

## AUSTRALIA

*(July 1998 - June 1999)*

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### Executive Summary

1. This report addresses developments in the Australian financial year (1 July 1998 to 30 June 1999), although events prior to 9 September 1999 have also been included where possible.
2. During 1998-99 Australia's National Competition Policy (NCP) became the subject of general public debate and a number of public inquiries were undertaken into aspects of the Policy. Details of these are provided in Part V of this report.
3. Australia's national competition and consumer protection statute, the *Trade Practices Act 1974* (the Act), has now been in place for 25 years. Over that period the substance of the competitive conduct rules have been maintained and the scheme for their administration has not changed substantially. Nevertheless, the Act has been subject to constant review and a significant number of additional regulatory schemes have been added. The most recent of these, detailed in Part I, involves measures designed to prevent price exploitation during the transition to Australia's new indirect taxation system which centres on the introduction of a goods and services tax.
4. The Government has provided significant additional resources to the national competition agency, the Australian Competition and Consumer Commission (ACCC), to undertake its wide-ranging enforcement and education work. Over the past year the ACCC has continued to bring selected cases before the Federal Court (the Court). The most significant of these, including several alleging misuse of market power, have not yet been determined. The National Competition Council<sup>1</sup> (NCC), which was created in 1995 to oversee the implementation of the National Competition Policy, also continues to play an important role.

### Part I - Changes to Competition Laws and Policies

5. Several amendments were made to the Trade Practices Act during the period of this report. These changes were consistent with the NCP adopted in 1995 and do not detract from the force or application of the competitive conduct rules in Part IV (Restrictive Trade Practices) of the Act, which continue to apply generally to all businesses.

#### *Transitional Price Exploitation Measures covering Implementation of Tax Reforms*

6. In June 1999 the Commonwealth Parliament enacted laws to implement a major taxation reform package. The centrepiece of the package will be the imposition, on 1 July 2000, of a goods and services tax, coupled with the removal of existing wholesale sales taxes, reduction in income tax rates and the removal of other Commonwealth and State indirect taxes.
7. The Australian Government is concerned that there should be transitional measures in place to reduce the scope for businesses to increase prices unreasonably during the transitional period and has allocated the principal role in this task to the ACCC.
8. This new role for the ACCC arises through the addition of a new Part VB (Price Exploitation in Relation to a New Tax System) and a Part XI<sup>2</sup> (The New Tax System Price Exploitation Code) to the Act<sup>2</sup>. The new provisions are transitional and operate from 29 July 1999 until 30 June 2002, by which time it is anticipated that consumers will have become accustomed to the new arrangements.

9. These measures aim to ensure that businesses pass on the benefits from the removal of wholesale sales tax to their customers and that they do not charge unreasonably high prices during the implementation phase of the goods and services tax. In particular, the new measures:

- prohibit businesses charging ‘unreasonably high prices’, having regard to the New Tax System changes, changes in suppliers’ costs, changes in supply and demand conditions and any other relevant matter (section 75AU); and
- give the ACCC special transitional powers to monitor prices, issue notices and institute proceedings against businesses which it considers are engaging in price exploitation<sup>3</sup>.

10. A contravention of the new provisions exposes businesses and individuals to the same penalties as apply to contraventions of the competitive conduct rules of the Act<sup>4</sup>.

11. The ACCC is required to issue guidelines as to when prices will be regarded as contravening the new price exploitation prohibitions. It released draft pricing guidelines in April 1999 for public comment and issued revised guidelines on 13 July 1999.

#### *Gas Sector Access*

12. Part IIIA of the Act has provided a general legislated regime to facilitate third party access to services of essential facilities of national significance since 1995. New sector-specific legislation dealing with access to gas pipelines took effect in July 1998 as part of general reforms in the gas industry.

#### *Rail Access*

13. The Part IIIA access regime does not apply if an effective access regime has been introduced at the States or Territory Government level and is certified to exist by a Commonwealth Government minister, after consideration by the NCC. Several States and the Northern Territory have sought certification for their own rail access regimes.

#### *Payments System Access*

14. New legislation has been enacted to give responsibility for access to services and competition in the payments system to the Reserve Bank of Australia, the central bank. The ACCC will be responsible only for ensuring that payment system arrangements comply with the competition and access provisions of the Act when the Bank has not designated a payments system as being subject to its powers.

15. Following public consultation, the Bank may impose an access regime on the participants and/or determine standards for that system. Where the Bank has taken these steps and participants have complied with the Bank’s requirements, members of that system will not be at risk of contravening the Act.

#### ***Other relevant measures, including new guidelines***

##### *Australia-US Antitrust Treaty*

16. On 27 April 1999 Australia and the United States signed the *Mutual Antitrust Enforcement Assistance Agreement*. This agreement, which is of treaty status, will facilitate the exchange of information and evidence between the ACCC and the United States Department of Justice and the Federal Trade Commission.

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### *Codes of Conduct Guidelines*

17. Part IVB of the Act provides for the promulgation of industry codes of practice in regulations made under the Act<sup>5</sup>. In May 1999 the Government released guidelines on how codes will be developed and how the Minister for Financial Services and Regulation will decide if a code should be prescribed. It is intended that codes will only be relied upon rarely and to fill gaps in the application of general competition laws. To date, two mandatory codes have been prescribed – one covering franchising and the other covering retailing in the petroleum industry.

