensation or redress.

19. In many other cases the ACCC negotiates settlements of matters on the basis of enforceable undertakings to cease alleged offending conduct or to provide some form of redress or compensation for affected parties.[2] Such undertakings have been enforceable in the Court since 1993 and have been used widely by the ACCC.

Anti-competitive conduct matters

20. In 1997-98 almost half of the restrictive trade practices issues investigated involved anti-competitive agreements or exclusionary provisions, including primary or secondary boycotts. In total 22 restrictive trade practices matters were litigated or were proceeding through litigation. Just over a quarter of restrictive trade practices investigations involved a small business, either as a complainant or target of a complaint.

Significant cases

J McPhee & Son (Australia) Pty Ltd

21. On 27 March 1998 Justice Heerey of the Federal Court imposed penalties totalling $4 million on J McPhee & Son (Australia) Pty Ltd and four of the company's executives in relation to price fixing in the freight industry. The Court found that McPhee and three of its executives had attempted to reach a collusive tendering arrangement with a competitor, Discount Freight Express (DFE), in 1995. A penalty of $3 million was imposed on McPhee for this incident. A director of the company, was penalised $100 000; the General Manager, $60 000; and the Business Development Manager, $80 000.

W D & H O Wills (Australia) Ltd & Brenton Porter

22. On 23 February 1998 the Federal Court imposed penalties of $250 000 on cigarette manufacturer WD & HO Wills (Australia) Ltd for its role in an attempted price fix of cigarettes. The Court accepted joint submissions on injunctions and penalty for breaches of the TPAct by Wills and a small delicatessen owner. The Court ordered that Wills pay a penalty of $250 000, pay $30 000 toward the ACCC's costs, refrain from repeating the conduct, revise its existing trade practices compliance program, and write to

each of its customers in South Australia informing them of their respective obligations under the Act. The delicatessen owner also consented to an injunction and agreed to contribute toward the ACCC's costs.

23. This was the first ACCC action under a State Competition Code, which applies the restrictive trade practices sections of the TPAct to individuals. The individual in this case was not subject to a penalty because the offence occurred during the phasing in of the Code when no penalties applied.

Maritime Union of Australia

24. On 22 May 1998 the ACCC instituted proceedings against the Maritime Union of Australia (MUA) in relation to various primary and secondary boycotts that are prohibited by the TPA. The ACCC alleged that the MUA:

- took steps to get the International Transport Federation (ITF) and its affiliates to organise and implement an international ban of ships and shipping lines which are loaded or unloaded by non-MUA labour in Australia;

- threatened ships and shipping lines that they would be the subject of such bans if they used Patrick Stevedores (Patrick) or other stevedores using non-MUA labour;

- organised a campaign of domestic boycotts of Patrick operations because it used non-MUA labour, including:

  - withdrawal of labour for tugs and lines to impede ships berthing at Patrick; and
  - blockading Patrick to stop transport companies delivering and picking up cargo.

25. The ACCC alleged that this conduct was engaged in for the purpose, and with the effect of, stopping Patrick and other stevedores using non-MUA labour from engaging in international trade or commerce, in breach of the primary boycott provisions of the TPAct.

26. On 12 June 1998 the MUA advised the Federal Court that it would write to the ITF withdrawing any call for the ITF and its affiliates to engage in boycott conduct of ships loaded by non-MUA labour in Australia between 7 April and 10 May 1998. The ACCC had been concerned at the apparent ongoing communication between the MUA, the ITF and its affiliates which suggested the continuing involvement of the MUA in the alleged international boycotts of non-MUA loaded ships. The ACCC advised the Court that the MUA's withdrawal addressed some of its concerns.

27. The ACCC also began proceedings against the MUA in relation to the boycott of stevedores serving ships formerly contracted to Patrick Stevedores who refused to use labour from the Patrick labour hire companies, now in administration. It alleged that, as part of this plan, the MUA boycotted the loading and unloading of the Althea and the Bay Bonanza at P&O terminals at Newcastle and Port Adelaide. P&O won the right to stevedore the ships, formerly contracted to Patrick Stevedores, when Patrick Stevedores ceased operating in those ports. The ACCC claimed that this conduct was engaged in for the purpose, and had the effect, of preventing or substantially hindering shipping lines from engaging in trade or commerce involving the international movement of goods, in breach of s. 45DB of the TPAct, which prohibits boycotts affecting trade or commerce involving the movement of goods in and out of Australia.

28. On 3 September 1998 a court endorsed settlement was reached between the ACCC, Patrick and MUA. The settlement provided for a damages fund of $7.5 million, funded by Patrick, to be available for

small businesses damaged by the boycotts during the dispute. The MUA also provided a formal undertaking to the court, valid for a period of two years, not to repeat the boycotts that were alleged to be unlawful by the ACCC during the dispute.

