AUSTRALIA’S NATIONAL COMPETITION POLICY 1995-2005
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BY

DAVID WISHART

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Statement of Authorship

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No other person’s work has been used without due acknowledgement in the text of this thesis.

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David Wishart

Date
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Abstract

Between positive structuralism and post-modernism lies an epistemological gap in which much understanding is lost. This is particularly true of the study of government policies. The National Competition Policy was one such: a vast program of change of Australian law, governmental processes and regulation; it changed thousands of pieces of legislation, brought new institutions of government into being, ruled governments and cost livelihoods. Thinking about the National Competition Policy falls into that epistemological gap.

This thesis sets about rendering the National Competition Policy thinkable by developing an epistemology: thick reflexive description. It proceeds to describe the National Competition Policy in that way, bearing in mind the Scylla of theory contingent abstraction and the Charybdis of volume. It starts by defining in precise terms what the National Competition Policy is taken to mean including its institutional, constitutional and legal context, and its prior history. Finally the thesis sets out accounts, both by year and by topic, of the National Competition Policy’s implementation and also of reactions to it.

A thick study does not seek to prove or disprove. Its results are simply observations, which may run counter to alternative descriptions. Questions may be answered and it may provide the opportunity for reflection. It may throw up hypotheses for later testing or even for measurement against evaluative criteria. This thesis concludes with such responses.

It asks whether the National Competition Policy achieved change and answers that it did very little that was not in train already, although it overcame some barriers due to the federal/state vertical fiscal imbalance. On the point of whether the National Competition Policy was good for Australia, it concludes that despite much official literature, no study has been able to demonstrate that it did. On the theoretical point of whether the National Competition Policy implemented neo-liberalism it concludes that it was the expression of pre-existing neo-liberal politics but conceded the place of the public interest to a greater degree than erstwhile. There was a price for even that in the rise of irrational politics. When applied to the question of whether the National
Competition Policy rewrote federalism, it suggests that while it further developed techniques of its working, albeit at the cost of democracy and accountability, it did not rearrange its fundamentals.

Many observations are made possible by the thick reflexive description of the National Competition Policy. For example, it is surprising how uncritical the various estates of the Australian polity have been of the Productivity Commission. That body was mistaken about the benefits in the beginning and concealed its inability to evaluate at the end. It was deployed as a partisan tool of government to defeat political critique.

Most importantly, this thesis observes how ill-researched the basic thrust of competition policy is. The goodness of competition is assumed and any wrongs committed in its name attributed to implementation of the policy.
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Chapter 1
INTRODUCTION

Australia’s National Competition Policy was a unique program of reform of governmental presence and intervention in Australia’s national economy. It lasted from the early 1990s to the mid-2000s. Even then it did not really finish: strands of it were maintained to date in the guise of the ‘National Compact on Regulatory and Competition Reform’. Moreover, a comprehensive review of competition laws and policy was announced on 4 December 2013 explicitly referring to ‘changes resulting from the Hilmer Review’ – in other words, the National Competition Policy.

Under and in association with the National Competition Policy there was substantial law reform, and considerable governmental and bureaucratic activity. Billions of dollars were involved in the form of intergovernmental transfers, administrative expenditure and private investment. It was the subject of substantial public resistance and protest, both generally and in particular instances. Moreover, at least one, and perhaps two, Governments lost office because of it and it is being taken as a model for competition policies in a number of other countries.

4 See for example OECD, Competition Assessment Toolkit (English Version) (OECD, 2010) (available at <http://www.oecd.org/topic/0,3699,en_2649_40381664_1_1_1_1_1_37463,00.html> (last accessed 27 July 2014)) 3-4; World Trade Organization Working Group on the Interaction between Trade and Competition Policy, Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, WTO Doc WT/WGTC/W/80, 18 September 1998 and World Trade Organization Working Group on the Interaction between Trade and Competition Policy, The Fundamental Principles of Competition Policy, WTO Doc WY/WGTC/W/127, 7 June 1999, both of the latter, according to Morgan, being drafted by a group of six advocates of competition policy, two of which were Australians: Bronwen Morgan, Social Citizenship in the Shadow of Competition, (Ashgate, 2003), 11. See also the
A ‘National Competition Policy’

What, then, was the ‘National Competition Policy’? Conventionally it is taken to have been the program more or less effecting the recommendations of the *Hilmer Report*.5 That report was submitted to all the heads of Australian Governments, including those of every State, Territory and the Commonwealth, on 25 August 1993.

The program of reform recommended by the *Hilmer Report* had six elements. They were:

1. To slightly modify and broaden the application of existing generally applicable competition conduct rules.6
2. To reform regulatory restrictions on competition; the report outlined the applicable principles and processes.
3. To reform the industrial structure of existing public monopolies.
4. To impose conditions of competitive neutrality between governments and private businesses.
5. To provide a general access regime.
6. To more narrowly focus the existing prices oversight mechanism.

The report identified a number of implementation issues, including the necessity for new government institutions, the resolution of constitutional impediments to reform, transitional arrangements, and resource requirements.7

The whole was formulated with the federal nature of the Australian polity in mind. As the Report stated:

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6 Found in Part IV of the then *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)).

7 Hilmer Report, above n 5, xxi.
... full implementation of this report will require a level of cooperation between the Commonwealth, States and Territories which has only rarely been achieved in the past. The Committee, and most of the groups with which it consulted during this Inquiry, would encourage governments to see these recommendations in a positive light and reach early agreement on their implementation. Failure to do so will forgo urgently needed benefits for the Australian economy and community.\(^8\)

Despite appearances, the National Competition Policy was not simply the result of the genius of the Hilmer Committee. Even then competition policy had a history. Going backwards in time, the Hilmer Committee, properly the National Competition Policy Review Independent Committee of Enquiry, was established by the then Prime Minister, Mr Paul Keating, by specific and quite determinate terms of reference dated October 1992 and setting out what it was supposed to conclude.\(^9\) This was subsequent to considerable discussion at an intergovernmental level in the Australian federation and was pursuant to a communiqué issued after the 1991 Premiers and Chief Ministers Meeting.\(^10\) And even that was after these matters had been a subject of much discussion at a variety of levels throughout the preceding decade. In particular, the Australian economy had come to be seen as a single integrated national market, rather than local or State-based, and many sectors of the economy were seen as sheltered from international and, indeed, domestic competition. That is to say nothing of the long gestation of the intellectual framework underpinning the understandings of government, society and economy upon which the policy was built.

The intellectual framework underpinning the recommendations of the Hilmer Committee represented a global movement in the way the relation between government and business was configured, away from state-centred governance. There are many words and phrases depicting this, including ‘neo-liberalism’, ‘economic rationalism’ or ‘economic liberalism’ – even ‘economic fundamentalism’, ‘micro-economic reform’,

\(^8\) Ibid xxxix.
\(^9\) Ibid 361-3.
\(^10\) Premiers and Chief Ministers Meeting of 21-2 November 1991, Communique. Interestingly, this meeting was not attended by the Prime Minister, Bob Hawke, as his position was under an ultimately successful challenge by Paul Keating.
and the time and location specific ‘Thatcherism’ or ‘Reagonomics’. Mostly it has been said to have involved corporatisation and privatisation, contracting out, strengthened competition laws and non-specific ‘regulatory reform’. In turn, these depend on a resurgent interest in the economic analysis of state actions, corporations law and governance, and a substantial strengthening in the sophistication of analysis of the ways markets worked. In particular, there was considerable acceptance of the view that Australia was losing its position in global rankings of wealth and that this could be addressed by improving local competitiveness.\textsuperscript{11}

Various governments within Australia had ready implemented many aspects of competition policy, most stringently by the Kennett Government in Victoria. As the Hilmer report noted,\textsuperscript{12} some utilities had already been restructured to minimize monopoly, various statutory marketing arrangements reformed, and competition in the provision of professional services and occupations enhanced. Since 1974, Part IV of the \textit{Trade Practices Act 1974} (Cth) had provided a substantively comprehensive competition law, regulating the conduct of competition, although its coverage was limited in a variety of ways. It itself was the last, albeit the only effective one, of a series of attempts at such regulation.\textsuperscript{13} Despite this quite expansive list of pro-competitive reforms, these activities were seen by the Hilmer committee as having been patchy and inconsistent.

\textsuperscript{11} Michael Porter, \textit{The Competitive Advantage of Nations} (Free Press, 1990) was highly influential although little cited in much of the discussion surrounding the National Competition Policy. In this Porter argued that a nation’s prosperity depends on the capacity of its industry to innovate and upgrade. He identified four attributes of national advantage in achieving prosperity: the availability of skilled labour and infrastructure, an appropriate demand, related or supporting industries, and, relevantly, firm strategy, structure and rivalry. The role of government is argued to be to create the environment in which companies can gain competitive advantage. This is mostly taken to imply that competition at home leads to competitiveness abroad, although to say so is to stretch Porter’s argument.

\textsuperscript{12} Hilmer Report, above n 5, xvi-xviii, 8-13.

\textsuperscript{13} In order: \textit{Australian Industries Preservation Act 1906; Restrictive Trade Practices Act 1965; Restrictive Trade Practices Act 1971}. In the States a variety of attempts were enacted: NSW \textit{Monopolies Act 1923} (NSW); \textit{Profiteering Prevention Act 1948} (Qld); \textit{Unfair Trading & Profit Control Act 1956} (WA) – replaced by the \textit{Trade Associations Registration Act 1959};and \textit{Collusive Practices Act 1965} (Vic).
Moreover, in the early 1990s there was a renewed interest in treating Australia as a single market and in fixing perceived difficulties with the federal system under the Australian Constitution. In particular, the financing model, where tax revenue is raised mostly by the federal or Commonwealth government but spent by the States and Territories, distorted the ability of governments to undertake national projects. Mechanisms to coordinate government arrangements were under development, resulting in the establishment of the Council of Australian Governments.

Accordingly and fairly promptly after the publication of the Hilmer Report, the Council of Australian Governments set about working at implementing its recommendations. By February 1994, after substantial negotiation, the various governments had agreed to the principles upon which it was to be implemented, and on 11 April 1995 they agreed to a program for implementation. Three agreements setting out the whole program were signed on behalf of the respective Governments on the latter date, 11 April 1995.14

The three agreements are:

- The Competition Principles Agreement, which set out the principles under which the six elements of competition policy are to be undertaken. They were

• Prices oversight of government-owned business enterprises
• Competitive neutrality of government-owned business enterprises
• Structural reform of public monopolies
• Legislative Reviews
• An access regime for essential facilities.

• The Conduct Code Agreement: this is rather technical, setting out a Competition Conduct Code in much the same terms of Part IV of the Trade Practices Act 1974 (Cth.), but which would be applied by way of application legislation to all persons not subject to that Act by reason of the division of powers set out in the Australian Constitution. It also set out rather complex arrangements for consultation on and the process of amendment of the Conduct Code. Further, it provided for consultation for appointments to the Australian Competition and Consumer Commission, the administrative body responsible for the Trade Practices Act.

• The Agreement to Implement the National Competition Policy and Related Reforms (hereafter the ‘Implementation Agreement’). This set out what the various State Governments agreed to do and what they would get from the Commonwealth for doing so. They agreed to:
  • Conduct legislative reviews according to a schedule set out in various intergovernmental agreements.
  • Participate in the establishment of a competitive national markets in electricity, gas and water
  • Reform road transport

They were to get, divided between them on a population basis and in 1994 prices, the substantial incentive of 12 billion (Australian) dollars over nine years. Payment was conditional on performance: the arbiter was to be a body called the National Competition Council.

For reasons to be explained in Chapter 2, the making of these agreements is a convenient marker for the beginning of the National Competition Policy. They were amended in 1997 and again in 2000, although the changes are all but imperceptible to the casual observer. Around 2000 there was substantial upheaval in the implementation of the Agreements, as political pressure protecting rural, regional and remote interests
forced the hobbling of the National Competition Council and a more rigorous definition of the important public interest test.

Ten years later, at the end of 2005, the following was said by the National Competition Council¹⁵ to have been the product of the policy:

- A competition law applying to all persons, including government businesses, within all jurisdictions in Australia;
- Price oversight mechanisms for all Australian government businesses;
- Competitive neutrality principles applied to varying extents in all states and territories;
- A fairly general removal of regulatory functions from government business enterprise;
- Reasonably extensive restructuring of public monopolies by separating out monopoly elements from government businesses, and privatising and introducing competition where possible;
- About 85% of all government legislation (Commonwealth, State and Territory) reviewed with restrictions on competition not justifiable in the public interest removed.
- A third party access regime to essential infrastructure established; and
- Structural reform to enhance and promote competition in the electricity, gas, road transport, and water industries implemented.

Moreover, between 1997 and 2006 the Commonwealth had transferred some $5.7 billion to the States and Territories pursuant to the Implementation Agreement under which the States and territories undertook to implement the National Competition Policy.¹⁶ An extensive bureaucracy, including a completely new government body, the National Competition Council, had been created, with other personnel and institutions at almost every level of every government. A variety of powers had been conferred on a number of bodies, including substantial new powers to the Australian Competition and Consumer Commission.

¹⁵ National Competition Council, Assessment of governments’ progress in implementing the National Competition Policy and related reforms, 2005, pp ix-xvii.

Less positively, two governments had lost power in elections in which competition policy had been a major electoral issue and a new political party, One Nation, had risen on a platform of reversing the National Competition Policy. As mentioned above, the exercise of its powers by the National Competition Council had caused considerable controversy resulting in it being reined in by the then Government. Hundreds of speeches were given in Parliament and some millions of words appeared in the media.

The National Competition Policy thus wrought substantial change on Australian society and also the economy, if one wants to separate the two. It changed the law, the way government was done, and even what government was supposed to do. It changed the social geography of Australia; for example, restructuring in the Latrobe valley driven by the National Competition Policy led to the loss of 18,000 jobs in a community of 70,000 people. The Productivity Commission claims that it improved the economy by some 2.5%, down from the 5.7% the Industries Assistance Commission, its immediate predecessor, projected in 1994, but still something it thought substantial.

**Literature Review**

In view of the dramatic changes outlined above, it is surprising that there is no overall assessment of the National Competition Policy from outside government, although its implementation was, of course, assessed by government itself. The literature review

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17 Evidence of Mr A Stephens, Latrobe Shire Council, to the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, *Committee Hansard*, 16 July 1999, 519-523; quoted in Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, *Riding the Waves of Change*, 2000, 77-82.

18 For reasons discussed in Chapter 2, consideration of Government material, of which there is a vast amount, is deferred until the relevant point in the story this thesis tells. To foreshadow the argument: Government material is considered to be a matter of implementation and not of external assessment. The main government texts considered later providing an independent assessment are: Standing Committee on Family and Community Affairs, Commonwealth House of Representatives, *What Price Competition?* 1998, which was one of the most critical of government reports into the implementation of competition policy albeit substantially limited to contracting out; and Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, *Riding the Waves of Change*, 2000 and its interim report Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, *Competition Policy: Friend or Foe. Economic Surplus, Social Deficit?*, Interim Report, 1999. Other assessments, less independent but also considered later are: Industry Commission,
following considers the available non-government material. It demonstrates that there are ellipses, elisions and aporias, as well as theory contingency in the literature on the National Competition Policy. This finding is crucial to the legitimacy of the theoretical approach adopted in this thesis. That approach is discussed later in this chapter.

Because there is no reference to ‘competition policy’ in the sense used here in Australian\textsuperscript{19} literature before the Hilmer Committee Report, the focus here is on post-Hilmer works. In that sense, contrary to what is said at the beginning of the section immediately prior to this one, the Report does create the National Competition Policy because it names a category of proposed government actions. On this basis we can forgive many commentators. Yet a name and a category do not construct a policy and in what follows the Hilmer Committee Report and the National Competition Policy itself are kept separate.