### *Airports Access Declaration Guidelines*

18. On 13 October 1998, the ACCC issued, under the general access regime of Part IIIA of the Act, a draft guide to the access declaration process for airport services. Under the Act, the NCC may make a recommendation to the responsible Commonwealth, State or Territory Minister that a service be 'declared'. Once a service is so declared, it is possible to obtain a ruling about access to this service from the ACCC<sup>6</sup>.

19. The draft access undertakings guide is designed to assist airport operators in deciding whether to lodge an access undertaking and contains information about which airport services the ACCC considers likely to be declared as well as explaining the relationship between declaration of an airport service and airport access undertakings. The ACCC has indicated that the following services are likely to be declared: airside facilities (runways, taxiways, aprons), certain passenger processing areas (check-in, holding lounges, immigration and customs services), land for providing refuelling services, sites for storing ground service and freight handling equipment, sites for light/emergency maintenance and landside vehicle facilities.

### *Telecommunications Competition Notice Guidelines*

20. On 5 August 1999, the ACCC issued new competition notice guidelines which will guide it in deciding whether to issue a 'competition notice' in response to anti-competitive conduct within the telecommunications industry. Part XIB of the Act prohibits any telecommunications carrier or carriage service provider from engaging in anti-competitive conduct – the 'competition rule'. Should the ACCC consider that the competition rule has been breached by a carrier or carriage service provider, it has the power under the Act to issue a written 'competition notice'. The effect of this notice is that it reverses the onus of proof in relation to the matters in the notice (i.e. the carrier or service provider must prove that it has not contravened the law). If the service provider continues with conduct which is the subject of the competition notice, the ACCC can seek an injunction from the Court and a penalty of up to \$A10 million in fines plus \$A1 million for each day the conduct continues.

### *Guidelines for Legislation Reviews*

21. Under the NCP, all Governments were required to establish a legislation review and reform programme and to complete those reviews by the year 2000. The NCC issued guidelines in February 1999 on the legislation review process, including the implementation of recommendations.

### *General Advisory Publications*

22. The ACCC has continued to offer a number of publications outlining aspects of the Act and other competition legislation, as well as the ACCC's approach to enforcement. New guides included revised merger guidelines, a practical guide to the Act for small businesses, a guide to the Franchising Code of Conduct, a revised overall guide to the Act and a guide to corporate trade practices compliance

programmes. It has also continued to release a number of business and consumer information sheets and leaflets.

#### *Revised Merger Guidelines*

23. In September 1999, the ACCC reissued its Merger Guidelines<sup>7</sup> that included minor adjustments designed to respond to changing market conditions, particularly the increased exposure of Australian business to international markets.

#### ***Government proposals for new legislation***

##### *Postal Services Access*

24. As part of the postal reform package announced in July 1998, the Government indicated that it would introduce measures to increase competition in the postal market from the beginning of July 2000. This will be achieved by reducing the regulated monopoly over letter mail exercised by Australia Post (Australia's government-owned national postal agency), and by allowing open competition in all international mail services. As part of this reform, legislation is currently being developed to introduce a specific access regime for postal services.

25. Competition will also be enhanced in the postal market through the reduction of Australia Post's 'reserved service protection' so that it will only encompass the delivery of letters which weigh up to 50 grams (currently 250 grams) or for which the charge is up to 45 cents (currently \$A1.80).

#### **Part II - Enforcement of Competition Laws and Policies**

26. The competitive conduct rules in Part IV of the Act prohibit a wide range of anti-competitive practices. These include price fixing, primary boycotts, many secondary boycotts, misuse of substantial market power, third line forcing and resale price maintenance. There is also a prohibition against mergers and acquisitions and other arrangements that would or do result in a substantial lessening of competition. The ACCC is the independent statutory enforcement agency and may seek pecuniary penalties and other remedies from the Court where a contravention of the rules has occurred. In addition, private parties may seek a range of remedies from the Court, including damages.

27. In performing its enforcement role, the ACCC seeks to secure compliance with the rules through education or by bringing suitable cases before the Court in an effort to strike an appropriate balance between the goals of long term improvement in compliance, deterrence and achievement of compensation or redress. In many 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<sup>8</sup>.

#### ***Anti-competitive conduct matters***

28. In 1998-99 the ACCC investigated 654 competition matters and commenced six new court actions<sup>9</sup> – bringing the total number of matters being litigated before the Court to 25. In the eight years from July 1991, the ACCC succeeded in 33 of the 37 competition matters decided by the Court, while another 29 were settled on terms advantageous to the ACCC.

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### *NSW Anaesthetists and the Australian Society of Anaesthetists*

29. Until Australian governments extended the coverage of the competitive conduct rules as part of the NCP in 1995, medical and other professionals that carried on business as unincorporated entities were not usually subject to the general competition laws. The first case against medical professionals under these new provisions was commenced by the ACCC in October 1997 when it alleged that anaesthetists at three private hospitals had reached unlawful agreements relating to the provision of on-call services and had agreed not to supply on-call services unless the hospital agreed to pay for the supply of such services. In December 1998 the anaesthetists gave undertakings to the Court that they would not engage in similar conduct in the future and the ACCC did not seek penalties.