Transport Workers' Union of Australia

29. On 22 August 1997 the ACCC instituted proceedings against the Transport Workers' Union of Australia (TWU), alleging contraventions of the secondary boycott provisions of the TPAct.

30. The ACCC alleged that the TWU engaged in boycott conduct against smaller transport companies in Queensland which have not entered into enterprise bargaining arrangements with the union under the Federal Workplace Relations Act. The alleged conduct involved a refusal by union members to load or unload the smaller transport companies' vehicles at the major transport companies' yards.

31. The ACCC instituted a second action against the TWU on 12 December 1997 for secondary boycott conduct. The ACCC alleged that TWU members refused entry to vehicles driven by non-TWU members to a number of transport yards in Brisbane, and refused to load or unload those vehicles.

The ACCC settled its litigation against the TWU on 13 August 1998 on the following terms**:**

- injunctions requiring the TWU not to engage in the conduct referred to above in the state of Queensland for a period of two years whilst the TWU retained the right to seek to ascertain whether drivers are members and to communicate with them about membership issues;
- implementation by the TWU of a trade practices compliance program to inform key TWU officers and officials of their obligations under the TPAct;

an agreed contribution by the TWU to the costs of the ACCC's proceedings.

Construction Forestry Mining and Energy Union

32. On 15 December 1997 the ACCC instituted proceedings against the Construction Forestry Mining and Energy Union (CFMEU) alleging contraventions of a secondary boycott provision of the TPAct.

33. The ACCC alleged that the CFMEU engaged in secondary boycott conduct against a transportable buildings supplier in Western Australia which had not entered into enterprise bargaining arrangements with the union under the Federal Workplace Relations Act. The CFMEU conduct allegedly involved hindering or preventing operators of crane hire services from supplying crane services to unload transportable buildings at a construction site.

34. This action is continuing.

Mergers and acquisitions

35. Since January 1993 section 50 of the TPAct has prohibited mergers and acquisitions which substantially lessen competition; previously the section prohibited mergers and acquisitions which created or enhanced market dominance.[3] Whilst only the ACCC may seek an injunction to prevent a merger which is likely to contravene section 50, after a merger has occurred any person (including the ACCC)

may seek divestiture, a declaration or a compensatory award of damages. Australia does not operate a pre-merger notification scheme.

36. During 1997-98 the ACCC considered 176 proposed mergers and joint ventures , compared with 169 in the previous year. A breakdown of the types of mergers considered over the past two years is shown in Table 1. The ACCC reviewed these mergers against the concentration thresholds set out in its revised Merger Guidelines (issued in July 1996) in order to determine whether it should undertake more detailed investigations. Under these thresholds, the ACCC will consider mergers where:

a) the merger would result in the merged entity having 40 per cent or more of the market; or

b) the merger would result in the four largest firms having more than 75 per cent of the market and the merged entity more than 15 per cent of the market;

unless other aspects of the market (e.g. import competition or barriers to entry) are such as to indicate the merger would be unlikely to raise competition concerns.

Table 1.
Types of mergers and acquisitions considered[4]

	97-98	96-97
Horizontal	134	155
Vertical	17	21
Changed shareholding	14	12
New entry to a market	13	13
Privatisation/Asset sale	39	27

37. Since the merger test was changed in 1993 the ACCC has not opposed any merger where there has been substantial import competition, recognising the increased exposure of Australian businesses to global markets. Table 2 shows the number of mergers considered during 1997-98 and their outcome.

Table 2.

Result of mergers considered

	97-98	96-97
New mergers referred to the ACCC	206	169
Considered by the ACCC and Foreign Investment Review Board[5]	43	37
Not proceeded with or amended following ACCC concern	7	7
Court action	1	0
Authorisation sought	1	0

38. Where a merger raises competition concerns, options available to the parties include applying for authorisation or offering the ACCC an enforceable undertaking under section 87B of the TPAct to remove any competition concerns, or both. Undertakings offer the opportunity for a merger proponent to restructure its proposal so as to address aspects of concern to the ACCC.[6] The ACCC's preference is for 'structural' undertakings, as opposed to ongoing behavioural undertakings, such as price, quality and service guarantees.

AUSTRALIA

Significant Mergers and Acquisitions

Pay TV

39. On 14 October 1997 the ACCC sought a Federal Court injunction to block the proposed merger of the pay TV companies Foxtel and Australis Media alleging the merger was likely to have the effect of substantially lessening competition in a number of markets, particularly in the pay TV and local telephony markets. In the pay TV market, the ACCC alleged that the merger would give a combined Foxtel/Australis Media business a high market share, a factor which is of special importance in a pay TV industry which is characterised in Australia by exclusive programming.