No law text does more than either briefly describe the National Competition Policy\textsuperscript{20} or annotate the law effecting it.\textsuperscript{21} While there is considerable material in more general


\textsuperscript{19} There is some prior reference to ‘competition policy’ in relation to European jurisdictions, however it is there confined to discussion of competition law. International institutions are vague in the delineation of terminology: while competition law is regularly defined in terms of restrictive trade practices, there is very little consensus as to what in the range of policies and rules affecting competition and contestability, including trade and regulatory policies, are or would be included in such a concept.

\textsuperscript{20} For example, the most thorough textbook, S G Corones, \textit{Competition Law in Australia} (Lawbook Co., 5\textsuperscript{th} ed, 2010) (also 4\textsuperscript{th} ed, 2004), has a bare seven pages.
sociology in which competition policy is a part of the periodised transition from welfare state to neo-liberalism, most of those texts are not directly concerned with competition policy as such, let alone the specifics of Australia’s National Competition Policy. In that little explicitly concerned with it, the argument is that the National Competition Policy is a means by which neo-liberalism – unquestioned as a Bad Thing – is imposed on Australian society. This, it is there argued, restructures social relations on individualistic grounds, denies the proper role of the state, and destroys the intrinsic self-worth and dignity of the individual. Further, dominant groups deploy neo-liberalism to secure power and, in particular, the control of wealth. Unfortunately the texts mounting the argument and its variants are short on the detailed analysis necessary to convince. Not only are the details wrong or misleading, but the way in which the processes do those very Bad Things is not worked through. And, finally, the argument on the other side is not considered well at all: efficiency is seen only as a theoretical construct and the political arguments are ignored or, at least, considered unexceptionable.

Oddly enough for a program inspired by economics, there is very little critical assessment of its economic benefits. As King put it in 2003:

21 See in particular, Russel V Miller, Annotated Competition Policy Law and Practice (LBC, 2000). An ‘annotation’ generally sets out the statute and provides material such as a general description, legislative history, interpreting or applying cases on most chapters, parts and sections. It is quite an ancient form of legal writing – the Institutes of Justinian are in this form, and much more prevalent in Civil Law jurisdictions. It carries very little evaluation.

22 John Braithwaite, Regulatory Capitalism. How it Work, Ideas for Making it Work Better (Edward Elgar, 2008) 1-16, provides a different periodisation and shunts neo-liberalism (and hence competition policy) into a program rather than a description of what is. Here a program is taken to be as much a part of reality as the static description of institutions. Comp. Michel Foucault, The Birth of Biopolitics. Lectures at the Collège de France 1978-9 (Michel Senellart ed; Graham Burchell tr) (Palgrave, 2008) but Foucault talks of reality as programmes.


25 Of course, there is a set of hagiographic studies, such as Rex Deighton-Smith, ‘National Competition Policy: Key Lessons for Policy-making from its Implementation’ (2001) 60 Australian Journal of Public...
The debate over the gains from the Hilmer reforms reflects a lack of input from economic research into parts of the reform process, and the need for further research into how competition policy interacts with the wider economy.  

Little of that further research has been published. Even in government circles, it was entirely left to the Productivity Commission. King himself argues that the National Competition Policy is not just about competition; rather, it is ‘simply the latest wave in an on-going process of interaction between government and markets’. It was ‘partially successful’, mainly due to ‘a failure of the initiators of the reform process to consider the underlying economics or to have a naïve and simplistic view of the economics’.  

Another exception is the work of John Quiggin. In a series of articles in the press, in academic circles and by way of submission to various inquiries, Quiggin mounted strong opposition to the National Competition Policy. His arguments boil down to three: that the benefits of microeconomic reform and hence the National Competition Policy were overestimated, free market policies are a danger to social democratic values, and the National Competition Policy consisted of a number of ill-considered policy positions which could reduce social welfare. Amongst the last is the argument that competition payments are a threat to democracy and also, amalgamating and perhaps

\[ \textit{Administration} \] 29. Just as similar government reports are inconsequential for this thesis, so also are these studies.


27 Ibid 29.


reading in too much, that what is business and what is government function needs to be further distinguished.31 These, amongst many other arguments, are all taken up at various points in this thesis. Moreover, in Chapter 7 the furious reaction of the National Competition Council to Quiggin’s arguments is noted as its own position came under threat and as proselytization of competition policy became the chief defence against critique.

Various other economists critiqued aspects of competition policy as formulated by the Hilmer Committee. These included Ted Kolsen, who argued that higher levels of competition may not necessarily lead to greater efficiency even within existing economic theory. He pointed to the theory of second best, externalities and tax and subsidy policies as necessary elements in the calculus of whether competition will enhance efficiency.32 Gavan Butler examined the ‘downside’ of opening up public enterprises to contestation, including the problem of natural monopoly, the disproportionate effect of these processes on labour and the definition of community service obligations.33

Policy-making in Australia has long been studied and there is a rich literature surrounding it. ‘Competition policy’ can be found within this literature, but once again its details are not explored. It is generally located as a specific instance of ‘economic rationalism’ or ‘neo-liberalism’, which in turn is a description of a particular transformation of Australia’s political economy. Economic analysis is treated as sets of policy recommendations. There is little interest in the specifics of what is done. Occasionally general concepts or ideas are thrown up for consideration. In one such article, Geoff Edwards reflects on the meaning of competition itself and provides the sketch of a genealogy of the term.34 With that he mounts a strong critique of the

31 Ibid 2.
National Competition Policy: that it has ‘elbowed out’ other ways of doing things to the detriment of policy generally.

Kain, in a Parliamentary Library Research Paper,35 sought to discuss some of the ‘underlying assumptions and recommendations’ of the Hilmer Report. His discussion, albeit published prior to even the finalisation of the Agreements, followed a sequence which is replicated in almost every later comprehensive assessment within Government circles.36 Setting it out explicitly:

1. There are divergent views on competition policy. Some say monopolists should be controlled, other say this is radical right wing economics.
2. Competition is a Good Thing37 and therefore we need not debate it.
3. Disagreement with competition policy’s foundations in economics is mere philosophical quibbling and need not be pursued.
4. The sole questions for consideration then lie in the policy’s means and effects. Such a logic is ridden with inconsistency and unsupported assertion. If 1, why 2? Surely we would need some evidence of general support for competition?38 That the ‘foundations in economics’ are laissez-faire economics may be so, but exactly how, and surely, if it is so, it is not mere ‘philosophical debate’ to question them and to ask for a fully articulated rationale as to why a policy should be founded in them? It may not be drawing too long a bow to see here a thinly veiled reference to ‘workable competition’ from competition law, which was and is universally deployed to overcome to difficulties with meeting the requirements of micro-economics for markets to be

36 Ibid 31-4.
37 Sellar and Yeatman deploy the taxonomy of Good Thing and Bad Thing in their spoof of British history: W C Sellar and R J Yeatman 1066 and All That (Methuen, 1970) (first published 1932). The irony they deploy is that the distinction between Good and Bad is assumed, there is no moral framework to justify it.
38 That competition is a Good Thing in the Sellar and Yeatman sense (ibid) echoes a passage in the Hilmer Report at p 206 referring to ‘the new consensus over the proper role of competition ...’ However, it is probable that this ‘new consensus’ in the Hilmer Report is between Australian governments, rather than more generally, because it is in relation to competition being the default position in legislative reviews and the degree to which the State governments would resile from that principle.
'pure'. 39 The call is, therefore, ‘Let’s be practical here!’ That may be an appropriate response, but only if whether it is so is worked through. After all, the means of implementation may be derived from the theory behind the policy, and the effects may be viewed through the lens of the purposes as defined by the theory. In other words, that competition is a Good Thing is considered by the logic to be a truism when that is the nub of an acknowledged debate either in general or in particular circumstances. This argument signals a major theme in this thesis: That competition is a Good Thing has not been substantially challenged and that the lack of such a debate represents a major flaw in Australia’s democratic processes.

The Kain paper moved onto to consider with some broader issues, most of which did indeed become substantially problematic during the currency of the National Competition Policy. These included the issue for democracy in Executives binding future Parliaments, the place of efficiency in assessment of public benefit, and the status of competition as metaregulatory.

Moving away from the focus on competition policy as such, the strands of analysis of how policy, including the National Competition Policy, has been or is formulated provide a context for the study of implementation of specific individual or institutional action. One such action is the formation of Council of Australian Governments within the context of federalism and in this the study of the National Competition Policy forms a critical part. 40 The National Competition Policy is seen as one of the chief, even formative, activities of Council of Australian Governments. Yet, again, the National Competition Policy is seen as little more than its legislation reviews, although this time because the State and Territory governments were bound to the Agreements by the


conditional nature of substantial competition payments under the Implementation Agreement. This is seen to impact on the way the Australian federation works.

In contrast to the paucity of research into the National Competition Policy as policy, as a thing in itself, there is a huge mass of material on specific features and implementations of competition policy. Corporatisations and privatisations, legislative reviews, industry specific reform and regulation, contracting out, access regimes, competition law, administrative procedures, the constitutional context, and the nature of the government institutions all have substantial literatures. Debates and argument swirl. Many of these mention the National Competition Policy, but few explore it. They limit themselves to the particular and frequently are theory-contingent.

One exception to this is Bronwen Morgan, Social Citizenship in the Shadow of Competition. It is an extensive, if narrowly focussed, review: from a regulatory perspective it considers competition policy to be ‘meta-regulatory’ – regulation of the form of regulation. For that reason the other elements of and the rationale for

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45 (Ashgate, 2003).
competition policy are invisible in Morgan’s analysis, other than as they become significant in the constitution of the subject of regulation. Morgan’s account is therefore a description of one of the processes of legality construction and useful as such, yet abjuring, like much sociological literature, steps towards evaluation. In more recent efforts in regulation studies, steps are indeed taken towards evaluation, yet they are tentative, for the point of regulation theory is ‘How?’ not ‘What?’ This literature will be referred to extensively in the chapters that follow.

Another exception to the conclusion that there is little written on the National Competition Policy as such, is that there were, during the curse of its implementation innumerable\footnote{An attempt at numeration is made at the outset of Chapter 7.} speeches in Parliament and newspaper articles on the topic. However, due to their nature they are best treated as a measure of impact rather than as analysis: they tend to be reaction to specific events or proposals, rather than attempts at overall critique or even analysis. Indeed, the rise of the One Nation political party was contemporaneous with the National Competition Policy and accordingly much of the coverage viewed the events of the day through the lens of its nationalist and rural-centred politics. There is little substantial assessment amongst this reportage of rhetoric.

\footnote{This is the governmentalist’s retreat: see below n 60.}

\footnote{Starting in 1990, efforts have been made to bring some sort of ethical evaluation into regulation studies. Thus John Braithwaite and Philip Pettit brought a republican notion of liberty or freedom into Criminal Justice studies in \textit{Not Just Deserts. A Republican Theory of Criminal Justice} (Clarendon Press, 1990) ch 5. Later, in John Braithwaite \textit{Regulatory Capitalism. How it Works, Ideas for Making it Better} (Edward Elgar, 2008) ch 8, a more encompassing effort at evaluating, not regulatory theory, but what such a theory describes as ‘regulatory capitalism’ is made. The conclusion is that the ‘vibrant capitalism fostered by more enabling metagovernance of competition’ does not of itself lead to a better world because ‘[m]arkets do not make moral judgements’. But understanding of regulatory capitalism does enable deliberative democracy to do its work. Again, this represents somewhat of a retreat. Moreover the argument of this thesis is that competition in itself might have morally unsustainable characteristics but that these remained and remain ill-considered.}
A Thesis Question

The general conclusion of the literature review is that independent and rigorous study of the National Competition Policy is lacking. This, then, is the preliminary contention of this thesis: that the National Competition Policy, as both significant in Australia and as a model for policies elsewhere, should be made known, analysed and assessed. Further, it argues that thinking about the National Competition Policy, or even Australia’s competition policy, has either been left to its proponents or has become lost in the detail of all the particular instances. The result is that there has been no evaluative thinking of it as a reasonably unified policy approach. The consequence is irresponsible and unaccountable social change. The lack of analysis, or even of a rational framework for thinking, has led to social frustration and anger, mostly manifesting itself in violent protest. We need in this regard only think of Billy Elliot in musical\textsuperscript{49} or film\textsuperscript{50} version, the novel Three Dollars,\textsuperscript{51} or protests against the G20 or other meetings at which such matters are considered.

How, then, is the National Competition Policy to be ‘made known, analysed and assessed’? Indeed, are the contentions set out above – that the National Competition Policy is a thing in itself, that there has been no coherent evaluative framework, that there has been unaccountable and irresponsible social change – maintainable? And what would the results of an assessment be? This thesis pursues these questions by formulating and adopting a process nominated as ‘thick description with reflexivity’. It is a comprehensive approach or rationality comprehending theory contingency. It points to directions for future research and evaluation.

The Approach

Ever since Kant, and Hume before him, it is conventional that there can be no observation without a theory. De Certeau talks of the inevitable abstraction of the

\textsuperscript{49} Billy Elliot the Musical (Music by Elton John, script and lyrics by Lee Hall) first produced 2005.

\textsuperscript{50} Billy Elliot (directed by Stephen Daldry) 2000

\textsuperscript{51} Elliot Perlman, Three Dollars, (Picador, 1998); filmed Three Dollars (directed by Robert Connolly) 1998.
Indeed it is accepted that it is not honest to describe as if there were discourse-independent facts. However, as the literature review above illustrates, the result is that analyses either talk past one another or render things invisible leading to gaps and elisions. Obvious matters simply escape critical attention. Examples are: the constitutional role of intergovernmental agreements; the relation between the National Competition Policy as implemented policy and competition law, and the relation of either or both with economics; the ends of competition policy, other than simply as ‘competition’ leading to ‘economic benefit’ and whether the means adopted were the appropriate ones; whether there were gaps between what was intended and what happened; even something as basic as whether a competitive society is an important social matter. Other matters are of course considered, but there is no collection of such considerations. We do not see the whole for the particular. This is the thorny problem of the theory-contingency of description.

Scientific structuralism, particularly in the form of Popper’s hypothesis refutation model, is designed to deal with theory contingency. One postulates a hypothesis and the task of science is to refute; there is no absolute knowledge only unverifiable conjecture. Yet there are far too many hypotheses about questions that are far too small to grasp what was happening in the National Competition Policy itself. The problem here is the Kuhnian one of the state of chaos when no one paradigm can be thought to triumph. Yet Kuhn does not tell us how to think when there is no paradigm of thinking. The solution adopted in this thesis is rather old-fashioned: like Archimedes, to simply observe and shout ‘Eureka!’ when something happens.

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56 We could move to Lakatos’ ‘research programmes’ – Imre Lakatos, *Methodology of Scientific Research Programmes* (Cambridge University Press, 1978) – to simply work within a paradigm of
Yet to describe without theorizing still leaves the description open to the challenge of hidden theory contingency. A constituting discourse is inevitable. While not perceived as a crisis in most studies in law, regulation or policy, anthropology has met the matter head on. The question, ‘How do you study cultures without just talking about one’s own culture?’ is similar to the question, ‘How do you talk about an economic policy and not just talk about what matters to one’s own discipline (especially if you are an economist)’ or ‘How do you talk about law without adhering to the “inside” and “outside” dialectic?’

The approach adopted here, ‘thick description’ with reflexivity is a rough and ready way out of the dilemma of theory contingency. ‘Thick’ in the context of a study of the knowing. Yet, working within this paradigm is to acknowledge the existence of other paradigms of knowing and the fact that each describes in its own way. Each paradigm leaves elements of society out in what it recognises. That is the problem faced in respect of the National Competition Policy.

57 Margaret Davies, *asking the law question* (Law Book Company, 1994) 10-21


60 See also Sally Falk Moore, *Law as Process. An Anthropological Approach* (Routledge and Kegan Paul) ch 1, where the idea of the semi-autonomous social field is developed as the relevant heuristic device.

National Competition Policy means that distinctions between important and trivial must be made with extreme caution and therefore as much material as possible should be included; ‘reflexive’ implies a consciousness that, while those distinctions are inevitable, they are made out of pre-existing understandings which should be exposed.