### *Maritime Union of Australia*

30. Following extensive litigation, which was detailed in Australia's previous report, the ACCC settled Court proceedings with the Maritime Union of Australia on 3 September 1998. The ACCC had alleged in two separate proceedings that the Union had contravened the boycott and secondary boycott provisions of the Act, damaging small business and exporters. The settlement provided for a damages fund of up to \$A7.5 million, funded by the enterprise which employed the Union's members, to be available for small businesses damaged by the boycotts during the dispute. This followed earlier settlements secured by the Union from the employer and other parties in separate proceedings.

### ***Mergers and acquisitions***

31. The ACCC has a very significant role in relation to merger control as it alone may seek an injunction to prevent a merger that is likely to contravene the merger provision<sup>10</sup>. After a merger has been completed, any person may seek divestiture, a declaration or a compensatory award of damages although such actions are rarely taken. While Australia does not operate a pre-merger notification scheme (in the interests of reducing the regulatory burden on business), it has become common practice for parties contemplating an acquisition to consult the ACCC about any competition concerns in the early planning stages.

32. Since 1993, when the merger test changed from one of 'dominance' to 'substantial lessening of competition', the ACCC has not opposed any merger where there has been substantial import competition, recognising the increased exposure of Australian businesses to global markets. Where a merger raises competition concerns, options available to the parties include applying for authorisation (which requires the applicant to demonstrate that the merger would result in a net public benefit) or offering the ACCC an enforceable undertaking under section 87B of the Act 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.<sup>11</sup> The ACCC's preference is for 'structural' undertakings, as opposed to ongoing behavioural undertakings in relation to such matters as price, quality and service guarantees.

33. During 1998-99, the ACCC considered 185 proposed mergers and joint ventures, compared with 206 in the previous year. The ACCC reviewed these mergers against the concentration thresholds set out in its Merger Guidelines in order to determine whether it should undertake more detailed investigations. Table 1 shows the number of mergers considered during the past three years and their outcome.

**Table 1: Result of mergers considered**

	98-99	97-98	96-97
New mergers referred to the ACCC	185	206	169
Not proceeded with or amended following ACCC concern	8	7	7
Court action	0	1	0
Legal action sought	2	1	0

*Cable & Wireless Optus / AAPT*

34. When the second ranked telecommunications enterprise, Cable & Wireless Optus, proposed to acquire the third ranked enterprise, AAPT, the ACCC felt that the increased concentration would raise significant competition issues in a number of telecommunications markets under the merger provision of the Act. The acquisition subsequently did not proceed. In particular, the ACCC felt there would be a substantial lessening of competition in:

- the upstream or wholesale market for the provision of a national telecommunications network of line links, switches, points of interconnection, billing and customer support by means of which carriers and carriage service providers are able to provide the range of voice, data, Internet and video telecommunication services to consumers (or end-users); and
- a number of downstream or retail markets, each relating to provision of Internet, data and local access to end-users.

*The Coca-Cola Company and Cadbury Schweppes*

35. In June 1999, the ACCC announced its rejection of a revised proposal by The Coca-Cola Company to buy the international Cadbury Schweppes soft drink brands. In March 1999 the ACCC initially opposed a proposal by The Coca-Cola Company to purchase assets of Cadbury Schweppes primarily related to its beverage trade marks in Australia. This proposal envisaged that The Coca-Cola Company would retain only the Cadbury Schweppes international beverage brands (i.e. *Schweppes*, *Dr Pepper*, *Canada Dry*) and that all other assets would be divested to an undetermined buyer.

36. The revised proposal did not address the ACCC's core competition concern arising from the original proposal that the premium *Schweppes* branded drinks remained part of the transaction, since the merger would result in a market structure where Coca-Cola would control the leading carbonated drinks in almost every category. With the *Schweppes* brand in its portfolio, The Coca-Cola Company's share of the Australian carbonated soft drink market, currently 65%, would have increased by several percentage points. The ACCC considered that Cadbury Schweppes Australia, and the *Schweppes* brands in particular, had been a significant force in constraining prices, maintaining service levels and generating innovation in the carbonated soft drink market. It was concerned that small business and consumers would pay substantially more for carbonated drinks if the merger were to proceed.

*British American Tobacco Plc and Rothmans International BV*

37. In June 1999, the ACCC accepted a court enforceable undertaking in relation to the world-wide merger between British American Tobacco Plc (BAT) and Rothmans International BV. The undertaking addresses the ACCC's concerns about the effect of the proposed merger on competition in Australia. BAT

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has a 67% interest in the Australian cigarette manufacturer WD & HO Wills Holdings Limited, and Rothmans International BV has a 50% interest in the Australian cigarette manufacturer Rothmans Holdings Limited.

38. The merged group has undertaken to sell a portfolio of cigarette brands, roll-your-own tobacco and cigarette paper brands to Imperial Tobacco. The divestiture will maintain three competitors in the cigarette market, leaving the merged group with a market share of 44% compared to 61% had the merger proceeded without the ACCC's intervention.