40. At the time of the merger proposal, key exclusive programming in Australia was split more or less equally and exclusively between Optus Vision on the one hand and, on the other hand, between Foxtel, Australis Media and its franchisees through cross-licensing arrangements. Suppliers of key exclusive programming tend to supply those pay TV operators who have the highest subscriber numbers. Relatively smaller subscriber numbers following the merger would weaken the ability of Optus Vision to obtain new programming or retain its existing programming when contracts came up for renewal.

41. The ACCC alleged that a 'downward spiral' would be created for Optus Vision whereby increasingly inferior programming would lead to lower subscriber numbers leading to even more inferior programming, etc. It was alleged that Optus Vision was likely to withdraw from the pay TV market because of the effects of the merger on the quality of its programming, thus substantially lessening competition in that market in terms of section 50.

42. As a consequence of the effect on competition in the pay TV market, the ACCC also alleged that the merger would reduce competition in the local telephony market by weakening the capacity of Optus Vision to enter and compete in that market against the incumbent monopolist, Telstra.

43. Optus Vision entered the local telephony market by rolling-out its own local cable network. Pay TV provided Optus Vision with the opportunity to enter the local telephony market by this means because of two main factors:

- the marketing links between pay TV and local telephony, which have been demonstrated by overseas experience and the action of Telsta in substantially overbuilding the Optus Vision cable network, its 50 per cent investment in Foxtel and its exclusive carriage arrangements with Foxtel; and
- the revenue streams from pay TV and local telephony, together with the associated economies of scope, which provide a necessary source of funding for the cable network roll-out and servicing.

44. In view of these factors, Optus Vision's business strategy was to package its pay TV service with its local telephony service. The ACCC alleged that the dilution of Optus Vision's pay TV revenues through the effects of the merger on Optus Vision's programming quality would have flow-on effects on Optus Vision's local telephony revenue stream and on its ability to realise the significant economies of scope from providing both pay TV and local telephony services.

45. It was further alleged that the reduced investment returns would substantially hinder or prevent Optus Vision from fully servicing and maintaining its cable network, resulting in the likelihood that Optus Vision would withdraw from the local telephony market.

46. The ACCC had earlier raised its concerns with Australis Media and Foxtel (including its partners, News Limited and Telstra) and had sought undertakings from them that they would not take further steps to complete the merger without advance notice to the ACCC. The parties would not give the undertakings requested and the ACCC had no option but to apply to the Court for an injunction.

47. However, Australis announced on 17 November 1997 that it had received notices from News Limited and Telstra of their intention to terminate the merger. On 20 November, the ACCC was advised that the merger was terminated. The Court gave the ACCC leave on 24 November 1997 to file a notice of discontinuance of the proceedings and ordered that each party pay its own costs.

Snack Foods

48. In November 1997 the ACCC was notified by PepsiCo, Inc., the USA parent company of Frito-Lay Australia, that it intended to acquire from United Biscuits (Holdings) Plc, a number of businesses including The Smiths Snackfood Company. PepsiCo advised the ACCC that, as a condition of the acquisition, it intended to divest a portfolio of brands and production facilities sufficient to ensure that the acquisition did not result in a substantial lessening of competition.

49. After conducting market inquiries, the ACCC formed the view that, without simultaneous divestment, the acquisition would result in a substantial lessening of competition. It was concerned to ensure that divestment created a vigorous and effective competitor with the ability to constrain the actions of Frito-Lay in Australia.

50. To this end the ACCC obtained an enforceable undertaking from PepsiCo that it would complete the acquisition of The Smiths Snackfood Company only in conjunction with a simultaneous divestiture of assets. Undertakings were also obtained to ensure the smooth transition of the sale assets to another major company in the snack food industry, Dollar Sweets. The ACCC concluded that, in light of the purchase of Snack Brands Australia by Dollar Sweets, the acquisition of The Smiths Snackfood Company by PepsiCo was unlikely to result in a substantial lessening of competition.

Brewing

51. On 20 January 1998 the ACCC announced it would not intervene in the world-wide merger between Guinness Plc and Grand Metropolitan Plc. Guinness is involved in the production, marketing and sales of spirits and beers around the world, publishing and hotels. Through its wholly owned subsidiary United Distillers, it owns a number of leading spirit brands such as Johnnie Walker, McCallums, Dewars, Real McCoy and Vickers. In Australia, Guinness spirits products are distributed by its local subsidiary United Distillers (Australia) which also distributes Stolichnaya under an agency agreement.