While the second stricture is quite feasible, the first, ‘thick’, is more problematic. The sheer volume of material does not lend itself to a comprehensive account. Of course this is one of the reasons why there has not been a comprehensive study before this one: some culling mechanism is necessary. The problem is that culling mechanisms infringe the second stricture. Disciplinary discourses, case study selection, tightly defined purposes and so forth have all been deployed by others to cull material yet all render invisible material which alternative discourses find vital. As mentioned before,

An admission: the research for this thesis commenced under the influence of governmentality, especially as set out by Alan Hunt, above. It would have been a broader version of Bronwen Morgan, Social Citizenship in the Shadow of Competition (Ashgate, 2003). While the researcher inhabited the governmental world, it became apparent to him, somewhat belatedly, that pursuing governmentality as the express theoretical orientation for this work would be limiting. In particular, just as Foucault needed to set out matters fully in his studies of the prison and of sex, so the whole structure of policy formation and implementation must be knowable before aspects of competition policy itself can be described in terms of governmentality. Governmentality has gaps in coming to grips with actual policies. Thus ‘purpose’ and ‘effect’ are terms clearly present in analysis, policy documents and conventional discourse but absent from governmentality (comp. Alan Hunt and Gary Wickham, Foucault and Law: Towards a Sociology of Law as Governance, (Pluto, 1994), 6-7). More relevantly, evaluation is abjured when evaluation is the point.

However, it is more than merely possible that the theoretical approach adopted in this thesis has adopted a metatheoretical stance more governmental than the above admits. In particular it accepts the displacement of the individual, the fall of law as the central government action (Brendan Edgeworth, Law, Modernity, Postmodernity (Ashgate, 2003)), the fragmentation of the state and the focus on techniques of government as the central concern in understanding society..

61 The website <ncp.ncc.gov.au> is an example. Some thousands of documents are available. It contains most of the government-originated documents relating to the National Competition Policy.

62 A subtle example is the way in which law texts write the law as at a date. In them the National Competition Policy is a fixed thing, change is just a matter of history. Sequence and co-temporaneity are ignored. Thus Russell V Miller above n 21.
another and less violent metaphor is that of the map: there can be no perfect map as it would be the thing itself. (Then it would be a thing which itself would have to be mapped and so ad infinitum.) All maps render things invisible in a variety of ways. The point of a map is to select what is important.63

How, then, does this study select what is important? It takes a number of approaches. First, it tightly defines the topic. It is about evaluating a particular program of government action, explicitly nominated as a thing in itself, and confined in time. Indeed, the National Competition Policy was chosen for this study because it is discrete and limited, this enabling the study of a policy as such. Second, the merely repetitive is ignored, except where the fact of repetition is important. Third, it accepts the primacy of the text, not so much as a result of some abstruse Derridean stricture, but because there seems to be no point at this stage to going beyond what is already written.

There is a consequent question as to whether the description presented here should delve into personal accounts of what happened. Surely, it might be argued, if the description is ‘thick’ they are necessary. However, there are a number of reasons why this is not the case. First, sufficient such research has already been done. Morgan, for example, pursued this approach extensively in her study of the processes of implementation. Further, a great deal of material as to impact was gathered by Parliamentary enquiries.64 Second, apart even from the dangers of confabulation, individual purpose in or memory of the construction of a policy seems irrelevant when the subject of the examination, the policy, is the record of decisions in a set of texts. Finally, personal accounts are in this context more a matter of testing descriptive propositions derived from that material rather than creating alternative visions. As the likelihood of substantial error is slight (the details are more susceptible), because this is an initial study and as there is much to do apart from correcting the trivial, the texts will take centre stage.

A final, but in some ways dangerous, possible technique for managing the material is a distinction between primary and secondary material. It says that there is material which

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63 De Certeau, above n 52.

64 Especially Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, Riding the Waves of Change, 2000.
is actually expressive of the policy and other material which describes, analyses and comments on the policy. The first is important for the description and the latter for what follows. In practice this would mean that the description would draw on the *Hilmer Report* and the subsequent Council of Australian Government *Communiqués*, intergovernmental agreements, legislation, and governmental action (including National Competition Council assessments and reports) and law reforms. Having a category of secondary literature enables a later informed focus on the certain texts as analysis without denying the importance of those not so much the subject of that analysis.

The primary/secondary distinction is dangerous because it assumes a pre-existing analysis to determine what is constitutive and what is secondary, and it refuses the mutuality of texts, that secondary texts maintain and reinscribe meaning on what is done and therefore are no less primary that those that come before. The trap represented by this assumption is carefully negotiated at critical points in the argument that follows; indeed, the trap is a product of the circumstance which impels this thesis and which the analytical methodology it adopts is designed to overcome. The argument asserts that the difference is not one of categorization of documents, rather is one between perspectives of a particular document. Every document is primary in the sense that it inscribes meaning and is therefore constitutive, and secondary in that it inscribes meaning on something, is about texts and actions that have gone before.

In summary, the approach adopted in this thesis is to describe, in as much detail as feasible, what happened as a result of the adoption by government of a particular policy. It simply observes and then comments, reflecting on what others have said and what the description throws up that is contrary or new. Of course it is an imperfect epistemology, but it is least bad. Moreover, answers to existing questions are made possible, much that is different is found and many new hypotheses can now be imagined. Much of this is done *en passant* in the description; the Conclusion in Chapter 8 merely and, given the above, somewhat dangerously, summarises.

**Thesis Structure**

Bearing these issues in mind, the thick description of the National Competition Policy comprises the bulk of this thesis. After pinning down the National Competition Policy
as a topic in Chapter 2, ‘The National Competition Policy 1995-2005’, there are five chapters setting out its story. On the way, the answers to questions are identified, observations are made and hypotheses constructed. The commentary of the Productivity Commission, the discursive inadequacies of the Australian polity, the characterisation of the National Competition Policy as a matter of federalism and so forth come to mind. Chapter 8, ‘Conclusion’ simply summarises all this: it sets out the approach – a ‘thick study’, condenses the story of the National Competition Policy 1995-2005, and outlines the answers and observation, concluding with a reflection on the significance of the thesis for our understanding of the National Competition Policy, for competition policy, for policy studies and for the epistemology of research.

Chapter 2, ‘The National Competition Policy 1995-2005’, is about the policy itself. It defines the field of study. It involves discussing what a ‘policy’ is both in general and in the particular, where it can be found and how it may be distinguished both from its ‘context’ and from its ‘implementation’. For the purposes of the instant study, it is commonly asserted that the National Competition Policy was established by the Hilmer Committee and is set out in the Report of that committee. However, this is to misapprehend the processes of government involved. If a ‘policy’ is a description of a course of action that has been proposed, adopted or carried out, even if the proposals of the Hilmer Committee were more or less adopted, they are not the policy itself. What the government proposed was the policy and what it did was more or less the result of it. Given that ‘policy’ is a concept or descriptor, the referent is somewhat elusive; how to pin it down is thus a more precise description of the subject of Chapter 2. There the Agreements themselves are taken to be a defining statement of the policy but not for any theoretical reason, rather out of convenience. That it is mere discursive convenience is borne in mind for the balance of the thesis. The Agreements are then explored as texts of the policy. What the Agreements as the text of the policy implies for the idea of the policy as an object of study is considered: what is implementation in terms of the record of actions and how to legitimately select from its vast mass.

65 Or, in terms of Salk Moore, above n 60, the semi-autonomous social field.

66 Comp. Valentine, above n 23, who finds the National Competition Policy in Council of Australian Governments (COAG) Meeting 11 April 1995, Communiqué.
Chapter 3, ‘How the National Competition Policy Came to Be’, relates the policy’s social and political history, and its surrounding established constitutional, governmental, institutional and legal structures, although this latter is somewhat limited lest the thesis be seduced into a general sociological analysis of 1990s society. Taking the policy to be the set of agreements signed in April 1995 is most useful here, as it enables a focus without necessarily structuring the discussion. In doing so, it explores the policy’s stated rationale in economics.

Chapters 4-7 set out what happened by way of implementing those agreements both in terms of the general assessments made by the National Competition Council, the Productivity Commission and various Parliamentary Committees, and in terms of case studies of specific implementations of the National Competition Policy. For the latter, it draws on some existing case studies, provides a couple of previously unpublished others, and synthesizes accounts from situations where there has been a number of studies.

The first chapter dealing with implementation, Chapter 4, ‘Institutional Context’, is concerned with context in the sense of developments in the institutional structure in which implementation took place over the period of the policy. Chapter 5, ‘Implementation: Sliced by Time’ takes the reader through 1995-2005, from the signing of the Agreements to the final Assessment by the National Competition Council, concentrating on generality and the flow of events. The third chapter as to implementation, Chapter 6, ‘Implementation Diced: the Elements’, looks at each of the elements of the National Competition Policy as set out in the Agreements (reform of competition law, prices oversight of government businesses, access, competitive neutrality, legislation reviews and structural reform) and drills into specific action as much as time permits. It is here the case studies can be found.

The final chapter about implementation, Chapter 7, ‘Responses and Defences’, deals with reactions to what was done, and responses to those reactions. It considers the various protests against and critical assessments of the National Competition Policy made during its course, and the defences to such criticism. Notable amongst the defences were the ‘duck’, the ‘weave’ and ‘the falling man’ defences. To some extent adjustments were made to the National Competition Policy and these are traced.
Naturally, the final chapter, Chapter 8, ‘The Conclusion’, sums all that up, drawing together identification of previously neglected aspects of the National Competition Policy, threads of critique, new ways of looking at it and techniques of evaluation. It sets out in summary form a new and different story of the policy.

This story set out in Chapter 8 challenges all the academic perspectives on the National Competition Policy to date. It presents the National Competition Policy as the product of ego and federal structure, and of rationalities in politics and the Public Service. It views it as damaging to individuals, communities and society in many ways, some perceptible by econometric evidence but many not. Politics, it argues, was irremediably changed. It may have increased the material wealth of some Australians but no convincing assessment of even that has or can be made.

This thesis further argues that the National Competition Policy can be seen as a trope for policy generally. Some of the matters identified in relation to the National Competition Policy are more generally applicable; for example, the constitutional stature of intergovernmental agreements, the legitimacy of the work of the Productivity Commission, or the identification of the techniques of evasion of critique and hence of responsibility. Even more abstractly, this thesis represents an attempt at a reconceptualisation of how governmental policy may be thought and how the researcher should go about thinking it. It develops the ‘reflexive thick study’ as a technique of research. It finds that extant ways of analysing policy development fail to cater to this instance of it.

The final, overriding argument of this thesis is that there has been a failure in the processes of responsible government which has allowed social engineering to proceed without restraint. While this point has often been made in respect of the National Competition Policy, this thesis identifies exactly how this happened and argues for a way of thinking which may help prevent reoccurrence.
Chapter 2
‘The National Competition Policy 1995-2005’

Quotation marks surround the heading of this chapter to highlight an irony that might otherwise escape the reader. The irony lies in the topic selected for this thesis: *Australia’s National Competition Policy 1995-2005*. As established in Chapter 1, ‘National Competition Policy’\(^1\) is constantly referred to as a known particular thing and is chosen as a topic for this thesis for that reason, with dates to confine it further. Yet, on closer examination, every element of the phrase is blurry, in part polemic, and the whole is only as definitive as it is constructed to be; the consequences of this ambiguity are the basis of perhaps the most important conclusion of the thesis, that there is no established way to think about it. This chapter sets this argument out, and proceeds to define and describe the policy as best might be, thus quelling the irony. It also describes the changes that were made to the policy as so defined. Finally it deals with the implications of this choice: what would be considered as implementation of the *Agreements* and where evidence of those things is to be found.

**Dealing with Ambiguity: Constructing Certainty**

The overall task of this chapter is one of definition: just what is Australia’s National Competition Policy 1995-2005? What do the words of the topic mean? To what do they refer?

‘Australia’s National’ refers to an Australia-wide applicability and its settlement by the Council of Australian Governments. ‘Australia’s National’ is therefore both a political and constitutional\(^2\) phrase, a statement that it is a policy of all governments,

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\(^1\) ‘Australia’ was a late addition to the title. It is only there to locate the jurisdiction to which the National Competition Policy applies.

\(^2\) This thesis assumes the reader has a basic understanding of Australian constitutionalism and constitutional law. For the record, the relevant core understandings are: that the Australian federation preserves the sovereignty of the States (but not of the Territories); that residual power inheres the States; that there is a federal/State fiscal imbalance whereby the Commonwealth taxes far more than it spends
differentially autochthonous as they may be, and hence contains a clear claim of legitimacy for all ‘Australians’. It resonates with the polemic of being above politics.

‘Competition’ is what is being aimed for, yet also inferentially is the theoretical basis for the action.3 ‘Competition’ is thus both a purpose and effect, inviting a problem of evaluation: what is the nature of competition such that it can be achieved and what is it that makes it a thing worth doing? Moreover just what it is, how you get it and how much of it is desirable are highly debateable issues. As such, it is not the policy itself and the policy here is not described as implementing competition. Thus the policy is a statement of intention that certain things will be done and the word in the title merely asserts that those things may be about competition. That they are not or do not implement it well may be a matter of critique, although there are but few critics who make the argument.4

‘Policy’ is the vaguest word of the lot. A policy is not action, although its development and adoption is so, rather it is a commitment to action. It concedes there may be countervailing alternative reasons for action but maintains that it is at least a reason for some actions and is involved in the rationalisations of others. It presupposes reasons for

and the States depend on the Commonwealth for much of their income; and that the Australian Constitution does not structure Australian society, rather it performs just three functions: sets up a new government, called the ‘Commonwealth’, divides governmental power between the Commonwealth and the States, and constructs Australia as a free trade zone.

3 For a useful history of the concept, one referred to in the Hilmer Report (Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, National Competition Policy, 1993), see Kenneth Dennis, Competition in the History of Economic Thought (PhD Thesis, Oxford University, 1975).

itself and perhaps even the legitimacy of the manner by which it was adopted. There is no agreement as to whether it refers to simply the substance of what is intended or also includes the processes and procedures. For some it includes a rationale. In the context of legislative drafting it is often taken to be the particular documents which convey the wishes of Cabinet and from which drafting instructions are drawn.

‘1995-2005’ are beginning and end dates. They are the dates agreed in Council of Australian Governments as the start and termination of certain agreements which are often said to be the embodiment of the National Competition Policy. Yet few would say that 1995 is its beginning – most would count the *Hilmer Report* as such, even though governmental action was not commenced as the National Competition Policy until after the start date agreed to. Moreover much counted in the National Competition Policy was done years earlier and it has been continued subsequent to its agreed end date.

‘National Competition Policy’, then, has many dimensions and can be viewed narrowly or broadly in most of them. It has a history and context, and a postscript, which vary according to the perspective. Moreover, while there is a relatively coherent set of actions considered by commentators to be within the category of those nominated as done pursuant to the National Competition Policy, the phrase is often deployed to point to particular aspects of its elements; for example, to the theory, to particular actions by governments – such as legislation reviews or privatisation, or to the agreements themselves.

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Yet the irony inherent to the argument of this thesis is that it takes the National Competition Policy as a thing in itself in order to evaluate and critique. The means to this end in a context of vague and undisciplined terminological usage is to define exactly what is meant, to stick with this, and to tease out when alternative definitions are used and what their use implies. In other words, to be conscious of the issue even to the point of preciousness. With this approach nothing much except practicality hangs on exactly what is to be taken to be the meaning of the National Competition Policy, provided that it and its contiguous referents are precisely defined. The result should be a relevant terminology that is as value free as possible. Of course, if a different thing is chosen to describe, evaluate and critique, the results of the latter two processes might be different. However, they would be visibly different and the divergence would be interesting in itself.