### *Pirelli Cables Australia Limited and Metal Manufactures' Energy Cables Division*

39. In March 1999, the ACCC announced that it would not intervene in the proposed acquisition by Pirelli Cables Australia Limited of the Energy Cables Division of Metal Manufactures Limited, even though the acquisition will result in two key domestic manufacturers controlling just over 80% of the Australian energy cables market. Market inquiries revealed the existence of an agreement between Metal Manufactures Limited and BICC plc (a UK-based cable manufacturer with extensive cable manufacturing facilities in the region) which prevented BICC from competing in Australia.

40. To overcome these competition concerns, Metal Manufactures Limited gave the ACCC a court enforceable undertaking to formally release BICC Plc from the 'no compete' provisions of the agreement and not to enforce the 'no-compete' obligations (if any) arising from any other arrangements with BICC. The ACCC continues to have concerns about the past existence of the agreement and is considering any issues that may arise under other parts of the Act. However, the ACCC was satisfied that the existence of a domestic competitor and a number of smaller manufacturers/importers, combined with the ability of BICC to compete in Australia, was likely to ensure that the merger did not result in a substantial lessening of competition.

### *Email Limited and Southcorp Limited*

41. In March 1999, the ACCC announced that it would not oppose Email Limited's proposal to acquire Southcorp Limited's whitegoods business. Email and Southcorp are major Australian manufacturers of whitegoods products. Both companies submitted that rationalisation of the Australian industry was necessary to achieve international competitiveness in an increasingly globalised industry. The ACCC considered the effects of globalisation in this industry and in particular the presence of imports in the major product markets. Although the ACCC considered that the acquisition would result in a high degree of concentration, it concluded that the continued presence of a significant competitor (the New Zealand-based Fisher & Paykel), together with existing and potential import competition, was likely to ensure that the merger did not result in a substantial lessening of competition.

### *Privatisations and asset sales*

42. The ACCC continued its work in assessing privatisations and asset sales, principally in gas asset privatisations, sales of rail assets, sale of radiofrequency spectrum and the privatisation of Australian Defence Industries. While the ACCC has no role in advising governments on whether assets should be sold, proposed acquisitions of government assets or businesses by private sector enterprises are subject to the merger provisions of the Act. In most cases, such acquisitions do not raise competition concerns or problems. For example, the ACCC assessed the sale of a number of Victorian gas assets, including each of the three Victorian retail/distribution businesses and the gas transmission network owner, but did not oppose any of the sales. It is also liaising with State Governments and private corporations in relation to future privatisations in the energy and transport sectors.

*Authorisation decisions and notifications*

43. The Act provides for immunity from legal proceedings under one of two administrative procedures.

44. Under the *authorisation* procedure the ACCC is empowered to grant immunity when satisfied that the conduct, except in relation to misuse of market power, 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 in relation to mergers, the ACCC must publish a draft determination and provide interested parties with the opportunity for a conference before making a final determination.

45. Another administrative procedure applies only to exclusive dealing conduct. Under the *notification* procedure, exclusive dealing conduct (except third line forcing) receives immediate and automatic immunity when notification is given to the ACCC<sup>12</sup>. The immunity remains unless revoked by the ACCC.

46. ACCC determinations under both procedures are reviewable by the Australian Competition Tribunal upon application. The number of ACCC determinations processed in 1998-99, compared to relevant figures for the two preceding periods, is shown in Table 2.

**Table 2: Adjudication matters considered**

	Tribunal Reviews			Authorisations			Notifications		
	98-99	97-98	96-97	98-99	97-98	96-97	98-99	97-98	96-97
Previously under consideration	5	1	3	78 <sup>(b)</sup>	52	26	38	20	18
New applications/notices	2	5	0	43	61	34	246	230	82
Withdrawn	1	0	1	10	8	0	2	3	0
Decided	3	1 <sup>(a)</sup>	1	37	27	8	262	209 <sup>(c)</sup>	80
Unresolved at 30 June	3	5	1	7 <sup>(d)</sup>	78 <sup>(b)</sup>	52	20	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 - these are issued by the ACCC to revoke immunity for exclusive dealing conduct notifications to the ACCC under the Trade Practices Act.

(d) This figures includes 43 applications relating to electricity distribution and marketing arrangements and 10 applications relating to gas distribution and marketing arrangements.

*Star Alliance*

47. In July 1998, the ACCC issued a final determination authorising for five years the agreement between Ansett Airlines, Air New Zealand and Singapore Airlines to enter into an alliance providing for the co-ordination of various airline services. The co-ordination related to capacity, frequency and price on services operated between Singapore and New Zealand, between Australia and south-east Asia, between Australia and New Zealand, on Australian domestic routes, and on routes beyond Australia, New Zealand and Singapore.

48. The ACCC formed the view that the alliance was likely to involve public benefits in terms of increased competition, particularly with the Qantas/British Airways group (One World Alliance), more

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efficient use of resources, elimination of duplication and improved customer service. However, it did not accept the claims made by the alliance carriers that public benefits would result from the savings arising from the joint procurement of aircraft or the establishment of a joint venture in information technology. Nor did it accept the public benefits claims that the alliance would result in more routes or frequencies, that the alliance was required to ensure that Ansett remained a viable competitor to Qantas in the domestic market or that the alliance would generate employment benefits. The ACCC concluded that the agreement would not increase barriers to entry to the airline market to an extent that would substantially lessen competition.