52. Grand Metropolitan Plc (GrandMet) is a consumer goods company involved in food manufacturing, fast food restaurants, pubs and the production and marketing of distilled spirits. Its major brands include J&B, Smirnoff, Gilbeys, Baileys Irish Cream and Malibu. In Australia, GrandMet brands are distributed by Swift & Moore under an agency arrangement. GrandMet owns 30 per cent of the share capital of Swift & Moore.

53. The ACCC considered that the spirits industry was highly brand oriented and products tended to be marketed as individual brands rather than under the brand name of the supplier. Further, each brand tends to be specific to a particular category, and brand extensions do not usually cross spirit categories.

The merged entity would control several leading brands in rum, vodka and liquers. However, the merger was likely to increase concentration only in the vodka and gin categories. The ACCC concluded that the effect of the merger on concentration in scotch, which is the largest spirits category, would be minimal.

54. Because of the world-wide nature of the merger, the ACCC had discussions with competition regulators overseas including the New Zealand Commerce Commission, the United States Federal Trade Commission (FTC) and the Canadian Competition Bureau. On 16 October 1997 the European Commission announced that it had cleared the merger subject to conditions, including the divestment by the merged company of some brands on a regional or Europe-wide basis. On 15 December 1997 the FTC gave tentative approval to the merger after the companies agreed to divest their world-wide rights to Dewar's Scotch, Bombay Original gin, and Bombay Sapphire gin.

Authorisation decisions and notifications

55. Except for misuse of market power, immunity from legal proceedings may be available under one of two administrative procedures. Under the *authorisation* procedure, the ACCC is empowered to grant immunity when satisfied that the conduct will be likely to result in a net public benefit. Authorisation may be granted conditionally or subject to a time limit and may be revoked if there has been a material change of circumstance. It is a public process involving submissions from interested parties. Except for mergers, the ACCC must publish a draft determination and provide interested parties with the opportunity for a conference before making a final determination. Under the *notification* procedure, a party which notifies exclusive dealing to the ACCC obtains automatic immunity when the notice comes into force, which will continue unless revoked by the ACCC.

56. ACCC determinations under both procedures are reviewable by the Australian Competition Tribunal, upon application. The number of ACCC determinations processed in 1997-98, compared to relevant figures from 1996-97, appear below in Table 3.

Table 3
Adjudication matters considered

	Tribunal Reviews		Authorisations		Notifications	
	97-98	96-97	97-98	96-97	97-98	96-97
Previously under consideration	1	3	52	26	20	18
New applications/notices	5	0	61	34	230	82
Withdrawn	0	1	8	0	3	0
Decided	1[(a)]	1	27	8	209[(c)]	80
Unresolved at 30 June	5	1	78[(b)]	52	38	20

(a) ACCC decision to revoke authorisation was overturned by the Tribunal.
(b) This figure includes 34 applications relating to electricity distribution and marketing arrangements and 22 applications relating to gas distribution and marketing arrangements.
(c) Three s 93(3) notices issued.[7]

Noteworthy authorisation matters during 1997-98 are discussed below.

Electricity and Gas

57. The ACCC has been heavily involved in changes in the utilities sector of the economy during 1997-98. In December 1997 the ACCC authorised the National Electricity Code. The arrangements for providing third party access under the code are being finalised. The ACCC has made draft determinations on the applications by the Victorian Government on its gas transmission access arrangements. It has also made a draft determination on Victoria's application for authorisation of its Market and System Operation rules. (Electricity and gas issues are discussed in more detail in Part III of this report).

Airlines

58. On 22 December 1997, Ansett Australia Limited, Ansett International Limited, Air New Zealand Limited and Singapore Airlines Limited (the alliance carriers) lodged an application for authorisation to enter into an alliance agreement. The agreement provides for the co-ordination of various aspects of their airline services, including capacity, frequency and prices, on services operated between Singapore and New Zealand, between Australia and South-East Asia, trans-Tasman, on Australian domestic routes, and on routes beyond Australia, New Zealand and Singapore.

59. The ACCC formed the view that the alliance was likely to have public benefits in terms of:

- increased competition, particularly with the Qantas/British Airways group;
- more efficient use of resources and elimination of duplication; and
- improved customer service through integration of computer systems, seamless service, wider lounge access and the ability to earn frequent flyer points on economy class travel with Singapore Airlines.

60. The ACCC concluded that the proposed conduct would be likely to result in a benefit to the public which would outweigh the detriment. On 11 June 1998 it issued a draft determination proposing to grant authorisation for five years on condition that the carriers inform the ACCC of any proposal to extend the alliance agreement at least fourteen days before the proposed extension is to come into effect.