For the purposes of this thesis, then, the ‘National Competition Policy’ is taken to be that which the Governments of Australia agreed to undertake in on 11 April 1995 as set out in three intergovernmental agreements: the ‘Competition Principles Agreement’, the ‘Conduct Code Agreement’, and the ‘Agreement to Implement the National Competition Policy and Related Reforms’ (hereafter the ‘Implementation Agreement’). These agreements set out ideas and concepts, intentions, processes and procedures. They were amended in 2000 and again in 2007 after the expiry of their original term of operation. 1995 is thus the commencing date and the agreements were expressed to run until 2000, whereupon they would be reviewed. They were extended and final assessments were conducted in 2005. This study runs only to 2005 because the implementation processes changed after that date, including the cessation of the tranche payments to the States and the mandated assessments by the National Competition Council.

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6 This is the approach taken by the whole High Court of Australia in Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, 452. This reference is provided here not to say that it is an authorised approach or somehow legally legitimate, for such legality is irrelevant to the argument, rather it is to provide the imprimatur of learned people: simply to say it is not such a stupid move after all.

7 See Chapter 1, n 12.

8 While no termination date is expressed, the final payment of competition payments under the Implementation Agreement was to be assessed in 2000 and paid in 2001-2.

9 See Chapter 6.
The debates, arguments and protests surrounding the National Competition Policy are taken to be ‘context’, although dealt with separately in a dedicated chapter (Chapter 7, ‘Responses and Defences’); governmental action for the same purposes beforehand, the development of and rationale for the policy, and the aftermath and the continuations are also all ‘context’ or ‘history’ and are dealt with in Chapter 3, ‘How the National Competition Policy came to Be’. ‘Implementation’ is the governmental actions taken as a result of those agreements. It is worth noting that this definition includes the agreed means of effecting agreements in the policy itself while other processes deployed are considered to be implementation.

Many other writers appear to conceptualise the National Competition Policy as otherwise – perhaps it is encapsulated in the recommendations of the Hilmer Committee,\textsuperscript{10} or maybe it is some abstraction of a series of governmental activities under the rubric of ‘competition policy’, or even that set out in the Council of Australian Governments \textit{Communiques} from time to time. Nevertheless, here the contrasting approach is adopted: to anchor the discussion on particular text or texts. Doing so renders the policy particular, identifiable and comprehensible, and enables many discussions defined away or otherwise rendered invisible. Competition theory no longer dominates; nor, on the other hand, does what was done and reactions to it. Both theory and implementation are implied as matters involved in the particular instance of competition policy and each has its own place: what they are and their place are matters discussed in later chapters.

In other words, this study takes seriously the title case of ‘Policy’: as a result of a fortuitous constitutional framework there is, in the form of the agreements setting out the National Competition Policy, the text of a statement of intent. It can be studied as a thing in itself. This is the task of this chapter. How it came to be, including precursors and the context of the policy, is the subject of the next chapter.

\textsuperscript{10} See National Competition Policy Review Independent Committee of Enquiry (Fred Hilmer, Chairman) \textit{National Competition Policy} 1993.
The Policy

The three agreements were signed at a Council of Australian Governments meeting on 11 April 1995.\textsuperscript{11} They will hereafter collectively be referred to as the ‘Agreements’. Naturally there had been much negotiation in the Council of Australian Governments before this; indeed one of the Bills intended to implement a National Competition Policy had been introduced into Commonwealth Parliament more than a year previously, although amendments were made after the 11 April meeting, and a draft package was released for public comment in September 1994. However, as discussed above, the three agreements are here taken to be the National Competition Policy.\textsuperscript{12} Discussion of what each entails follows, prior to which is a description of the nature and features of intergovernmental agreements as such.

\textsuperscript{11} Council of Australian Governments (COAG) Meeting 11 April 1995, \textit{Communique},

\textsuperscript{12} The \textit{Communiqué} itself is a little confused as to the relative statuses of the Agreements, the ‘legislative package’ and the \textit{Communiqué} itself. It said, ‘The Council agreed to a national competition policy legislative package providing for uniform protection of consumer and business rights and increased competition in all jurisdictions’ which seems to imply the \textit{Communique} itself represents the agreement, yet goes on to say ‘The Competition Policy Reform Bill was introduced into the Commonwealth Parliament on 29 March 1994. The two Inter-governmental Agreements which complete the package were tabled at the same time. Further amendments to the Bill were agreed by the Council and will be incorporated in the Bill following the Council meeting’ which seems to suggest that the Bill plus the Agreements represent the agreement. However, perusal of the Agreements reveals that they themselves set out all that the \textit{Communiqué} represents as the agreed National Competition Policy package, although they tend to assume that the Bill is already law. The approach taken here is that the Agreements provide a tidy solution to the problem of exactly what the National Competition Policy can be taken to be. But there is no quibble about adding in matters like the mechanism for voting on amendments of the Competition Code. Most importantly, such a solution fixes the National Competition Policy as statements and agreements, and distinguishes it from reasons, context and implementations, thereby ensuring that there is a language with relatively fixed referents. Without plunging into the (stormy) waters of hermeneutics, the emphasis here is on \textit{relatively}: better than others. It is a matter of language: that if we deploy a very precise language formalised against a metatheoretical approach we can align disciplinary discourses and make them talk to one another.
**Intergovernmental Agreements**

At the heart of Australia’s federal system lie intergovernmental agreements. There is evidence of their existence from the first decades of the twentieth century\(^\text{13}\) and since then such agreements have proliferated.\(^\text{14}\) It is not surprising then that the National Competition Policy took the form of (or, if a different definition of the National Competition Policy is used, involved) intergovernmental agreements: its national operation at all levels of government was a key, even defining, feature

There are many types of intergovernmental agreements, they take many forms and involve differing elements. They differ in the governments that sign them: they can be between two or more States and may include the Commonwealth. Clearly treaties with other countries fall into the category but for obvious reasons are not further considered here. Neither are putative agreements between any Australian government or governments and indigenous mobs, peoples or communities, although this part of this thesis draws upon research by its author in that area.\(^\text{15}\) Finally, also falling outside the

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\(^{13}\) Martin Painter, *Collaborative Federalism* (Cambridge University Press, 1998), 100, identifies a 1914 agreement between the Commonwealth, New South Wales, Victoria and South Australia to establish joint institutions of governance of the Murray River as one of the first although his source, Roger Wettenhall, ‘Intergovernmental Agencies: Lubricating a Federal System’, (1985) 61(11) *Current Affairs Bulletin* 28, 32-3, is actually talking about intergovernmental agencies, identifying the River Murray Commission as a very early one. In *South Australia v Commonwealth* (1961-2) 108 CLR 130, the dispute originated in a 1907 agreement between the Commonwealth and South Australia, by which the Northern Territory was surrendered to the Commonwealth and *inter alia* arrangements were made for a railway from Darwin to Adelaide (it was completed on 17 September 2003). Indeed it is highly unlikely that there were no such agreements prior to federation.

\(^{14}\) By 1935, the late Sir W Harrison Moore could write, ‘In Australia, the [inter-government] agreements are numerous and of vast scope, detailed and complicated’: ‘The Federations and Suits between Governments’, (1935) 17 *Journal of Comparative Legislation and International Law* 3rd Ser. 163. Given their importance, one would have thought considerable effort would have been put into maintaining the record of their existence. However, this is not the case. There is but one compendium: it is of agreements operating in 1986 (Advisory Council for Inter-government Relations, *Compendium of Intergovernmental Agreements* (1986)), and the Council of Australian Governments maintains a record of current intergovernmental agreements signed under its auspices: (<http://www.coag.gov.au/intergov_agreements> (last accessed 7 November 2011)).

\(^{15}\) As compared to the United States of America where the indigenous peoples are ‘First Nations’ with a measure of sovereignty or New Zealand where the Treaty of Waitangi preserved *te tino rangatiratanga*
category are agreements between governments and other\textsuperscript{16} legal persons, although the binding force of these agreements are similarly constrained, \textsuperscript{17} since the National Competition Policy was between Commonwealth, State and Territory governments.\textsuperscript{18}

Intergovernmental agreements can be signed by many individuals, despite being confined by ‘intergovernmental’.\textsuperscript{19} They can be signed on behalf of the governments by the Governor-General on the part of the Commonwealth or one or more Governors on the part of the States, by the Prime Minister or Premiers, by Ministers, or even by heads of relevant administrative organisations (departments and such like). Indeed, they need not be signed: they may be adopted into legislation by participating governments or may simply be as expressed in the charters or other constitutive documents of joint bodies.\textsuperscript{20} They can come in a variety of forms:\textsuperscript{21} formal documents, appended to legislation, approved by legislation, enacted as law by joint legislation, or given binding force by legislation. They are sometimes tabled in Parliament but often not. They can exist as mere memoranda of understanding or perhaps as simply an exchange of letters: an example of the most informal of these is the agreement to set up the Council of Australian Governments itself, which was simply an announcement in a \textit{Communique}\.\textsuperscript{22}

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\textsuperscript{17} Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54; see Tony Blackshield and George Williams, Australian Constitutional Law and Theory. Commentary and Materials (Federation, 5th ed., 2010), 449.

\textsuperscript{18} Local Government is sidelined at this stage, not being signatory to the \textit{Agreements}. Clause 7 of the \textit{Competition Principles Agreement} ‘applies’ that agreement to local government, although it makes ‘[e]ach State and Territory … responsible for applying those principles to local government’.

\textsuperscript{19} Rose, above n 16, 246-52.

\textsuperscript{20} Compendium, above n 14, viii-ix.

\textsuperscript{21} Painter, above n 13 , 100-1.

\textsuperscript{22} Heads of Government Meeting 11 May 1992, \textit{Communique}. For further on the formation of the Council of Australian Governments, see Chapter 3, ‘Federalism’.

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Relevantly, the 2000 alterations to the *Agreements* were made by simple letter from the Prime Minister to the other Heads of Government, without recorded assent although no later dissent either.\(^{23}\)

Intergovernmental agreements have no template,\(^{24}\) contain a great variety of arrangements\(^{25}\) and are put to a variety of purposes.\(^{26}\) At core, whatever their objective or substance, they evince an intention to bind, not necessarily legally, the other parties to the negotiated position. Accordingly, their terms will be designed to prevent breach or abandonment of voluntary commitments to future action or inaction. Of course, it is easy to overstate this last point. The vertical fiscal imbalance skews bargaining power, meaning that the States and Territories, and local government for that matter, may have no option but to accept the terms on offer. Second, it is a mistake to consider that ‘government’ is unitary. That one signature appears (if there is one) may have symbolic meaning and there may be constraints on the exercise of the power to sign, but government itself is only a concept or idea and is comprised of a multiplicity of persons, agencies, institutions and so forth. Hence what suits one person, agency or institution may not suit or even be contemplated by another.\(^{27}\) This is so at any one point in time as well as over time, and also in respect of levels of government. And that the objective of government is to be able to do things when there are a multiplicity of citizens involved does not diminish the point: agency issues are a necessary concomitant of decision-making.

If there is a problem with assuming that commitment is implied by agreement, it can be solved by reference to legality: contract law. Thus, the question of whether intergovernmental agreements bind governments. It is commonly thought not, or at least as Blackshield and Williams put it, ‘the principle that agreements with obvious implications for matters of government policy, such as intergovernmental agreements,
may be construed as not intended to create legal relations at all’.  

Saunders qualifies this by stating ‘although this depends ultimately on the terms of an agreement, including the character of the undertakings.’ The question is complex and subject to the usual judicial casuism.  

Whatever the position, those negotiating intergovernmental agreements manoeuvre in a context of probable unenforceability. There is no strangeness about this: the marginality of law is a commonplace.  

Moreover, apart from the Commonwealth’s obligation as to just compensation under Constitution sec 51(xxxi), Parliaments are not bound by the executive nor even by themselves, the latter apart also from manner and form requirements which are not in point here. The questions that parties face are practical: if officials sign them and legislation is required for implementation, how compelled will Parliaments feel? Assuming under the Westminster system that the executive is a creature of the Lower House, an Upper House may demur. Perhaps it is a minority Government. Maybe parliamentarians will feel dragooned into compliance. On the other hand, agreements are often reached amongst publicity and fanfare and this can supply a deal of political pressure to comply. Moreover, there may be a change in Government, raising real issues of how to bind a later Parliament.

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28 Blackshield and Williams, above n 17, 449.


30 The relevant authority in relation to intergovernmental agreements is *South Australia v Commonwealth* (1962) CLR 130. The contentious issue is whether the question is of enforceability or justiciability – is a matter of private or public law. See also *The Administrator of the Territory of Papua new Guinea v Leahy* (1961) 105 CLR 6, 11 per McTiernan J.


33 Painter, above n13, 103.
Recalcitrant Parliaments have a point: as Saunders puts it:

Intergovernmental arrangements have clear and identifiable effects on the institution of parliament which detracts from its role as a component in a system of responsible government. This is not to deny that intergovernmental co-operation is a useful and in some instances essential technique in the operation a modern federal system.\textsuperscript{34}

If Parliaments are compelled to comply with decisions made by the executive, a real problem in accountability arises. Parliaments are not legally bound to comply with agreements, as discussed above, yet the compulsion to do what is required of them by the executive may be strong. Hence, if the parties have manoeuvred to attain some form of binding force, a conscious act to deploy financial and other powers effectively subverts independent parliamentary decision-making. More broadly, if the arrangements restructure the federal system, the High Court as the body entrusted with the determination of the line between the powers of the States and of the Commonwealth is effectively subverted. It may be that there has been a shift in the matter to the, at best, political and this may be no bad thing.\textsuperscript{35} Yet it is more likely that intergovernmental agreements are the creature of executive branches of government seeking to bind Parliaments to their will. \textsuperscript{36}

This discussion applies in relation to the National Competition Policy in the following way. The Agreements are relatively detailed, providing for most of the matters listed on the Council of Australian Governments website. They were tabled in the Commonwealth Senate on 8 June 1995 and signed by the Heads of Government of the States and the Commonwealth. They required legislative action by the Commonwealth in order to amend the then \textit{Trade Practices Act 1974 (Cth)} to provide for access

\textsuperscript{34} Cheryl Saunders, \textit{The Impact of Intergovernmental Arrangements on Parliament} (Intergovernmental Relations in Victoria Program, Law School, University of Melbourne, 1985) 24.


\textsuperscript{36} Painter, above n 13, 103.
arrangements and establish or reform the three key administrative bodies; the States and Territories to legislate in order to apply the Competition Code within the various States and to establish access regulators and prices oversight apart from Western Australia. Considerable quantities of legislation were envisaged to come out of legislative reviews. Such legislation as came out of the agreements was, therefore, as a consequence of the agreements as agreed, not as a matter of their consideration as an accountability measure. Of course, the agreements were debated to a more or less extent when the *Competition Policy Reform Acts 1997* (Cth) was debated, although mostly there was effective bi-partisan agreement to what was proposed. Consideration in the Commonwealth Parliament was diverted to a Parliamentary Committee, although no report was forthcoming until 1997 and no change in the National Competition Policy resulted.

The *Conduct Code Agreement*

The *Conduct Code Agreement* is best read in conjunction with the then *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) because it assumes that the changes to that Act provided for in the *Competition Policy Reform Bill* had been implemented. The *Agreement* deals with competition laws as they then existed,

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38 Uniform legislation under the name *Competition Policy Reform Act ([Name of State]) 1995* (NSW, Vic.) or 1996 (ACT, NT, Qld, SA, Tas).


42 For example, it refers in clause 1, ‘Interpretation’, to the ‘Competition Code’ as the ‘Schedule version of Part IV of the Trade Practices Act’, when that schedule was to be inserted by the *Competition Policy Reform Bill*. There are many other examples. It is acknowledged in clause 1(2), where it is stated ‘Where
assuming no substantive change, and provides for their application within jurisdictions where until then the Commonwealth’s legislative competence could not comprehensively apply those laws. The method ratified by the Agreement is a familiar one within the Australian federation: The Commonwealth was to pass legislation providing for a set of laws to be adopted by the States and Territories as amended from time to time. This was the ‘Conduct Code’ provided for in the Competition Policy Reform Bill 1995. Clause 5(1) sets this out and also the procedure to be undertaken if a State or Territory decided to make significant alterations to the Code. No such thing has happened.