### **Part III - The Role of Competition Authorities in the Formulation and Implementation of Other Policies**

49. In addition to the ACCC and the NCC, there are a number of agencies involved in NCP. At the national level, these include the Department of the Treasury, other Commonwealth Government Departments and the Productivity Commission. The Productivity Commission is an independent Commonwealth agency that undertakes public inquiries on matter relating to industry and productivity in response to terms of reference provided by the Commonwealth Government. Most State and Territory governments maintain competition units and have appointed independent pricing regulators. Further information on the roles of the national authorities is available on their Internet sites<sup>13</sup>.

#### *National Competition Policy*

50. The Commonwealth, State and Territory Governments agreed to implement the NCP in 1995. The NCP covers:

- the review and, where appropriate, reform of legislation that restricts competition;
- 'prices oversight' of government business enterprises;
- the introduction of 'competitive neutrality' between government and private enterprises;
- structural reform of public monopolies;
- access to significant infrastructure facilities;
- the application of competition principles to local governments; and
- a commitment to related reforms in the key infrastructure areas of electricity, gas, water and road transport.

51. The NCP has also resulted in the application of the competitive conduct rules in the Act across all jurisdictions (including the scope for exceptions in certain circumstances), centrally administered by the ACCC. The NCC was created to oversee the implementation of the NCP.

#### *National Competition Policy Payments*

52. State and Territory governments complying with the NCP implementation timetable receive annual 'Competition Payments' from the Commonwealth Government. These payments represent the States' and Territories' share of the increased revenue raised by the Commonwealth Government as a consequence of competition reform. Competition Payments are conditional on the States or Territories undertaking agreed reform action within the specified time.

53. The NCC undertakes an assessment of each jurisdiction's progress in meeting reform commitments and its eligibility for Competition Payments. The NCC's recommendations are provided to the Commonwealth Treasurer who determines the payments to be made. Competition Payments have been

made to the States and Territories on the basis of the NCC's recommendations in 1997 and 1999. In both cases, a process of supplementary assessment has been adopted to afford States and Territories additional time to demonstrate that reform commitments have been met. The NCC will deliver its third report in June 2001.

54. Following the second tranche assessment in June 1999, over \$A600 million in Competition Payments are being provided in 1999-2000 to those States and Territories assessed as having met their NCP reform obligations. Around \$A15 million in payments has been suspended for one State because the NCC was concerned about that State's performance in demonstrating that a specific reform commitment had been implemented adequately. This payment may be restored after further assessment by the NCC. An estimated further \$A450 million will be available in 2000-01 following a series of supplementary assessments.

55. While significant progress has been made in implementing the NCP, some difficult areas of reform are still to be addressed. These areas include implementation of specific water and road transport reform commitments and the reform of the remaining statutory agricultural marketing arrangements, retail trading arrangements (including liquor licensing arrangements), taxi licensing, the regulation of the professions (including retail pharmacy arrangements) and mandatory insurance arrangements (e.g. workers compensation and transport accident insurance).

### *Legislation Review*

56. The NCP provides for all Governments to review and, if appropriate, reform all legislation that restricts competition by the year 2000. Legislation will not be allowed to restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs, and the goals of the legislation can be achieved only by restricting competition.

57. The Office of Regulation Review, which is part of the Productivity Commission, provides assistance to Government agencies in the preparation of terms of reference for these legislation reviews and ensures that they comply with the requirements of the NCP. It also advises the Government on the adequacy of these terms of reference.

### *Progress of Reviews*

58. There has been significant progress in the review of Commonwealth and State legislation. The NCC's assessment is that about half of the intended reviews have been completed or are underway.

59. At the Commonwealth level, a review of the general exemption provisions of the Act<sup>14</sup> is being undertaken. These involve employment agreements, restrictive covenants, agreements about the use of certain types of standards, agreements relating exclusively to exports, and agreements dealing with licences and assignments of intellectual property which are exempt from the application of the competitive conduct rules in Part IV of the Act. In addition, a comprehensive review of intellectual property legislation<sup>15</sup> is currently underway, and other reviews are scheduled. These include the prices surveillance legislation<sup>16</sup> and the Act's general access to services regime (Part IIIA).

60. A national review covering State and Territory legislation relating to pharmacy ownership and the registration of pharmacists, plus Commonwealth legislation relating to the regulation of the location of premises for pharmacists approved to supply nationally subsidised pharmaceuticals, has also been established.

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61. There has also been significant progress achieved by the State and Territory Governments with the scheduling of legislation governing a range of professions for review. Many professions<sup>17</sup> have traditionally been shielded from competitive pressure through specific legislation and/or self-regulatory arrangements. Guidelines for the review of professional regulation were released in February 1999.

### *Prices oversight of government business enterprises*

62. At the direction of the Commonwealth Minister, the ACCC undertakes price surveillance, inquiries and monitoring in relation to particular industries and enterprises where there has been concern about the extent of competition. Under the *surveillance* procedure, an enterprise subject to a declaration is obliged to notify the ACCC prior to increasing the price of its goods or services. Prices surveillance is currently confined to aeronautical services at Sydney Airport, certain charges levied by Airservices Australia and various charges imposed by Australia Post. An *inquiry* involves a one-off study and report on particular prices. *Monitoring* involves an ongoing process under which prices, costs and profits in certain industries or enterprises are regularly reported to the ACCC. In 1998 the ACCC ceased formal price monitoring of the petroleum industry.