Part III – Implementation of competition policy principles

61. The national competition policy package settled in April 1995, saw the Federal, State and Territory governments agree to a reform program covering (amongst other things) the electricity, gas, water and road transport sectors of the economy. As part of that package, the Federal government agreed to provide the States and Territories with competition payments in return for their adherence to the reform program. The National Competition Council (NCC) is charged with guiding and assessing adherence by the States and Territories to that program.

Communications

Postal Services

62. On 16 July 1998, the Federal Government announced its postal reform package, which followed the report of a NCC review of the restrictions on competition in the postal services market. The review

was conducted as part of the Federal Government's commitment under the Competition Principles Agreement[8] to review any legislation that restricts competition. (See Part V for further information on the NCC's review).

63. The Government announced a package of reforms which will deliver increased competition in the postal services market from 1 July 2000. The key features will be:

- a reduction in Australia Post's reserved service protection from 250g and 4 times the standard letter rate to 50g and 1 times the standard letter rate;
- all incoming international mail will be open to competition; and
- a review will be undertaken in 2002 and completed by July 2003 to assess the effects of these changes and the need for further change.

64. Other features of the reform package include the opportunity for businesses to take advantage of bulk mail discount pricing with reductions in the volume threshold (from 2500 to 300), and the ability for groups of businesses to aggregate their bulk mail in order to obtain discounts. Arrangements will also be put in place which provide for access by competitors to Australia Post's network on a similar basis and on terms and conditions no less favourable than Australia Post offers its own customers.

65. As part of this package, the Government also decided that the standard letter rate will remain frozen at 45 cents until at least 2003.

Telecommunications

66. New regulatory arrangements for telecommunications in Australia commenced on 1 July 1997. Since that date key developments have related to the implementation of the more detailed aspects of the new regime, its ongoing administration and the growth of competition within the industry. In June 1998, the Government also proposed enhancements to the competition regulation regime in the context of its proposed full privatisation of Telstra (the incumbent telecommunications provider). However, the implementation of proposals will depend in part on the outcome of the Federal Election on 3 October 1998.

67. The newly enacted *Telecommunications Act 1997* deals with carrier licensing, carrier and service provider rules, universal service, numbering, technical standards and other industry specific matters. Under the Act, market access for both telecommunications infrastructure providers and service providers is open. Infrastructure (carrier) licences are available on application from the industry regulator, the Australian Communications Authority (ACA). Licence fees are cost-based. The provision of carriage services does not require licensing.

68. By 30 June 1998, the ACA had issued 21 carrier licences. Over 50 non-carrier service providers (excluding Internet Service Providers) were known to be in operation. By January 1998, Telstra's share in the long distance, international and mobile markets was reported to have fallen to 75%, 70% and 58% respectively. Competition in domestic and international long distance markets is evident with prices falling by up to 43% and 75% respectively since 1 July 1997.

69. New parts of the TPAct supplement general competition law with telecommunications-specific provisions in relation to anti-competitive conduct, tariff filing and record keeping (Part XIB) and access (Part XIC) administered by the ACCC.

70. Part XIB of the TPAct, amongst other things, enables the ACCC to issue competition notices to carriers and carriage service providers with substantial market power engaging in conduct with the purpose or effect of substantially lessening competition. On 30 June 1997 the ACCC published guidelines to which it must have regard in exercising its power to issue competition notices. On 28 May 1998, the ACCC issued its first competition notice in relation to Telstra's charging practices for Internet access services. Following this notice, Telstra concluded peering arrangements with the last two of its three competitors in this market and the competition notice was therefore revoked. A second competition notice was issued to Telstra on 10 August 1998 in relation to its customer transfer process (known within the industry as 'commercial churn'). The notice will come into force on 30 September 1998 and should Telstra continue to contravene the competition rule after that date, it will be liable for damages and the ACCC can seek penalties of up to $10 million, plus $1 million per day for each day the conduct continues.

71. Part XIC of the TPAct provides a framework for regulated access to specific carriage and related services where access is not provided on a commercial basis. Access to services under Part XIC is dependent on the ACCC declaring the services for the purposes of the access regime. The ACCC declaration process is intended to ensure incentives for investment in competitive facilities are not unduly eroded.

Energy

Electricity

72. The first stage of the National Electricity Market (NEM) commenced in May 1997. This linked the wholesale markets of New South Wales, the Australian Capital Territory and Victoria, allowing trade between the states, based on state arrangements, for the first time. South Australia is expected to join when the NEM has been fully established. Queensland and Tasmania have also indicated a desire to join the NEM in the medium term (subject to interconnection with the NEM).