The rest of the Agreement serves the adoption process: clause 2 controls the exemption process provided for in section 51 of the then Trade Practices Act 1974 (Cth.), provides in clause 4 for consultation with and approval from all State and Territory governments when appointments were to be made to the main administering and enforcing body for competition law, the Australian Competition and Consumer Commission, and deals with modifications to the Competition Code by providing for a voting procedure.

In essence this Agreement was about remedying what had been seen as a defect of the then coverage of Part IV of the Trade Practices Act 1974 (Cth.): it did not extend beyond the constitutional powers of the Commonwealth, extensive though they had become after the Tasmanian Dams Case. The States and Territories still preserved competence over non-corporate bodies such as partnerships, trusts and sole traders, and also a variety of government organisations in the right of the States or Territories. The price paid by the Commonwealth for the extension was to be consultation on appointments to the Australian Competition and Consumer Commission and loss of complete control in relation to amendments to the competition law.

this Agreement refers to a provision in legislation which has not been enacted at the date of commencement of this Agreement, or to an entity which has not been established at the date of commencement of this Agreement, this Agreement will apply in respect of the provision or entity from the date when the provision or entity commences operation.’

43 See the discussion in Tony Blackshield and George Williams, Australian Constitutional Law and Theory (Federation, 3rd ed, 2002) 255-270.

44 Commonwealth v Tasmania (1983) 158 CLR 1
The Competition Principles Agreement

In contrast to the Conduct Code Agreement which extended the application of known rules, the Competition Principles Agreement sets out rules and principles, and also more or less tightly prescribed processes for their implementation. It too takes the Competition Policy Reform Bill 1995 as implemented, controlling some more of its ambiguities in a federal context. In particular, it provides for the National Competition Council: its funding (clause 8: a Commonwealth responsibility), appointments to it (clause 9: by the Commonwealth but subject to State or territory veto), and its ‘work program’ (clause 10: to be agreed by the parties). The operation of the National Competition Council was to be reviewed after 5 years.

The Agreement was between the Commonwealth and the States and Territories. No local government nor any representative of any or all of them signed the Agreements, although representatives of Local Government have been part of the Council of Australian Governments since its inception – even participating in the Special Premiers’ Conference of 30 July 1991.45 Local government thus was a part of the negotiation and finalisation of the Agreements, representation being through the Australian Local Government Association.46 Nevertheless, with perhaps the exception of Lord Howe Island, local government is the creature of the States and Territories, entirely subject to their superior law-making powers. Hence, the Agreement extended to local government only by virtue of the obligations taken on by the States and Territories. The Agreement reinforces this in clause 7, simply requiring the States and Territories publish a statement, prepared in consultation with local government (without defining what body that term implicates) and specifying the ‘application of the principles [in clauses 3, 4 and 5, 6 being as to access regimes and not applicable to local government] to particular local government activities and functions.’ Whatevsoever the formal position of local government, it became a significant battle ground for the National Competition Policy.


46 This body itself consists of representatives of the local government associations of the various States and Territories. It has existed since 1947, establishing a secretariat in Canberra in 1976, which, as its website avers, ‘reflect[s] growing links with the Australian Government and an awareness of local government’s emerging national role’ <http://www.alga.asn.au/>.
In its first assessment of implementation of the National Competition Policy, the National Competition Council identified ‘greater recognition of the importance of applying the reforms to local government businesses’ as one of five key achievements in the first two years of the operation of the policy.\(^{47}\) It was sufficiently important to be the subject of a supplementary assessment – the only one for the first tranche payment. Consistently thereafter ‘local government reform’ was a matter for specific notice by the National Competition Council. Moreover, much of the resistance to reforms under, at least nominally,\(^{48}\) the National Competition Policy derived from their impact on the local and personal. Local government bore much of the disapprobrium.

The Agreement is expressed in terms of what can loosely be described as competition policy application topics: prices oversight of government business, competitive neutrality policy and principles, structural reform of public monopolies, legislation reviews and access to services. Each application topic has its own processes and procedures. There are separate parts of the Agreement for federal regulation of the National Competition Council, a body to be established by the Trade Practices Act 1974 (Cth.) as amended by the Competition Policy Reform Bill 1975, and for the application of the Agreement’s provisions to local government. Prior to the defined topics are explanatory statements – although they are a little stronger than that – about the meaning or import of particular terms: ‘costs’ and ‘benefits’, ‘merits’ or ‘effective means’; and an exclusion of consideration of the nature or form of ownership of business enterprises from the impact of the competition principles. At the end of the Agreement are some further explanations – as to what ‘consultation’ requires (clause 12), how to whom notices were to be sent, how new parties could join and existing ones withdraw. The Agreement was, under clause 15, to be reviewed after five years.

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\(^{47}\) National Competition Council, Assessment of State and Territory Progress with Implementing National Competition Policy and Related Reforms 1997, iv.

\(^{48}\) At times there were doubts as to whether certain actions, especially at the local level, were a product of competition policy or other changes in technology or society. This was examined in Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, Riding the Waves of Change, 2000.
The first application topic, prices oversight of government business enterprises, starts from its opening proposition (clause 2(1)): ‘Prices oversight of State and Territory Government business enterprises is primarily the responsibility of the State or Territory that owns the enterprise.’ It proceeds to hedge that responsibility with a series of recommendations and strictures about the way in which oversight is to be conducted.

The only firm commitments a State or Territory makes under the Agreement in this respect is to ‘work cooperatively to examine issues associated with prices oversight of Government business enterprises’ and to be subject to a ‘prices oversight mechanism’ in the circumstances described in clause 2(6). The latter is, in brief, where one Government refuses, even when asked, to subject one of its businesses to prices oversight and that that dereliction is ‘adversely affect[ing]’ another Government, then if the National Competition Council agrees that there is a problem for ‘constitutional trade or commerce’ and the Commonwealth Minister declares it, then the National Competition Council will administer a prices oversight mechanism for that business.

The Agreement is remarkably coy about just what is required by way of prices oversight. Not only is there no definition of ‘government business enterprise’, there is no indications at all about what mechanism should be deployed. It is variously called a ‘source of price oversight advice’ (clauses 2(3), (4) and (6)) and a ‘prices oversight mechanism’ (clause 2(5)). Clearly Governments are free to decide how prices oversight is to be done. If they do not want to decide they can ask the National Competition Council to do it if the Commonwealth agrees, or another Government (clause 2(5)). The only strictures (‘an independent source of price oversight advice should have the following characteristics’) are contained in clause 2(4). They are that the ‘mechanism’ or ‘source’ should:

(a) be ‘independent from the Government business enterprise whose prices are being assessed’;

(b) have ‘efficient resource allocation’ as its ‘prime objective’, but that should be ‘with regard to any explicitly identified and defined community service obligation’;
(c) apply to ‘all significant Government business enterprises that are monopoly, or near monopoly, suppliers of goods or services (or both)’;
(d) take submissions from all interested persons; and
(e) give reasons for its pricing recommendations.

(a), (d) and (e) are anodyne, if not obvious, but (b) and (c) are more substantial. Both are the product of the normative concept of ‘competition’ explored as the legitimating discourse of competition policy in Chapter 3, ‘How the National Competition Policy Came to Be’: that monopoly is the opposite of competition are therefore the thing to be dealt with; that, notwithstanding clause 1(5) that the nature and form of ownership of business enterprise is not a matter for the Agreement, Government business enterprises are the ones that require prices oversight; that prices are about ‘efficient resource allocation’ more than anything else; and that the only acceptable derogation from the principle of efficient pricing in its resource allocation sense is a community service obligation that is explicit.

Competitive Neutrality Policy and Principles

In contrast to the coy approach to the concept of prices oversight, the Agreement provides a comprehensive description of exactly what is meant by implementing ‘competitive neutrality’, although it remains restrained in its prescription of the processes of implementation. Dealing with the latter first, the Agreement simply says that each Governments is ‘free to determine its own agenda for the implementation of competitive neutrality principles’ (clause 3(2)), with some reporting requirements – a ‘policy statement’ within a year and an annual report on implementation (clauses 3(8), (9) and (10)).

The Agreement avoids defining ‘competitive neutrality’ but does define ‘the objective of a competitive neutrality policy’: it says what should be done rather than what the state of being competitively neutral is. The definition of the state that was to be sought is negative – the ‘elimination of resource allocation distortions’ or the absence of ‘net competitive advantage’. Net competitive advantage ‘aris[es] out of public ownership of entities engaged in significant business activities’ despite the specific statement in clause 1(5) that ‘This agreement is neutral with respect to the nature and form of
ownership of business enterprises ... is not intended to promote public or private ownership’. An exception is made for ‘non-business, non-profit activities’.

In the absence of a precise formulation of what competitive neutrality is, other than what it is not, the Agreement is prescriptive of what competitive neutrality implies for Government business enterprises. It divides them into two categories: those classified as Public Trading Enterprises,49 and other agencies. Governments commit themselves in both cases to implement certain principles, but only in so far as ‘the benefits to be realised from the implementation outweigh the costs’. A critical feature is that the distinction between them is not formulated other than be reference to categories nominated by the Australian Bureau of Statistics. These categories are not supported by any argument or theory; as will be discussed in Chapter 3 there is very little to support the distinction and this comes to be the subject or critique later in the period in question.

 Those Government business enterprises nominated as either Government Trading Enterprises or Government Financial Enterprises by the Australian Bureau of Statistics are subject to a set of substantive principles. Governments are, first, to adopt a ‘corporatisation model’50 for the former Government business enterprises, but only ‘where appropriate’ (clause 3(4)(a)). Second, Governments are to impose on them the taxation and the regulations to which private sector businesses are normally subject. Finally, they are to pay fees for any Government guarantee of their debts.

In respect of Government agencies which do not fall into the categories of Government Trading Enterprise or Government Financial Enterprise but which ‘undertake significant business activities as part of a broader range of functions’, Governments are only enjoined to implement the principles ‘where appropriate’; alternatively they are enjoined, again ‘where appropriate’, to ensure prices charged for goods or services

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50 The Agreement provides a suggested approach to corporatisation by referring to the ‘model developed by the intergovernmental committee responsible for GTE National Performance Monitoring: clause 3(4)(a).
reflect full cost attribution for tax, relief from regulation or government guarantees of debt

While the Agreement is directed at removing ‘net competitive advantages’ from Government business enterprises, as noted before it does not attend to any such advantages deriving from ownership other than by Governments. This is despite the injunction in clause 1(5) not to distinguish between forms of ownership. That competitive neutrality as an implementation of competition policy is targeted at a public ownership, despite the rhetoric, is reinforced by clause 3(7). This provision preserves from consideration as a matter of competition policy any regulations to which a Government business enterprise may be subject but which does not apply to the private sector. Not stated, but no doubt implied, is that whether such regulation is an exceptional burden on the Government business enterprise is not a concern of the National Competition Policy. Nevertheless, in implementation competitive neutrality was taken to require the evening up of competitive positions, including regulation particular to Government business enterprises.

**Structural Reform of Public Monopolies**

This element is perhaps that most commonly associated with competition policy generally, even though it is but one of several elements in the National Competition Policy as defined in the Agreements. Structural reform of public monopolies has four parts in the Competition Principles Agreement: first, excising any industry regulatory functions of a public monopoly; second, ensuring that any publicly owned entities are subject to other aspects of competition policy; third, ensuring the public interest is not prejudiced by the changes; and fourth, introducing competition into those elements of the public monopoly which are susceptible to it. Of these, only the first – the removal of industry regulation functions from the monopoly itself – is mandatory (clause 4(2)). Nevertheless, the National Competition Council in assessing progress in the implementation of the National Competition Policy, took account of the degree to which all elements were put into practice. This extended beyond the Agreements and came to be one of the chief reasons for dissatisfaction with its activities in the resistance experienced in and around 2000.
Beyond removal of regulatory functions, the various Governments are free to ‘determine their own agenda’ in reforming public monopolies (clause 4(1)). Yet while the ‘agenda’ is not fixed, the process of reform is controlled, albeit by the simple requirement of a review prior to the introduction of competition into the sector traditionally supplied by, or the privatisation of a public monopoly. The subjects of the review are two of the three remaining parts of structural reform as described by the Agreement.

The first of these is the imposition of other elements of competition policy; particularly competitive neutrality (clause 4(3)(e)), although that imposition is softened by the requirement of the review to consider only the best means of effecting them. Competitive neutrality elements are illustrated by clause (h) following, which requires the investigation of the financial relationship, including rate of return targets, dividends and capital structure, between the owner of the public monopoly and the public monopoly itself. The removal of regulatory functions can also be seen as an aspect of competitive neutrality. In this, the idea of ‘public monopoly’ is not precisely delineated. It is not quite the economic concept of monopoly. Rather it appears to be the business or entity carrying on the monopolistic business, from which regulatory functions and competitive elements are to be excised, leaving only ‘natural monopoly elements’ for the public monopoly to supply. The public monopoly is assumed to have commercial objectives in the endeavour, although what they are to be is left for the review (clause 4(3)(a)).

The second aspect of the review is the protection of the public interest, although that phrase is not used. Rather, the Agreement talks of reviewing the ‘merits of’ four things: the separation of natural monopoly elements of the business from the areas where competition could be introduced, of creating competing businesses in the latter, of the imposition of community service obligations, and of the best means of funding and delivering them. The Agreement also mandates, as a fifth matter, consideration of price and service regulation. These call into play clause 1(3), which sets out what should, where relevant, be taken into account. The list includes (‘[w]ithout limiting the matters that may be taken into account ...’) government initiatives as to ‘ecologically sustainable development’ – rather than protection of the environment or sustainability simpliciter; social welfare and equity considerations, including community service obligations –
although that is a process rather than a consideration; occupational health and safety, industrial relations and access and equity; economic development; the consumer interest; and, as if it were not taxonomically contradictory, economic efficiency. The fact of this list perhaps more than the items in it later comes to be one of the most critical features of the National Competition Policy, both (the difference is marginal) in respect of structural reform and in respect of legislative reviews.

Exactly how competition is to be introduced is not the subject of the review. It is this, presumably, which in addition to timing is substantively what is meant by ‘agenda’ in clause 4(1). Undoubtedly consideration of the merits of proposed structural changes is implied by the review, but nothing appears to be agreed as to the outcomes. In contrast to legislation reviews, the public interest was not stated to be preferred. Of course, mandating outcomes is the subject of the third Agreement and hence are defined by the economics of the assessing institution, the National Competition Council.

Legislation Review

Often mistaken for the National Competition Policy itself, legislation reviews are a unique aspect of Australia’s competition policy.\(^{51}\) The legislation review process is frequently taken to be an exemplar of good governmental practice in international circles concerned with competition issues: it is highlighted in the ‘Forward’ of the OECD’s *Competition Assessment Toolkit* in the following terms:

> In fact, one of the most successful examples of pro-competitive reform occurred in a federal system when Australia implemented broad, pro-competitive reforms at both national and state level in the mid-1990s. Since that time, Australia has experienced strong economic performance, with high and steady growth that has raised Australia’s economy from a mid-level performer to one of the top performing OECD economies.\(^{52}\)

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\(^{52}\) OECD, *Competition Assessment Toolkit* (English Version) (OECD, 2010) (available at http://www.oecd.org/topic/0,3699,en_2649_40381664_1_1_1_1_37463,00.html, accessed 17 May 2011)
Clause 5(3) sets out the objective of the legislation review process: that all then existing legislation that restricts competition be reviewed and, ‘where appropriate’, reformed. The Agreement extends the control (or metaregulation, to use the regulatory theory term) to new legislation ‘that restricts competition’ in clause 5(5), although the review process was not deployed for that purpose, rather the Agreement simply required that proposals for new legislation be accompanied by evidence that legislation was consistent with the principles on which the reviews were to be based. This was to become the regulatory impact statement process after 2005. Meanwhile, it was agreed in clause 5(6) that all reviewed legislation was to be ‘systematically’ re-reviewed once every ten years.

Governments were again free to determine their own agendas for this process, subject only to the requirement in clause 5(3) to develop a timetable of reviews. However, Governments committed themselves to an annual report of progress towards reviewing all legislation that restricted competition; the National Competition Council was to publish a consolidation of all the reports of the Governments.