63. Prices oversight arrangements exist in most States and Territories<sup>18</sup>, typically in relation to electricity, gas, water, ports, public transport and waste management. The NCC may recommend that certain State and Territory enterprises be subject to prices oversight by the ACCC.

### *Competitive Neutrality*

64. The achievement of 'competitive neutrality' between private and public enterprises is an important element of the NCP. Competitive neutrality is intended to ensure that significant government-owned businesses working in contestable (or potentially contestable markets) do not receive net competitive advantages simply as a result of their public ownership. This principle has been applied to all Commonwealth Government businesses activities.

65. The Commonwealth, the States and the Territories have all developed competitive neutrality policy statements and guidelines and each jurisdiction reports annually on implementation. Each jurisdiction has also provided mechanisms for complaints about the application of competitive neutrality to government business activities to be investigated. At the national level, the Competitive Neutrality Complaints Office within the Productivity Commission has been given the role of investigating complaints about the application of competitive neutrality to Commonwealth Government business activities.

66. In addition to these arrangements, the NCC performs a monitoring role by scrutinising the annual reports of Governments on NCP and competitive neutrality. In its most recent assessment, the NCC found that all jurisdictions had met their competitive neutrality obligations as at December 1998, with the exception of Queensland, for which an assessment was postponed.

### *Structural reform of public monopolies*

67. The structural reform of public monopolies involves the removal of regulatory responsibilities from businesses that are public monopolies so that they do not benefit from any regulatory advantage over potential entrants when competition is introduced into the activity. Alternatively, it may involve separating the monopoly elements of the business from its potentially competitive elements, in order to avoid the business deriving an inappropriate advantage from cross-subsidisation between these elements. The Commonwealth, State and Territory governments have agreed to consider business structure issues

systematically prior to the introduction of competition into markets that involve public monopolies, or before privatising these public monopolies.

68. In making its assessment of the progress of structural reform in the States and Territories, the NCC found that jurisdictions had generally met their obligations. In addition to the developments in the electricity market mentioned below, the States and Territories have undertaken a range of reforms. For example, several jurisdictions have recently moved towards privatisation of their Totalisator Agency Boards. These Boards provide retail gaming facilities, primarily in relation to horse racing. Victoria has subjected its public transport system to significant structural reform: five separate corporations have been created to provide metropolitan train and tram services and country passenger services which are being franchised to the private sector.

#### *Airports*

69. Following the leasing of most Commonwealth-owned airports to private sector operators during 1997 and 1998, the Commonwealth Government's remaining airport holdings (the Sydney basin airports and Essendon airport in Melbourne) were leased to newly created Commonwealth-owned companies in July 1998. The Federal Airports Corporation, which both previously held long-term leases over all the these airport holdings and also exercised regulatory functions, was abolished in September 1998. The objective of this restructuring was to separate the responsibility for the regulation of the airports from the operation of the airport lessees.

#### *Electricity*

70. There has been significant structural reform of public monopolies in the electricity industry since the early 1990s with the separation of electricity generation, transmission and distribution in those jurisdictions which are participating in the National Electricity Market (New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory). There has also been some horizontal disaggregation of electricity generation. The commencement of the National Electricity Market in December 1998 created a wholesale pool for the supply and purchase of electricity and an access regime that provides for non-discriminatory access to electricity networks. A key objective of these reforms has been to increase efficiency in the electricity supply industry by improving the access for new competitors to the generation and retail sectors.

71. In December 1997 the ACCC authorised a National Electricity Code which sets out principles that should govern the granting of access. Two new organisations, the National Electricity Code Administrator (NECA) and the National Electricity Market Management Company (NEMMCO) have been established to regulate and manage the Market although it remains subject to the national competition law administered by the ACCC. All electricity network service providers that are registered with NEMMCO are required to provide an undertaking to the ACCC about access to their networks in accordance with the Code.

#### *Access to infrastructure facilities*

72. The NCP requires that Governments implement legislation that allows for third party access to services provided by significant infrastructure facilities. The Act was amended in 1995 to establish a general access regime. However, the States and Territories also have procedures in place for access regimes and there are a number of industry-specific access regimes under the Act and other legislation.

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### *Telecommunications*

73. Part XIC of the Act provides an access regime for the telecommunications sector. Under these provisions the ACCC may 'declare' certain services or require voluntary access undertakings to be given.

74. In July 1999 the ACCC made a significant access declaration in respect of the local call network. This requires the Government-controlled telecommunications corporation, Telstra, to allow its competitors direct access to the use of its customer access network<sup>19</sup>. This will allow competitors to provide both local calls and high-speed data and other enhanced services to customers. The ACCC expects this development to lead to lower prices for local and long distance calls, stimulate the introduction and use of other services and generally to reduce the costs of participating in the information economy.

### *Gas Pipelines*

75. In November 1997 Governments endorsed a national regulatory regime<sup>20</sup> for natural gas transmission and distribution pipelines. The National Gas Pipelines Access Code establishes a set of rules for third party suppliers, retailers and users to obtain a legally enforceable right of access to pipelines on fair and reasonable terms and conditions. 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 that will allow gas to be freely traded across jurisdictions. There is now Commonwealth, State and Territory legislation providing access to gas pipelines in accordance with the Code<sup>21</sup>.