73. Underpinning the NEM is the National Electricity Code which was developed over two years through consultation between the Federal Government, participating State Governments and industry. The Code sets out the rules and network access provisions which form the basis of the NEM. Interim authorisation for the National Electricity Code was given by the ACCC in December 1997, and final authorisation of the Code was granted in August 1998. The National Electricity Code Administrator will administer the Code and regulate the market and access regime.

74. The next stage of the NEM will involve the transfer of responsibilities for operation of the electricity market from the States to the National Electricity Market Management Company (NEMMCO), which will run a central wholesale electricity market in accordance with the National Electricity Code.

75. Actual development of market systems for the NEM has proven to be a much larger task than envisaged, and is a much bigger project than has been attempted elsewhere in the world. The transfer of responsibilities for market operation to NEMMCO is expected to occur late in 1998.

76. Competition is being increased with the progressive lowering of the electricity consumption thresholds which determine the eligibility of customers to participate in the market. From 1 July 1998, small and medium-sized firms in New South Wales, Victoria and the Australian Capital Territory have become contestable. By July 2001 it is expected that all customers in these States will have the freedom to choose their electricity supplier.

Gas

77. In November 1997, the Federal, State and Territory governments agreed on a national framework for third party access to natural gas pipelines. The National Gas Access Code will provide a legally enforceable right for third parties, such as suppliers, retailers and users, to negotiate access to pipelines for haulage services on terms and conditions which are fair and reasonable to both access seekers and owners.

78. The eventual outcome of the third party access regime is expected to be the development of an integrated national gas market and an interconnected pipeline grid, which will allow gas to be freely traded across jurisdictions.

79. Each State and Territory has agreed to submit the Code to the NCC for certification as an effective third-party access regime for the transmission and distribution side of the industry. Both New South Wales and Victoria currently have interim access regimes based on the national framework for third party access to natural gas pipelines, and these will be replaced by the National Access Code.

80. As for electricity, competition in gas retailing is being increased with the progressive lowering of the consumption thresholds which determine the eligibility of customers to choose their gas supplier. In the new competitive gas market, contestable gas customers will be able to contract directly with a gas supplier of their choice, and contract separately with the pipeline owner for the transportation of gas.

Petroleum

81. On 20 July the Federal Government announced a package of reforms to the petroleum industry. One of the key aspects of the Federal Government's reform package is the agreement made by the four major oil companies in Australia to provide open access to their oil terminals. This should increase competition at the wholesale level given that customers of bulk fuel supply will be able to directly access terminals on a commercial basis, subject to minimum volume and health and safety requirements. Further, all major oil companies have agreed to establish a self-regulatory mediation or conciliation mechanism to settle any disputes about access that may arise.

82. In addition, the Federal Government has removed wholesale prices surveillance because it has had an adverse impact on the retail petrol market. Previously, the ACCC issued a maximum endorsed wholesale price (MEWP) every day based on an import parity price for petrol from Singapore for that particular day. However, the ACCC will maintain an oversight role on petroleum prices to ensure that the benefits of this package are passed on to consumers.

83. The Federal Government has worked with the petroleum industry, including representatives of the service stations, distributors and independent marketers, to develop a set of principles for a new strengthened Oilcode. The new Oilcode will be prescribed as a mandatory code under the TPAct (as outlined in Part 1 of this report).

Transport

Waterfront

84. The Productivity Commission (PC) released two important research reports on Australia's waterfront. The PC benchmarked Australian ports against comparable overseas ports and found that while world best practice is being achieved in bulk stevedoring for commodities such as wheat, coal and iron ore, Australia's net container crane handling rates are generally well below those at overseas ports for the same ships. (A more detailed outline of the PC report is provided in Part V of this report).

85. The Government's industrial relations reforms, legislated in 1996, have provided impetus for the industry to pursue improved waterfront performance. The purpose of the legislation is to further the spread of enterprise bargaining, giving employers and employees primary responsibility for their own wage setting and productivity arrangements.

86. In addition, the Government has established a set of benchmark efficiency objectives for waterfront performance, agreed to by Australia's major stevedoring companies. The objectives include an end to overmanning and restrictive work practices, a benchmark of 25 container movements per crane per hour, improved training, port reliability and safety performance, lower costs throughout the waterfront logistics chain, and the full use of technology.

87. An outline of major industrial action undertaken by the Maritime Union of Australia in 1998 is also provided in Part 1 of this report.

Shipping

88. The Government is streamlining cabotage administration and is in the process of selling ANL Ltd, the Federal-owned shipping line.

89. The Shipping Reform Group (SRG) reported to the Government on options for reforming Australia's shipping industry. The Government has been considering the SRG's recommendations in the context of its maritime reform agenda.