Three subclauses of clause 5 ((7), (8) and (9)) deal with ‘national dimension[s] or effect[s] on competition’ of reviews. Rather than some externally generated procedure, the process relies on the Government responsible for the review nominating the review as national, consulting other interested Governments and referring the matter to a body of its choosing with terms of reference it determines. The National Competition Council is stated to be able to undertake such national reviews, if asked and in accordance with its work program.

The placing of responsibility for reviews on the Government responsible for the legislation to be reviewed was inevitable, as it is doubtful that Governments would surrender sovereignty over the subject matter. However, out of the division of responsibility came much confusion which permitted the defences of the ‘duck’ and the ‘weave’. Those defences were frequently deployed as reviews proved to be the most

controversial and divisive competition policy application process, at least one review leading to street protest marches.\textsuperscript{53}

The source of that controversy lay in what the reviews were to determine and recommend. The ‘guiding principle’ for the reviews was set out in clause 5(1) and is repeated here, as it will be considered frequently in what follows:

The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition.

Clause 5(9) sets out what this entails: a review should

(a) clarify the objectives of the legislation;

(b) identify the nature of the restriction on competition;

(c) analyse the effect of the restriction on competition and on the economy generally;

(d) assess and balance the costs and benefits of the restriction; and

(e) consider alternative means for achieving the same result including non-legislative approaches.

Reviews conducted in accordance with this are in contrast to the other review procedures set out in the Agreement. Clause 1(3) demands a balancing of benefits and costs yet, while clause 5(9)(d) refers to balancing of benefits and costs, that balancing serves clause 5(1) where the benefits of a restriction must outweigh its costs. Legislation restricting competition is required to be justified by benefits greater than costs, those benefits being not otherwise achievable, and the net benefits being greater

\textsuperscript{53} The review of the office of the Victorian Auditor-General: see later, in Chapter 7. For a full explanation of the defences, see below 352-3.
than the benefits of competition both in terms of the purpose of the legislation and the economy at large. It is this that makes the legislation review procedure radical: the status quo has to be justified. Moreover, competition is assumed to be a Good Thing: the benefits that flow from it are not required to be rendered explicit, whereas the benefits of the restriction must be set out and weighed against its costs. This comes to be the touchstone of resistance to the National Competition Policy. Surprisingly, there was no pulling back from its rigours, despite that resistance, even though other elements of the National Competition Policy did not require it.

Access to Services Provided by Means of Significant Infrastructure Facilities

The longest clause of the Agreement is about access and it lead to one of the longest and most complicated parts of Australia’s competition law, Part IIIA of the Competition and Consumer Act 2010 (Cth). It, as will be seen, was the product of a choice not to pursue the route most other jurisdictions have chosen to deal with the problem of access to infrastructure facilities – to rely on core competition law provisions dealing with use of monopoly power – rather, a complete regime was to be formulated. Clause 6(1) sets out the Commonwealth’s obligation to legislate what became Part IIIA of the Trade Practices Act 1974 (Cth.), later the Competition and Consumer Act 2010 (Cth.). The envisaged legislation was to apply to the following circumstances, as set out in clause 6(1):

(a) it would not be economically feasible to duplicate the facility;
(b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;
(c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and
(d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.

This mutated into a complex two-step regime involving a declaration, with attendant appeal mechanisms, by the Minister that the service was essential; and, second, a
process to be used when agreement of the terms of access could not be achieved and under which the terms and conditions of access were to be determined. The first step is about clause 6(1) and the determination of which infrastructure facilities were to be subject to the access regime, and the second was to deal with negotiated settlements and to determine prices and conditions in the absence of the much preferable, from the point of competition policy, negotiated settlement.

An access regime was nothing new, as the economics of natural monopolies was well and truly established in 1995, hence the States and Territories already had quite a few access regimes in place. Naturally, then, the respective provinces of the Commonwealth generic regime and State and Territory arrangements were delineated. The Commonwealth regime was not to apply to access arrangements as to facilities within a State and Territory and which conformed to agreed principles. Moreover, the Commonwealth regime could override the State arrangements where the either the facility was situated in more than one jurisdiction and ‘substantial difficulties’ arose from that, or had influence beyond a jurisdictional boundary and the National Competition Council determined the arrangements were ‘ineffective’. Where access arrangements existed in more than one State or territory to a single service, those Governments were to come up with a procedure under which a person seeking access only needed to utilise a single process.

The facilities to be subject to a State or Territory access regime were described in the Agreement in the same terms as those subject to the Commonwealth regime, barring the requirement of national significance. However, in contrast to the absence of any requirement beyond the description of those facilities to which the regime was to apply, State and territory regimes had a rigorous set of ‘principles’ to which they had to adhere. These principles set out in detail what should be incorporated in a regime.

As it turned out, after negotiation all governments agreed to some variation on these. However, the structure mostly survived into Part III of the *Trade Practices Act 1974* (Cth). What eventuated is considered in Chapter 7.

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54 Clause 6(2).

55 Clause 6(4)(p).
The Implementation Agreement

The third and last agreement comprising the National Competition Policy was the Agreement to Implement the National Competition Policy and Related Reforms. It sets out financial arrangements ‘in relation to’ the National Competition Policy and related reforms’. ‘[I]n relation to’ is somewhat euphemistic: it conceals the importance of the financial arrangements as incentive structures ensuring compliance with the program set out in the other agreements. In summary, it promises that the Commonwealth would pay the States and Territories large sums of money if they carried out the Agreements.

As a promise to pay money it does all the usual things: it says how much, when, and for what. It does this in a considerably more informal document than the other two agreements; the Commonwealth simply promises to pay. However, concealed in the bland format is the considerable, if well-known and understood, institutional complexity of Australian federalism. The particular features of this implicated by the Implementation Agreement are the relations between the States and the Commonwealth which within which the agreements were negotiated and signed, and the Federal/State vertical fiscal imbalance.

The Federal Context

For present purposes, the most important feature of the Australian federal structure is that the States hold plenary powers subject to the Australian Constitution. There is no delegation from the Commonwealth to the States; rather, the States were first conferred rather circumscribed plenary powers by the imperial government, the United Kingdom, at various times in the nineteenth century, then a later-created statute of the United Kingdom Parliament, the Commonwealth of Australia Constitution Act 1900, further

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56Section 106. The Australian Constitution (hereafter the Constitution) is provided for in sec. 9 of the Commonwealth of Australia Constitution Act 1900 (U.K.) 63 & 64 Vict. c. 12

57Ibid.
limited the powers of the States under their Constitutions by taking some powers from the States and giving them to the Commonwealth. Hence governmental powers under the Constitution are divided between the States and the Commonwealth, with defined powers going to the Commonwealth and the pre-existing residue to the States. The Commonwealth cannot legislate where it has no head of power to do so or for which power has been referred by the States under s 51(xxxvii).

Section 92 of the Constitution creates something approaching a free trade area within Australia’s borders. To say this is, of course, to vastly oversimplify an incredibly complex series of cases; although it must be said that that such oversimplification

58 These limitations were the colonial law doctrines of extraterritoriality and repugnancy, somewhat constrained by the Colonial Laws Validity Act 1865 (28 & 29 Vict., c. 63) and various other Imperial Statutes.


60 The Commonwealth is also constrained from legislating by the guarantee of freedom of religion in s 116 of the Constitution, the express guarantee of non-discrimination on the basis of State of residence in s 117, and various implied ‘immunities’, such as the implied guarantee of political communication, the most authoritative statement as to which is in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 although Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104 is more frequently cited, and implied limits resulting from Australia’s federal nature as set out in Melbourne Corporation v Commonwealth (the State Banking Case) (1947) 74 CLR 31; re Australian Education Union; ex parte Victoria (1995) 184 CLR 188; Austin v Commonwealth (2003) 215 CLR 185.

61 Although one hesitates to cite High Court judgments as authoritative history (about which see Rob McQueen, ‘Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia’, (1990) 19 Fed. L. R. 245), the judgment of the whole Court in Cole v Whitfield (1988) 165 CLR 360, 385-392 provides a useful and easily accessible summary.

62 There are numerous excoriations of the Privy Council and High Court of Australia’s attempts to interpret the section. Sarah Joseph and Melissa Castan Federal Constitutional Law: A Contemporary View (LawBook, 3rd ed. 2010)) quote Sir Robert Garran: ‘More than fifty years ago in Australia we issued clean from the press a beautiful constitution. A choice bit was section 92 – and look what a mess we have made of it! I have been musing over the judgments upon it, and frankly, I want to burn the lot!’ from R. Garran, Prosper the Commonwealth (Butterworths, 2007) 351. As the Full Court of the High Court itself said in Cole v Whitfield (1988) 165 CLR 360, 383-4, ‘No provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s 92. That notwithstanding, judicial exegesis of the section has yielded neither clarity of meaning nor certainty of operation. Over the years the Court has moved uneasily between one interpretation and another in its endeavours to solve the
appears to have a deal of currency in discussions of competition policy in Australia. These latter focus on whether there is a national market in Australia as if that is a matter of econometrics and barriers to trade rather than also a question of regulatory competence and a federal balance. On the other hand, the latest interpretation of s 92 has cited the National Competition Policy, inter alia, as providing an element of a new context for understanding the prevailing ideology within which s 92 should operate.


64 Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, 452-3. The Court said this:

The third development [in the legal and economic milieu in which s 92 operates] is the emergence since 1995, and by inter-government agreement under the auspices of the Council of Australian Governments, of a National Competition Policy. Elements of that policy include as a “guiding principle” that legislation should not restrict competition, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs and that the objectives of the legislation "can only be achieved by restricting competition". [cited: Competition Principles Agreement] Further, provision of financial assistance by the Commonwealth to the States is made conditional upon progress in the implementation of the National Competition Policy.[cited: Implementation Agreement] Counsel for the plaintiffs emphasised that the greater the degree of implementation of the National Competition Policy, the less the occasion for recourse to s 92.

This is somewhat opaque especially as Counsel for the plaintiff’s arguments are, in this respect, not reported. The best sense seems to be start from the tautology that where there is a free market there is no regulation and proceeds to the obvious yet ideologically insignificant point that given that the National Competition Policy seeks to extend the reach of markets into erstwhile government monopolies, there will be less regulation to infringe s 92. Mind you, it ignores the acceptance of the limits on the reach of
That case, Betfair,\(^{65}\) has been taken to possibly ‘signal some changes to the Cole test, to the end of promoting a national economy free of divergent State legislation’.\(^{66}\)

Section 92 is as follows:

\[\text{92  Trade within the Commonwealth to be free}\]

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Legislation infringing this stricture is unconstitutional and therefore void. The current test is set out in Cole v Whitfield.\(^{67}\) most commonly (and it can be put in a number of ways\(^{68}\)) a law is contrary to s 92 if it imposes ‘discriminatory burdens of a protectionist kind’.\(^{69}\) The Commonwealth has power under s 51 to ‘make laws for the peace, order, and good government of the Commonwealth with respect to: (i) trade and commerce with other countries, and among the States’, but that is ‘subject to this Constitution’ and hence to s 92 (and s 117 for that matter).

The upshot of these constitutional complexities is that the Commonwealth Government has severe restrictions on its powers to force the State Governments to change the form of their laws. (The Territories are in a somewhat different position as they take their legislative powers from the Commonwealth and are subject to its laws: s 122.) For that reason if there is to be a national policy with regard to laws, including competition laws, within the States plenary powers it has to be implemented by the respective

\(^{65}\) Ibid.


\(^{67}\) (1988) 165 CLR 360.

\(^{68}\) See Tony Blackshield and George Williams, Australian Constitutional Law and Theory. Commentary and Materials (Federation, 5th ed., 2010) 1215-6

\(^{69}\) Cole v Whitfield (1988) 165 CLR 360, 394.
Governments. The strategy generally deployed to achieve the implementation of a policy, whether or not it was a matter of imposition by the Commonwealth or some more universal imperative, was agreement. Yet in the case of the National Competition Policy, while electoral pain was foreseen in its implementation, offsetting gain was hypothesised from greater economic activity; however the gain would be received by the Commonwealth through taxation rather than the States: the Federal/State vertical fiscal imbalance. There was also the matter of some Governments being more committed to others and the possibility of game-playing between Governments. The very same Federal/State vertical fiscal imbalance as created the problems provided an opportunity to address these concerns.

It is a truism in Australia’s constitutional framework that the Commonwealth has almost the whole power to tax with limited powers to spend,70 and the States and Territories have the obligation to spend with very little concomitant power to tax.71 The shortfall in State and Territory revenue is made up by Commonwealth grants under its financial assistance power.72 Oddly enough, only customs and excise duties, historically an expanding category,73 are exclusive to the Commonwealth,74 the States retaining power to levy taxation in all other respects under s 107 of the Constitution. However, the history of the taxation power has so far concentrated power to tax in the hands of the Commonwealth.75 In particular, income taxation is levied solely by the Commonwealth, any threat by the States to impinge on this being met with counter-threats to the level of financial assistance to them by way of Commonwealth grant.76

70 The Commonwealth’s power to spend is limited to powers specified in the Constitution or statutes made under it: Pape v FCT (2009) 238 CLR 1; [2009] HCA 23.

71 One of the better analyses of the extent of the fiscal imbalance is Anne Twomey and Glenn Withers, Federalist Paper 1. Australia’s Federal Future: Delivering Growth and Prosperity (Council for the Australian Federation, 2007) 34-39.

72 Commonwealth Constitution, s 96.

73 See, for example, Parton v Milk Board (Vic) (1949) 80 CLR 229; Hematite Petroleum Pty Ltd v Victoria (Pipeline Tax Case) (1983) 151 CLR 599.

74 Ibid, s 90.

75 See, in particular, Victoria v Commonwealth (Uniform Tax Case (No 2)) (1957) 99 CLR 575.

76 Halsbury’s Laws of Australia [90-6070]
Under section 96 of the Constitution, the Commonwealth may grant financial assistance to any State on any terms and conditions the Commonwealth Parliament thinks fit. The grants may be conditional: they may be for particular purposes, such as to build a road, or as an inducement to exercise legislative powers in one way or another – even not to exercise them at all. While not coercive, such grants may bind the State (although what ‘binding’ means is not entirely clear), be for objects outside the powers of the Commonwealth, and be at the discretion of a Commonwealth Minister. These possible characteristics come to the fore in the competition payments under the Implementation Agreement.

Payments

As was described above, the Implementation Agreement sets out a table of payments to be made by the Commonwealth, in addition to that which the States and Territories – indeed, also local government – would have otherwise received as calculated under the Financial Assistance Guarantees, provided the National Competition Council recommends to the Minister that no deductions are to be made. This is clearly the sort of grant which is constitutional within s 96 according to test set out by Dixon C J in

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77 Currently these are divided into National Specific Purpose Payments, National Partnership Payments of three types (project payments, facilitation payments and reward payments) and general revenue assistance, consisting mainly of a share of GST: see Gareth Griffith, Managerial Federalism – COAG and the States, Briefing Paper No 10/09, Parliamentary Research Service, Department of Parliamentary Library, Parliament of New South Wales, Sydney 2009, 18.

78 Victoria v Commonwealth (Federal Roads Case) (1926) 38 CLR 399

79 South Australia v Commonwealth (Uniform Tax Case (No 1)) (1942) 65 CLR 373 at 417.

80 South Australia v Commonwealth (Uniform Tax Case (No 1)) (1942) 65 CLR 373; [1942] ALR 186; (1942) 16 ALJ 109; Victoria v Commonwealth (Uniform Tax Case (No 2)) (1957) 99 CLR 575; [1957] ALR 761; (1957) 31 ALJ 369.

81 Victoria v Commonwealth (Uniform Tax Case (No 2)) (1957) 99 CLR 575, 605 per Dixon J: ‘It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition.’