### *Rail*

76. As noted above, the general access provisions in Part IIIA of the Act do not apply where an effective access regime has been introduced at a State or Territory government level. The States and the Northern Territory are developing their own rail access regimes and several have applied to the NCC to have these regimes certified as effective. An application by New South Wales is receiving ministerial consideration. The Western Australian Government recently submitted its access regime, covering a rail network it owns, to the Council for certification (the *Government Railways Access Code 1999*). The South Australia and Northern Territory governments have recently applied for certification of an access regime to cover a proposed railway extending from Adelaide to Darwin (the *AustralAsia Railway (Third Party Access) Code*).

### *Airports*

77. Special arrangements for 'declaring' services under the Act exist for airport services (see the earlier discussion on new guidelines in Part I). In May 1999 the ACCC issued a determination that public access roads and associated vehicle facilities for the transport of passengers at Melbourne Airport would be considered airport services.

### *Other reforms*

#### *Road Transport*

78. The Commonwealth, State and Territory Governments recently endorsed a 19-point reform package which includes a nationally consistent regulatory framework for heavy vehicle registration, driver

licensing, heavy vehicle mass and loading restrictions, commercial driver fatigue management and the national exchange of vehicle and driver information.

### Water

79. Governments have agreed to a strategic framework for the efficient and sustainable reform of the Australian water industry. This involves the adoption of urban and rural water charges that reflect cost recovery, the establishment of a system for determining and trading water entitlements and the provision of water allocation to the environment. Reform implementation has progressed in a number of areas. For example, pricing reform across the Australian metropolitan water industry has meant that urban water is generally now priced to encourage efficient water service provision and use, with residential and commercial consumers only paying for water actually consumed.

### Part IV – Resources of Competition Authorities

80. Data on the resources of the ACCC and the NCC are set out in Tables 3 and 4. Table 5 provides estimates of the staff resources employed by the ACCC on three principal competition activities (these data do not attempt to apportion corporate service resources).

**Table 3 – Annual Budgets**

	ACCC			NCC		
	98-99	97-98	96-97	8-99	97-98	96-97
\$A	39.007M	38.140M	34.149M	2.875M	2.730M	1.939M
USD	24.65M	24.06M	25.16M	1.82M	1.72M	1.43M

**Table 4 – Employees (person years) – by discipline**

	ACCC			NCC		
	98-99	97-98	96-97	98-99	97-98	96-97
Economists	84	78	71	7	7	7
Lawyers	95	95	79	4	4	4
Other professionals	84	84	76	3	3	3
Support staff	94	80	80	4	3	3
All staff combined	357	337	306	20	19	19

**Table 5 – ACCC Human Resources (person years) – by function**

	98-99	97-98	96-97
Enforcement against anti-competitive practices(a)	143	127	105
Merger review and enforcement	25	25	23
Competition advocacy	11	11	11
	179	163	139

(a) Includes adjudication and market studies and research directly related to competition issues

### Part V – Studies and Reports

81. As noted above, all Governments have agreed to review and, where appropriate, reform all existing legislation that restricts competition by the year 2000. The Commonwealth Government published the Commonwealth Legislation Review Schedule in June 1996. Each jurisdiction is also required to publish an annual report detailing progress with their legislation review schedules. Annual

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reports for 1996-97 and 1997-98 are currently available. There have been a number of specific reviews and reports dealing with more general competition issues. Some of these are mentioned below.

### *Inquiry into the Socio-economic Effects of the National Competition Policy*

82. A committee of the Senate of the Commonwealth Parliament has released an interim report on the socio-economic consequences of the NCP, including the benefits and costs on unemployment, changed working and social conditions, equity and environmental impacts. The Committee is also inquiring into the impact of the policy on urban and rural communities, its relationship with other microeconomic reform policies, and the role and definition of public interest in the policy.

83. The interim report found an understanding, in the main, that there are benefits flowing from the NCP as well as acceptance of the need to review established arrangements to ensure that they are efficient, equitable and transparent.

### *Retail Sector Inquiry*

84. A Joint Select Committee of the Commonwealth Parliament tabled a report on 30 August 1999 concerning the degree of industry concentration within the retailing sector, with particular reference to the impact of this on the ability of small independent retailers to compete. The Committee made a number of recommendations that the Government is currently considering.

### *Productivity Commission's National Competition Policy Inquiry*

85. The Productivity Commission has conducted an inquiry into the impact of the NCP on rural and regional Australia. Its interim report in May 1999 observed that rural and regional Australia is being affected by a range of beneficial and adverse influences that are of a long-term nature and largely beyond government control. These include declining terms of trade for agriculture, changes in technology and changes in consumer tastes which are main causes of the declining share of primary industries in national economic activity and the associated drift of population away from inland country areas. The interim report also noted that the effects of these broader influences were often wrongly attributed to the operation of the NCP.

86. The interim report affirmed that the NCP would bring net benefits to the economy and to rural and regional Australia as a whole. It suggested that Governments should take steps to improve community understanding of the NCP, including clarification of how social considerations are to be taken into account in its implementation. The report also noted that there is likely to be greater variation in the incidence of benefits and costs of the NCP among country regions than in metropolitan areas, and that governments may need to give consideration to specific assistance to some residents of regions where adjustment to change is difficult.