Airports

90. Following the sale of the first tranche of airports in July 1997, the remaining Federal-owned airports were privatised in May and June 1998, with the exception of the Sydney basin airports and Essendon airport in Victoria. A prices oversight arrangement is in place, administered by the ACCC, to ensure that privatised airports do not misuse their market power. Airport privatisation will facilitate the liberalisation of the aviation sector through placing more emphasis on market-based solutions to the allocation of airport infrastructure and encouraging constructive commercial relationships between airport owners and the airlines.

91. The airports that have not been privatised have been leased to new Government-owned companies, and are subject to a similar regulatory regime applying to the privatised airports. The sale of the Sydney basin airports is to await the resolution of noise problems at Kingsford-Smith Airport and a decision on proceeding with a second Sydney airport.

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Aviation

92. Domestic and international aviation has been exposed to more competition and formerly Government-owned airlines have been privatised. The PC is conducting an inquiry into the regulation of Australia's international air services and will report in September 1998 on options for reform.

Rail

93. The Government has sold the businesses (other than interstate track) of the Australian National Railways Commission and has announced its intention to sell the Federal Government's interest in the National Rail Corporation. On 14 November 1997, the Government announced an agreement with the States on interstate rail reform by establishing a "one-stop shop" for interstate operators to negotiate access to the national track system. The Australian Rail Track Corporation commenced operations on 1 July 1998, taking over management of the Federal and Victorian interstate track, and having the task of negotiating access arrangements to track in NSW and WA.

94. The Federal Government will make $250m available over four years from 1998-99 for investment in the interstate track. This funding is conditional on satisfactory access arrangements and plans for investment and harmonisation of regulatory and operational requirements being in place.

95. A number of significant rail projects, at different stages of planning and development, have also been announced.

Part IV – Resources of Competition Authorities

Australian Competition and Consumer Commission

96. The ACCC is the national competition authority in Australia. It has offices throughout the country.

Overall resources

a) the Annual budget for the ACCC in 1997-98 was $A38,140,000 ($US22,552,000), which compares to $A34,149,000 ($US25,164,000) in 1996-97;

b) Number of employees (person-years):

	97-98	96-97
Economists	78	71
Lawyers	95	79
Other professionals	84	76
Support staff	80	80
All staff combined	337*	306*

* Includes six full-time Public Office Holders - Chairman, Deputy Chairman and four other Commissioners.

Human resources (person-years) applied to:

97. Resources were allocated by the ACCC to four discreet programs of activity in 1997-98 as follows:

Program 1: Compliance with the TPAct

98. Objective: to secure compliance with the TPAct by responding to complaints and inquiries and observing market conduct and initiating actions where necessary.

99. Activities include:

	Person years
a) Investigation and enforcement	
- restrictive trade practices	57
- merger enforcement	25
- consumer Protection	45
b) adjudication	15
	142

Program 2: Improvement in Market Conduct

100. Objective: to secure improvement in market conduct by developing and implementing regulatory frameworks which maximise the potential for promotion of competition and efficient outcomes; assisting access to essential facilities; liaising widely with key stakeholders; and reviewing price notifications from declared companies and monitoring processes as required under the *Prices Surveillance Act 1983*. To contribute at the international level to competition and consumer protection issues.

101. Activities include:

	Person years
a) Market studies and research	
-Competition issues (includes telecommunications, gas etc.)	55
- Consumer issues	13
- Government directions	3
b) Prices surveillance and inquiries	1
c) Self regulation (codes of conduct)	2
d) Liaison and co-ordination	
- Competition issues	11
- Consumer issues	7
	92

Program 3: Education and Information

102. Objective: to inform the community at large about the TPAct and Prices Surveillance Act and their implications for business and consumers.

	Person years
	18

Program 4: Corporate Planning and Management

103. Objective: to maintain high levels of management efficiency and cost effective resource utilisation at both national and regional office levels.

	Person years
.....	85
Total person years	**337**

National competition council

104. The National Competition Council (NCC) was established in November 1995 as part of the National Competition Policy package. The NCC acts as an independent advisory body for all Federal, State and Territory Governments on implementation of the competition reforms. The key resource statistics for the NCC are as follows:

- the Annual budget for the NCC in 1997-98 was $2,948,187 compared with $2,092,656 in 1996-97;
- the NCC has a total of 5 councillors (including the President) who are located throughout Australia;
- in addition, the NCC's secretariat has twenty full time staff with the majority located at the NCC's head office in Melbourne.