82 Deputy Federal Commissioner of Taxation (NSW) v W. R. Moran Pty Ltd (1939) 61 CLR 735.

83 Ibid, 606, per Dixon C.J.
Victoria v Commonwealth (Uniform Tax Case (No 2)).\textsuperscript{84} It does not matter that no power in the Constitution enables the Commonwealth to legislate for competition as such or in respect of all the legislation subject to the Competition Principles Agreement. The Implementation Agreement does not tempt suit in relation to deductions by vesting the discretion to make them otherwise than in accordance with Dixon C. J.’s \textit{dictum}: the National Competition Council merely was to report to the Commonwealth its assessments as to whether the conditions for payment have been met. When the time for deductions came with the commencement of third tranche payments in 2000, the procedures were clarified by amendment to the Agreements: the National Competition Council was to make recommendations, notify them to the State and Territory Governments for comment, and to advise the Commonwealth Treasurer accordingly. That Minister would then formally decide on the level of payments to be made.

The \textit{Implementation Agreement} was the key to ensuring implementation. It bound the States and Territories by promising extra money and governments are always short of money. The sums were large enough for the States and Territories to continue complying no matter electoral results. Indeed, given that it was probable that at least some implementations would cause electoral opprobrium and many did in fact do so,\textsuperscript{85} it can only be said that it was a very effective strategy. The vast proportion of the promises made by the States and Territories were carried out. Predictably, given that there was no financial incentive to comply, the Commonwealth Government proved the laggard (with Western Australia) in implementation.\textsuperscript{86}

The incentive was not all or nothing; the reward was only for as much as was done. Decisions therefore had to be made as to the extent of non-compliance. The decisions

\textsuperscript{84} (1957) 99 CLR 575; [1957] ALR 761; (1957) 31 ALJ 369; 607.

\textsuperscript{85} While it cannot be determined with certainty, the Kennett Government in Victoria lost office in part due to excessive zeal in competition policy reforms, although it must be said that the Kennett government no doubt would have carried out such reforms whether or not it got paid for them.

\textsuperscript{86} As the National Competition Council wrote in its 2005 Assessment, ‘The Australian Government does not receive competition payments. As in previous assessments, the Council notes that the Australian Government is still to appropriately address some legislative restrictions.’ National Competition Council, \textit{Assessment of governments’ progress in implementing the National Competition Policy and related reforms’}, Melbourne, 2005, xxxvii.
clearly could not be made by interested parties – any of the Governments would fall into that category – hence an independent body, the National Competition Council, was set up for the purpose. Just as important as an appearance of disinterest between payer and payee, the Council also had to act fairly as between the States and Territories.

The National Competition Council was provided for in the *Conduct Code Agreement* and was established by amendment, enacted by the *Competition Policy Reform Act 1995* (Cth.), inserting Part IIA of the then *Trade Practices Act 1974* (Cth.), later for the purposes of competition law renamed as the *Competition and Consumer Act 2010* (Cth.).\(^87\) The *Conduct Code Agreement* ensured that appointments were made by consent and various provisions in all the Agreements ensured workload and workflow were regulated. Given that the *Competition Policy Reform Act 1995* (Cth.) was already extant in bill form, other provisions as to termination and conflicts of interest were agreed to by virtue of consent to the bill in draft form.\(^88\)

How much? And when? The Commonwealth promised to make a series of ‘Competition Payments’ to the States and Territories in three tranches: the first of $200 million in each of two years, commencing in July 1997, paid quarterly; the second of $400 million in each of two years, commencing in July 1999 and also paid quarterly; and the third and last of a total of $600 million with an unstructured payment schedule. The sums were indexed in real terms. They were conditional on satisfactory

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\(^87\) A more expansive discussion of the National Competition Council as a creature of statute, that is as the National Competition Policy was implemented, rather than as a matter of the three agreements, is found in Chapter 5.

\(^88\) Council of Australian Governments (COAG) Meeting 19 August 1994, *Communique*, where Council of Australian Governments agreed to ‘the establishment of the Australian Competition Commission and the Australian Competition Council (previously the National Competition Council) to exercise recommendatory powers in relation to access and pricing surveillance issues and advisory powers on matters determined by governments’. At the next meeting the Council of Australian Governments ‘supported’ the Commonwealth’s Competition Policy Reform Bill and the amendments made to it. These included a thinning down of the National Competition Council’s function. The Bill was noted to provide that ‘appointments to the ACCC and NCC will be a matter of close consultation between the parties and will require the support of the Commonwealth and a majority of the parties’; see Council of Australian Governments (COAG) Meeting 11 April 1995, *Communique*.  

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implementation progress, as described below, and were subject to review if Australia experienced a major deterioration in its economic circumstances.

The Agreement contains, indeed commences with promises by the Commonwealth to ‘maintain the real per capita guarantee of the FAG pool on a rolling three year basis.’ This somewhat arcane formula represents a foil to the possibility of the Commonwealth reducing payments generally or of the Commonwealth discriminating between States or Territories by changing payments made under its financial assistance to the States and Territories. That financial assistance was and is de rigueur as a result of the Federal/State vertical fiscal imbalance under the Constitution. In order to be able to make the promise that extra funds were to be made over to the States and Territories as a result of compliance, the Commonwealth had to reassure the other Governments that it was not going to claw back funds by reducing any other payments it might have made. Hence it created a ‘Financial Assistance Guarantee’ fixing grants to a per capita basis and promising to maintain their real value on a rolling three year basis. It extended the purview of these arrangements by setting up a separate Local Government Financial Assistance Guarantee pool, in doing so recognising the third tier of government not otherwise constitutionally acknowledged.

The payments were to be conditional on ‘satisfactory progress’, as the opening clause states. The text of the Agreement sets this out tranche by tranche, and an attachment provides ‘full details’. The progress was to be measured in relation to implementation of the Agreements, and implementation of further Council of Australian Governments agreements with regard to electricity, gas, water and road transport. The final payments were to be conditional on full effect and implementation of all the agreements. The attachment sets out all the commitments made by the States and Territories in the three formal Agreements, and gives a little more detail about the other matters: progress in electricity meant’ transition to a fully competitive National Electricity Market’, for gas it was ‘implementation of free and fair trading in gas between and within the States’, and for road transport it was ‘effective observance of the agreed package of road transport reforms’. Water industry reform received treatment only in relation to the second tranche where the specified reforms included ‘implementation of the strategic framework for the efficient and sustainable reform of the Australian water industry and
future processes. Without preamble or warning, the third tranche is also conditional on the setting of national standards in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action and also advice from the Office of Regulation Review. This is not as far-reaching as it seems: the standards are simply about the principles of good regulation, although they do introduce particular notions of the purpose of regulation, its justification, its features and methodologies of assessing these things.

The conditions on which the Competition Payments were to be made reveal that more than simply the obligations under the first two formal National Competition Policy agreements were to comprise competition policy in Australia for the time being. The third Agreement thus extends the National Competition Policy into industry reform. The unifying feature of these latter reforms was their perceived national character, either in terms of the way the industry crossed borders and hence was a matter of a national market (water and road transport) or where a national market was sought (electricity and gas).

**The changes made in 2000**

The National Competition Policy Agreements were changed twice: once in 2000 and again in 2007. The last falls outside the timeframe determined by the topic of this thesis, and hence will be considered later. The first was prompted by a provision in both the Conduct Code Agreement (clause 10) and the Competition Principles Agreement (clause 15) agreeing that the operation of the Agreements be reviewed after five years, and by a further provision (clause 11) in the latter agreeing that the operation of the National Competition Council be reviewed after five years also. Accordingly, in

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89 The future process were stated to be those ‘endorsed at the February 1994 Council of Australian Governments meeting and embodied in the Report of the Expert Group on Asset Valuation Methods and Cost-Recovery Definitions’.

its *Communique* resulting from the Council of Australian Governments meeting 3 November 2000,\(^{91}\) the following agreement was noted:

Heads of Government agreed to several measures to clarify and fine-tune implementation arrangements for NCP as set out in the Prime Minister’s letter of 27 October 2000 to Premiers and Chief Ministers. The adoption of these changes will establish a practical framework for the ongoing, effective implementation of NCP, while demonstrating our ongoing commitment to this policy and safeguarding the flow of benefits it is delivering to Australians as a whole. The changes will also serve to address a number of community concerns regarding the application of NCP which were identified in the recent Productivity Commission and Senate Select Committee inquiries into competition policy.\(^{92}\)

The actual changes were the product of agreement between ‘COAG Senior Officials’ and were set out in an attachment to a letter from the Prime Minister (then John Howard) addressed to all Premiers of States and Chief Ministers of Territories. In the words of the *Communique*, the amendments were:

that the National Competition Council (NCC) determine its forward work programme in consultation with COAG Senior Officials; that COAG Senior Officials continue to clarify and specify NCP reform commitments and assessment benchmarks for the NCC; that the deadline for completing the NCP legislation review and reform program be extended from 31 December 2000 to 30 June 2002; and that the NCP Intergovernmental Agreements be amended to provide further guidance to the NCC on how to assess whether jurisdictions have complied with their legislation review commitments.


\(^{92}\) Ibid 4-5.
Oddly enough, neither the letter nor the actual alterations as stated in its attachment were appended to the Communique. Fortunately Hon. Dee Margetts raised the matter of what was agreed in the Legislative Council of the Parliament of Western Australia in Question Time on 11 September 2003 and the letter was tabled. The attachment reveals that the changes were mostly expressed to be to the National Competition Policy arrangements, rather than the Agreements themselves. Even so, given that they were the subject of agreement, albeit subterraneously recorded, and given also that much of the Agreements was about procedure and processes, as a matter of definition they can be viewed as adding to the National Competition Policy. That they are called ‘Changes to National Competition Policy Arrangements’ reveals the fluidity and ambiguity of understandings of what comprised the National Competition Policy. Further complicating the picture is that some matters were considered important enough to demand alterations to the Agreements, rather than simply being recorded in the letter to which the Council of Australian Governments Communique refers. These amendments were as to the assessment of progress of governments in meeting their commitments as to legislation reviews and the deletion of the Table of Payments from the Implementation Agreement.

While the wording of the changes to the Competition Principles Agreement represented by the first of the amendments is quite clear, exactly where it was to be inserted is not. In the post 2007 version of the Agreements as recorded on the National Competition Council’s National Competition Policy website, it is a note to clause 5. In any event, it is as follows:

In assessing whether the threshold requirement of Clause 5 has been achieved, the NCC should consider whether the conclusion reached in the report is within the range of outcomes that could reasonably be reached based on the information available to a properly constituted review process. Within the range of outcomes that could reasonable be

93 Bronwen Morgan, Social Citizenship in the Shadow of Competition (Ashgate, 2003) 204
94 For convenience, it is included as Appendix 2.
95 There were a couple of others due to drafting errors in the Agreements.
reached, it is a matter for Government to determine what policy is in the public interest.

This is quite odd, as clause 5 has no mention of a threshold requirement. However, the proposed amendment is followed by instructions as to how the National Competition Council was to distribute the third tranche of competition payments. The procedure was that the National Competition Council would assess each Government’s performance in meeting reform obligations, casting the process as determining what penalties should be applied to a particular State or Territory’s payment. The penalty was to be assessed by taking into account:

The extent of overall commitment to the implementation of NCP by the relevant jurisdiction; the effect of one jurisdiction’s reform efforts on other jurisdictions; and the impact of failure to undertake a particular reform.

The process that then was to follow was that the National Competition Council would confidentially notify the relevant State or Territory Minister and the Commonwealth Treasurer of its recommendation. After one month, during which the State or Territory Minister could make representations, the Commonwealth Treasurer was to decide on the level of competition payments to be made. It was to be a purely bilateral process. The National Competition Council was to publish its reasons for its assessments in its Annual Assessment. Counteracting the increased rigour represented by these processes, was an extension of time for completion of legislation reviews.

Why the Table of Payments in the Implementation Agreement was deleted is not made clear. Certainly it was somewhat redundant due to the change in competition payment assessment procedures and had been rendered out of date due to inflation.

The changes and addition to the arrangements which did not merit amendment of the Agreements were as to transparency, governance of the work program of the National Competition Council, methodologies of assessment of competitive neutrality, and further cordonning off Community Service Obligations from competitive neutrality. The
impact of the High Court of Australia in *R v Hughes*97 was mentioned as a matter to which should be given ‘early consideration’ and the *Agreements* were set down for further review in 2005.

The motivation for these changes will be made apparent in Chapter 7, suffice it for now to say that there had been considerable criticism of various implementations of the National Competition Policy and the overriding solution to such voices was thought to be information: people would accept the difficulties if they knew what was going on and the good that would flow. Hence, under ‘Transparency’, Governments agreed to fully document public interest reasons supporting a decision or assessment, to ‘give consideration to explicitly identifying the likely impact of reform measures on specific industry sectors and communities, including expected costs in adjusting to change’, and also exhorted the National Competition Council to better explain and promote the National Competition Policy. The National Competition Council was also subjected to the guidance of ‘Senior Officials’ in interpreting the Council of Australian Governments’ guidance. Presumably they are the same anonymous group who formulated the proposed changes in the first place.

**After 2005**

While the *Agreements* did not provide for a termination date, the programs therein set out, especially in respect of legislation reviews, generally ran on until 2005. The National Competition Council was to provide its final assessment of progress in that year and there were no more competition payments provided for after that year in the *Implementation Agreement*. For those reasons, this thesis is expressed to cover only the period 1995 to 2005. However, the importance of a thing should not be measured only by its history: what happens as a result of it is perhaps even more relevant. Accordingly, as a matter of context, the continuation, albeit in partially expired and somewhat mutated form, of the *Agreements* is here considered. Just as significant is the accretion of policy and reform activities around the Agreements and these also are traced.

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In 2000 the Council of Australian Governments had agreed that all Agreements would be reviewed in 2005. In accordance with this, the Council of Australian Governments agreed in its meeting on 3 June 2005 to have Senior Officials (the same ones, presumably, as in 2000) from the Council of Australian Governments review the National Competition Policy, reporting to the Council by the end of 2005. The review was not only to ‘assess the effectiveness of the existing NCP arrangements’; it was to focus on a ‘possible new reform agenda’, including ‘practical options for implementation, monitoring and assessment’.

Meanwhile, on 23 April 2004, the Commonwealth Treasurer commissioned the Productivity Commission to conduct an independent review of the National Competition Policy arrangements. This review was to ‘inform’ the Senior Officials’ Council of Australian Governments review to take place in 2005, which indeed required to ‘draw from, but not [to] be limited by, the recommendations of the Productivity Commission report’. As a result, on 10 February 2006 Council of Australian Governments agreed to a ‘new National Competition Policy reform agenda’, which was located in a broader ‘National Reform Agenda’. The other two aspects of the latter agenda were health and regulatory reform. Thus, from 2006 National Competition Policy is no longer a thing in itself as funding arrangements, implementation arrangements and even program-setting become integrated in a broader governance program. It is a ‘stream of the COAG national reform agenda’, albeit ‘a substantial addition to, and continuation of, the highly successful National Competition Policy reforms.’ Thereafter national competition policy was to focus on ‘further reform and initiatives in the areas of transport, energy, infrastructure regulation and planning and climate change technological innovation and adaptation.’ Competition payments were no longer a matter of agreement, rather: ‘[t]he Commonwealth has indicated that it will provide funding to the States and Territories on a case-by-case basis once specific


99 Ibid.


102 Ibid 4-5.
implementation plans have been developed if funding is needed to ensure a fair sharing of the costs and benefits of reform.’

One area not mentioned in the Communique from the 10 February 2006 meeting, but prominent in an Attachment referred to in that document103 is the continuation of the legislation reviews. In clause 5(5) of the Competition Principles Agreement governments had agreed that ‘[e]ach Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principles set out in subclause (1)’. Decision 1.2 set out in the Attachment was:

Each jurisdiction will:

(a) continue and strengthen gate-keeping arrangements established in the National Competition Policy (NCP) arrangements to prevent the introduction of unwarranted competition restrictions in new and amended legislation and regulations; and

(b) complete outstanding priority legislation reviews from the current NCP Legislation Review Program in accordance with the NCP public benefit test.