### *International Air Services*

87. The Productivity Commission released a report into International Air Services in June 1999. The inquiry, conducted as part of the Government's legislation review programme, reported on Australia's bilateral air service agreements. These agreements govern the rights of each partner country, and cover such matters as capacity, frequency of flights, designated airlines and types of aircraft, routes and airports to be accessed, and 'freedom rights'. The Productivity Commission found that despite some liberalisation over recent years, the current bilateral system restricts competition, increases the costs of aviation

activities, and is unable to cope with the ever-growing demands for international air services. In response to the report, the Government has announced policies which will further the liberalisation of the international aviation market.

*Review of Exemption for Shipping Conferences*

88. Also as part of the Government's legislation review programme, the Productivity Commission was requested in March 1999 to inquire into Part X of the Act and to report on appropriate arrangements for the regulation of international liner cargo shipping services. Part X is the regulatory regime for international liner cargo shipping operations in Australia. It provides liner shipping conferences with an exemption from the prohibition on anti-competitive agreements and arrangements in Part IV of the Act.

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### NOTES

1. The NCC was established in 1995 to carry out research and provide advice on competition issues and to perform a number of other functions (see discussion in Part III of this paper).
2. Inserted by the *A New Tax System (Trade Practices Amendment) Act 1999*.
3. The ACCC may issue a 'price exploitation notice' under section 75AW of the Trade Practices Act against a business that it considers to be charging an unreasonably high price. Such notices are to be treated as prima facie evidence that a business has contravened the new price exploitation prohibition in any legal proceedings instituted by the ACCC under the Act. The ACCC may also issue and publish 'shaming notices' under section 75AX to aid prevention of price exploitation. These section 75AX notices may specify the maximum price, which, in the ACCC's opinion, a business should charge for the goods or services specified in the notice. However, unlike a section 75AW notice, a section 75AX notice has no evidentiary effect in any legal proceedings.
4. \$A10 million for corporations and \$A500,000 for natural persons.
5. A contravention of a prescribed industry code is to be treated as a contravention of the Act itself and, as a result, may give rise to various remedies, including damages available under the Act.
6. In the case of airports owned by the Commonwealth Government that have been leased to private-sector operators, the Commonwealth Minister for Transport may issue a determination that airport services are declared for the purposes of the Act. The Minister must make this determination unless the ACCC has accepted an access undertaking from the airport operator within 12 months of commencement of the lease. The ACCC may grant an extension of time to airport operators of no longer than a further 12 months.
7. Revised Guidelines were re-issued in September 1997 and again in September 1999. Under these Guidelines the ACCC continues to consider mergers in detail where the merger would result in:
  - a) the merged entity having 40% or more of the market; or
  - b) the four largest firms having more than 75% of the market and the merged entity more than 15% 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.
8. The ACCC can accept court enforceable undertakings under section 87B of the Trade Practices Act.
9. The actions involved alleged agreements lessening competition (1), primary boycotts (2), exclusive dealing (1) and resale price maintenance (2).
10. Section 50 of the Trade Practices Act prohibits mergers and acquisitions which substantially lessen competition.
11. 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.
12. In the case of third line forcing, immunity is not received until 14 days after the notification, unless the ACCC issues a draft revocation notice within that period.
13. The Commonwealth Treasury: [www.treasury.gov.au](http://www.treasury.gov.au) The ACCC: [www.accc.gov.au](http://www.accc.gov.au) The National Competition Council: [www.ncc.gov.au](http://www.ncc.gov.au) The Productivity Commission: [www.pc.gov.au](http://www.pc.gov.au).

14. Sections 51(2) and (3) of the Trade Practices Act.
15. *Copyright Act 1986, Trade Marks Act 1995, Designs Act 1902, Patents Act 1990 and Circuit Layouts Act 1989.*
16. *Prices Surveillance Act 1983.*
17. For example, legal practitioners, medical practitioners, property stock and business agents, architects, travel agents, surveyors, veterinary surgeons, dentists, teachers.
18. With the exception of Western Australia and the Northern Territory. Each State and Territory has an independent pricing body to undertake prices surveillance functions.
19. i.e. the copper lines which link customers to local telephone exchanges – such access will not occur until appropriate standards, procedures and rules about how services are to be provided, and how access and interconnection will occur, have been developed.
20. As part of the agreement, each State and Territory agreed to submit a regime consistent with the principles in the Code, as it is applied in their jurisdiction, to the NCC for ‘certification’ under the general access provisions in Part IIIA of the Act. Certification by the NCC means the State regime is the relevant regime for seeking access. On certification, the other mechanisms under the third party access provisions of the Act (undertakings and declarations) do not apply.
21. *Gas Pipelines Access (Commonwealth) Act 1998.* South Australia passed the first Act (*Gas Pipelines Access (South Australia) Act 1997*), and application legislation was then passed in each State (except Tasmania, which currently does not have any natural gas pipelines). Implementation of the National Code is following the certification route, with South Australia, New South Wales, the Australian Capital Territory, Queensland, Western Australia and Victoria now having applied for certification. South Australia was most recently certified as being effective in December 1998.