Part V – Studies

Review of the Australian Postal Corporation Act 1989 – NCC

105. One of the measures agreed under national competition policy was to review and, where appropriate, reform legislation which restricts competition. The *Australian Postal Corporation Act 1989* was reviewed in 1997 as part of this process by the NCC and the NCC released its report on 11 March 1998.

106. The NCC proposed a package of reforms aimed at facilitating increased competition in the postal services market while retaining the provision of a universal standard letter service at a uniform price by Australia Post. The main elements of the NCC's proposed package included:

- open competition in inwards international mail and business mail from 2000;
- funding of the Community Service Obligation (CSO) by direct budgetary payments (negotiated in advance for 5 year periods);
- household mail reserved to Australia Post at 2 times the standard letter rate;
- a review in 2005 to assess the impact of postal reform and whether further deregulation should occur; and
- the current uniform rate of postage for standard letters of 45 cents remain intact.

107. Telstra (Transition to Full Private Ownership) Bill 1998 - Senate Environment, Recreation, Communication and the Arts Legislation Committee

108. The Committee was tasked by the Senate with examining the Government's *Telstra (Transition to Full Private Ownership) Bill 1998* which provided for the full privatisation of the incumbent carrier, Telstra. Amongst other things, the Committee was asked to consider "whether the privatisation of Telstra confers an unfair competitive advantage to it, in detriment to open competition and the involvement of other telecommunications companies".

109. The majority report of the Committee concluded that the pro-competitive regulatory framework was fundamentally sound but recommended enhancements in relation to accounting separation, information disclosure and a private right of action against anti-competitive conduct under Part XIB of the TPAct

110. International Benchmarking of the Australian Waterfront - Productivity Commission Research Report 1998

111. International comparisons of container stevedoring performance, for the same ships and trades, indicated that Australia's charges were generally higher, productivity lower and services less reliable than overseas. These disparities could not be explained simply by scale disadvantages.

112. The Productivity Commission (PC) found that, with the exception of bulk grain loading, other areas of traditional stevedoring performed relatively poorly. It found that marine service and port infrastructure charges were in total two to three times greater than at ports overseas, noting that only some of this reflects cost-recovery pricing in Australia.

113. Together with other problems in the transport chain, this under performance not only results in higher direct costs to shippers, but also involves significant indirect costs from delays and unreliability which could be reduced. Overall, the international benchmarking revealed significant scope for improvement in Australia's performance.

Work Arrangements in Container Stevedoring – Productivity Commission Research Report 1998

114. The PC found that despite some improvements in recent years, the container stevedoring industry is characterised by a system of complex, inflexible and prescriptive work arrangements which constrain workplace performance. These work practices reduce and distort incentives to improve productivity, reduce timeliness and reliability, and increase labour costs for a given level of output.

115. The PC reports that there are several impediments to improved work arrangements including a workplace characterised by a high level of disputation, substantial union bargaining power, limited competition in the labour market for operational stevedoring employees, and constraints in competition within the industry.

116. The PC notes that the *Workplace Relations Act* 1996 facilitates change to work arrangements. Greater competition in container stevedoring would increase the pressures on management and employees to change work arrangements and improve performance on the waterfront.

Inquiry into impacts of competition policy and related reforms – Productivity Commission

117. The Government has announced a PC inquiry into the impacts of competition policy and related reforms flowing from the national competition policy agreements in 1995. It is intended that the inquiry will examine the possible differences between regional and metropolitan Australia in the economic and social impacts of reforms promoted by the national competition policy. The inquiry is also to identify measures which should be taken to facilitate the flow of benefits (or to mitigate any transitional costs or negative impacts) arising from competition policy reforms to residents and businesses in rural and regional Australia. The inquiry is expected to be completed in 1999.

118. The Australian Senate has also established its own Committee to study the 'socio-economic consequence of national competition policy', which is due to report in early 1999.

NOTES

1. Effected by the *Copyright Amendment Act (No.) 1998*

2. The ACCC can accept legally enforceable undertakings under s 87B of the TPAct.

3. The dominance test was used from 1977 – 1993. From 1974 – 1977 the substantially lessening of competition test was in force.

4. Some mergers fall within more than one category.

5. The Foreign Investment Review Board considers take-overs that come under the *Foreign Acquisitions and Take-overs Act 1975*

6. Undertakings should be distinguished from the authorisation process. The object of enforceable undertakings is to remove competition concerns, whereas with authorisation the competition concerns may remain, but the ACCC can determine that public benefits are present which outweigh the anticompetitive detriments.

7. Section 93(3) notifications are issued by the ACCC to revoke immunity for exclusive dealing conduct identified in notices given by private parties to the ACCC under the TPAct.

8. One of three intergovernmental agreements on competition policy reform signed in April 1995.