The Attachment set out further decisions under the heading of ‘Legislation Review’. They were that all jurisdictions were to ‘recommit’ to the Principles of the Competition Principles Agreement, that State and Territory governments were to publicise how those principles apply to local government activities and functions by preparing a statement specifying the application of the principles – the statement had to be prepared in consultation with local government; and, even less in relation to legislation reviews, that processes of appointments (presumably to the National Competition Council and Australian Competition and Consumer Commission) and processes of amendments to Australia’s competition law104 were to be streamlined.

The balance of the 2006 decisions relating to competition devolve into consideration of particular industries, most notably energy, transport and infrastructure. Certainly, there


104 In Part IV of the then Trade Practices Act 1974 (Cth.).
had been a mention of ‘related reforms’ in the original Implementation Agreement – even in its title, ‘Agreement to Implement the National Competition Policy and Related Reforms’ – and from the very earliest competition policy was seen to encompass more than simply the Agreements. The Attachment to the Implementation Agreement specifies progress in implementation of Council of Australian Governments Agreements in relation to the electricity, gas, water and road transport industries, as well as the rather anomalous matter of national standards, as being assessable for the purpose of deductions from tranches of competition payments.

By the July 2006 Council of Australian Governments meeting, competition had sunk further into being but a ‘stream’ of the National Reform Agenda. Such note as was made was directed at ‘the good progress in developing and implementing the competition stream of the National Reform Agenda, which incorporates reforms aimed at boosting Australia’s productivity, competition and the efficient functioning of markets.’\(^{105}\) ‘Important milestones’ were noted: the establishment of an Implementation Group and the release of an issues paper for the energy industry, the commencement of work on urban congestion, and the release of a Productivity Commission paper on the transport industry. Eight months later in April 2007 comment on the competition stream of the National Reform Agenda devolved into the noting of progress in reforms to electricity, gas transport and nationally significant infrastructure.\(^{106}\) There was a change of Government before the next meeting and thereafter consideration of competition policy took a different form. This is not to say there was no competition policy, merely that the National Competition Policy as something to be implemented as such had fizzled out.

With the election of a Coalition Government in 2013 came renewed emphasis on competition policy. A review of competition policy, the Competition Policy Review, was announced on 4 December and on 27 March 2014 the Minister for Small Business released Terms of Reference.\(^{107}\) These are not structured as the National Competition


\(^{106}\) Council of Australian Governments (COAG) Meeting 13 April 2007, Communique, 1.

Policy was, especially in respect of the elements of competition policy, however, they are clearly included in the ‘key areas of focus for the review’ (which are articulated in greater detail). The key areas of focus are:

- identify regulations and other impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest;
- examine the competition provisions of the Competition and Consumer Act 2010 (CCA) to ensure that they are driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets;
- examine the competition provisions and the special protections for small business in the CCA to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future;
- consider whether the structure and powers of the competition institutions remain appropriate, in light of ongoing changes in the economy and the desire to reduce the regulatory impost on business; and
- review government involvement in markets through government business enterprises, direct ownership of assets and the competitive neutrality policy, with a view to reducing government involvement where there is no longer a clear public interest need.

The first and last of these are clear, even explicit, references to legislation reviews and competitive neutrality although most of the other elements as defined in the Agreements can be found in the detail. The last defies the clear statement in the Competition Principles Agreement that who owns an enterprise is not significant in competition policy terms. Moreover, special protection for small business, although a frequent concomitant of competition policy, is generally regarded as antithetical to it.

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There are, in the detail, clear references to some of the more contentious aspects of competition policy over the last ten years or so, including the aforesaid protection for small business, the lack of impact of competition law on industries such as groceries, fuel and utilities, critique of the access regime, criticisms of Australian Competition and Consumer Commission power, and enforcement. It is difficult to say for certain, but there even appears to a reference to disaggregation of monopolies as in the *Enterprise Act 2002* (UK) Chapter 1, Part 4 or even the Sherman Act 1980 (US) which was notoriously deployed to disaggregate AT&T into the Regional Bell Operating Companies (the ‘Baby Bells’). The terms of reference state, *inter alia*, that the Commission should ‘consider alternative means for addressing anti-competitive market structure, composition and behaviour currently outside the scope of the CCA [Competition and Consumer Act 2010 (Cth)]. Finally, there is only muted reference to the federal structure of Australia as a matter to be taken into account in the Commission’s investigation of the effectiveness of regulatory agencies even though this was one of the major pillars of the National Competition Policy.

**Summary**

The three *Agreements* between the Commonwealth and the States and Territories taken together provide for a ‘National Competition Policy’ as a set of intended agreed modifications to law, and a set of obligations defined in varying specificity.

The obligations set out in the *agreements* were to:

- extend the operation of Part IV of the *Trade Practices Act 1974* (Cth)
- implement prices oversight of government business;
- apply competitive neutrality policy and principles;
- implement structural reform of public monopolies;
- legislation reviews; and
- access to services;
- plus a number of reforms defined in terms of the subject industry.

All were embedded in a complex of procedures and involved considerable institutional reform.
Considerable transfers of money from the Commonwealth to the States and Territories were conditional on performance by the States and Territories of these obligations. Determination of the extent to which Governments complied with the agreements and hence whether deductions from agreed payments to States and Territories were to be made was to be the function of an independent body, the National Competition Council, set up for the purpose. The payment-for-compliance procedures did not apply to the Commonwealth.

The Agreements were entered into in April 1995 and fizzled out from around mid-2005. There was no formal termination, simply a lapse into desuetude, apart from the obligation to assess the impact on competition of any new legislation. However, there is presently (2014) renewed emphasis in competition policy, an emphasis explicitly harking back to the Hilmer Committee Review, albeit without reference to the Agreements.

Accordingly the implementation of the Agreements forms a suitable subject for an examination of the National Competition Policy. It is a mere analytical convenience, but to do otherwise would be to increase complexity with little benefit of explanatory power. Thus to focus on the economic theory would be to subordinate the politics or to focus on the Hilmer Committee review would be to force the repetition of the gap between those recommendations and what was done. Both of these aspects are apparent in the course chosen, but they are simply accomplished.

**Implications**

If the implementation of the Agreements is taken to be the subject of this thesis’ examination of the National Competition Policy 1995-2005, and if the examination is ‘thick’, the things that are examined are the actions taken in pursuance of it. Yet, as discussed in Chapter 1, creating a simple record of the actions implementing the National Competition Policy is not a simple task: there are simply far too many of them.

The actions which comprise the implementation of the National Competition Policy include: speaking, investigating, reporting, meeting, making payments, denying requests and recording things. This list is of what people do. People can be said in doing so to
engage in transactions or relationships, legislate, regulate, set up institutions, engage in routines, and make contracts and arrangements. The actions may be abstracted further, such as review, corporatise, privatise, functionally separate, contractualise, implement a provider/supplier model, marketise, propertise, compensate, and so forth. Yet as we abstract we incorporate concepts and ideas which limit what we observe.

Even in the first two lists in the previous paragraph there are ways of thinking and assumptions narrowing the observable. Thus a series of questions follow: What does it mean to legislate – is it simply a particular procedure in a special room, followed by other procedures and if so, are the multifarious intentions and purposes of the legislators conflated and rendered irrelevant? What is an institution and does it have a group intention or will (as is implied when this thesis looks at the institutions of the administration of government, including those established to or tasked with the implementation of the National Competition Policy). Yet to not abstract renders the account irrelevant to, not to mention too unwieldy for, our purpose: the critical examination of the National Competition Policy. This involves discovering and considering the ideas and concepts behind it, and its intended and unintended consequences, a process to which full knowledge of what was involved is a prerequisite. Such is, of course, the issue continually plagues this thesis yet which paradoxically enables it.

However, all is not so bleak for the endeavour as the preceding paragraph intimates. That paragraph is an argument against assuming concepts and principles, against abstracting without considering the basis on which the matter is abstracted. Previous accounts of the National Competition Policy have done just that. However, the present purposes of making a debate possible are satisfied if the commonly held ideas of the procedures of government are assumed. It may be that later research will press the boundaries further; for now describing comprehensively within conventional thought suffices. Most importantly, it is all that can be done within the length and time constraints of a thesis such as this one.

Nevertheless the problem of summarizing or picturing a huge number of individual actions without imposing a framework remains. Five substantial versions of the story of the implementation of the National Competition Policy as a whole exist: from the
National Competition Council, the Productivity Commission, by Bronwen Morgan,\textsuperscript{109} in Hansard and in the media. There is a multiplicity of partial versions. And, of course, there is the record of the vast number of actual actions from which a story might be devised and which can be used to test the established ones.

The first two substantial versions are much the same, each drawing on the other extensively and repeatedly. They present a very detailed account of events and actions from beginning to end. The National Competition Council published, as required by the Agreements, assessment reports in 1997, 1999 and then yearly from 2001 until a final report in 2005. It also delivered yearly Annual Reports. The Productivity Commission generated a number of reports in which events and actions are detailed, and also issued major assessments in 1999 and 2005.\textsuperscript{110} These assessments and reports provide a wealth of detail as to what was done and attributed to the National Competition Policy and do in fact form the core of the historical account below. Yet to rely extensively on such a source raises the possibility of some bias. The rationale for so doing is that the National Competition Council had the role, provided for in the Implementation Agreement, of assessing what the States and Territories had done. Were its descriptions and data not to be correct it would have lost credibility as an arbiter between the Commonwealth and the States. This is subject to the caution that it took upon itself the role of convincing the Australian public that competition policy was a societal good and that the National Competition Policy should be carried out in full. Thus the detail of assessments should be privileged over the rhetoric of progress.

Bronwen Morgan conducted a series of interviews and conducted a deal of research on the National Competition Policy considering mainly implementation between 1997 and 2001. She drew substantially on the Commonwealth House of Representatives Standing Committee on Financial Institutions and Public Administration Inquiry into Aspects of

\textsuperscript{109} Morgan, above n 93.

the National Competition Policy Reform Package,\textsuperscript{111} conducting an extensive analysis of the submissions. Her book\textsuperscript{112} focuses particularly on the discourses within which the National Competition Policy as a program happened, so adopting a quasi-governmental approach in which the discursive framework of economics, particularly competition, is compared to the rule of law. This work, subject to the qualifications expressed in Chapter 1 about relying on interview evidence, provides a deal of material about the bureaucratic processes and discursive frameworks generated within them.

Hansard is, of course, the record of Parliamentary proceedings. During the period of this study, there is considerable discussion of the National Competition Policy and associated reforms. Of course, every piece of legislation, whether passing a new Act or amending a pre-existing one and in whichever legislature within Australia, and to the extent that they related to the National Competition Policy, was subject to debate. Moreover every tabled report and assessment received attention of some sort which may have demanded a governmental reply and perhaps even further debate. This is compounded by the usual processes of questions and so forth which at particular periods extensively dealt with the National Competition Policy. Within this mess of speeches, tablings, questions and responses, there are three discernible elements. The first is of speakers and documents acting as or emanations of the Government. In that respect there is little beyond the account as set out by the National Competition Council and Productivity Commission. The second is of Parliamentarians purportedly acting as representatives of their electorate, in which the content is mostly a matter of the effect of implementation on individuals and communities. This is summarised effectively in the Senate Select Committee Report on the Socio-Economic Consequences of the National Competition Policy.\textsuperscript{113} The third respect is again of speeches and documents as emanations of the Government, but in this respect is a matter of responding to critique. These second and third respects will be dealt with in Chapter 7.


\textsuperscript{112} Morgan, above n 93.

\textsuperscript{113} Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, \textit{Riding the Waves of Change}, 2000.
The fifth source of accounts of the implementation of the National Competition Policy is the media. It is perhaps a sad reflection on the state of the Australian media that little can be found in the extensive reporting of various implementations of National Competition Policy related actions or of the rise of One Nation (both of which form part of the account below) adds to the material about what actually happened. There appears to be no incisive account or any comprehensive analysis.

Within these accounts, such as they are, there is very little that conflicts. The story is consistent and matches the evidence. That story follows in Chapters 4 to 6. Chapter 4 deals with the establishment of the agreed institutional framework for the National Competition Policy. Chapter 5 provides an account of its implementation as ordered by time and Chapter 6 an account ordered by the elements of the National Competition Policy. By way of testing the reliability of the account provided and in order to illustrate the processes and procedures involved in implementation, some brief case studies are included in the last of these. In doing so, possible biases in their selection as discussed in Chapter 1 are reflexively considered. Chapter 7 deals with reactions to what was done. Before all of this, in the chapter following this one, the National Competition Policy is located in time and context in Chapter 4, ‘How the National Competition Policy Came to Be’, with the development of the National Competition Policy into the Agreements and its constitutional, administrative and legal context.
Chapter 3
How the National Competition Policy Came to Be

The Map

This chapter attempts a history of how the National Competition Policy came to be formulated as intergovernmental agreements signed in the Council of Australian Governments.

History is no less subject to contingent explanation than any other discipline. As argued in Chapter 1, a ‘thick’ account, a refusal of linkages assumed to be necessary, and an exploration in full of the textual evidence without discrimination on the basis of pre-existing analyses, is a means of avoiding it. Yet the possible influences and causes of any particular event or text exponentially multiply as one retreats in time, even if one is to reject the postmodern approach of the denying determinable cause and effect. A government policy, such as is the focus of this chapter, has a multiplicity of sources and originating influences. This is so even when the choice has been made, as it has here, of nominating particular texts (the Agreements') as its reality, and not merely its expression. Other histories are made observable. Thus the policy can be viewed as a product of the Council of Australian Governments, in a particular form, exposing certain theories and views. It can also be seen to have been implemented and changed. These can each be the subject of a separate account that when all taken together provide a richness of analysis approximating a unitary thick account. Moreover, the inconsistencies between the accounts can reveal that which might otherwise be hidden in the interstices of assumed epistemologies.

In accounting for a government policy a pedantic analyst would provide an undiscriminating account going backwards from the expression of the policy, detailing all possible formative events and texts. Unfortunately this is awkward, prolix and probably uninformative. The alternative is to gamble in choosing events and texts, taking the chance as to what is important and what not. If an analyst makes it clear that

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1 See Chapter 1, n 14.
they are gambling and that what they say may be misguided or wrong, and has made
their choices in as transparent a manner as possible, a more comprehensible sense of
what was happening should be forthcoming. This is the ‘reflexive’ approach; it is,
albeit somewhat apologetically, adopted here.

What, then, might have been important in the development of the National Competition
Policy? As was illustrated in Chapter 1, in this academic disciplines differ. One set of
political scientists seems to have focussed on the Council of Australian Governments;
economists tend to start with the *Hilmer Report*; lawyers, in dealing with the changes
to the *Trade Practices Act 1974* (Cth), start with Commonwealth attempts in the early
twentieth century to enact *Sherman Act* style legislation and, on the rare occasion the
other elements of competition policy are considered, with the *Agreements*; other
political scientists have given us accounts of the processes within the State and
Commonwealth bureaucracies through which the *Hilmer Report* was translated into the
*Agreements* and thence into particular implementation strategies.

Going backwards from 11 April 1995, then, according to writers other than this one but
without regard to their disciplinary discourses, the following have been nominated by
them as important in the development of the National Competition Policy:

- The process by which the recommendations of the *Hilmer Report* were
  translated into the *Agreements*;
- The *Hilmer Report* itself;
- The politics of federalism (which upsets the instant timeline somewhat as it is
  part of the process of translation of the *Hilmer Report*); and
- Legislative interventions in Australia since the US *Sherman Act 1890*.

This leaves some questions unanswered. Is there more than federalism in the origin of
the *Hilmer Report*? Is there more than political and bureaucratic exigencies in the
process by which the *Agreements* were formulated? What is the thinking behind the
policy and how did it come to be in the form implemented? Is the US *Sherman Act

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2 Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, *National Competition Policy* (1993); hereafter ‘Hilmer Report’. 
1890 part of that thinking? What is the importance of legislation to the policy or the Agreements? Clearly there is both too much (pre 1974 legislation is of marginal relevance to the policy) and too little (previous policies) in the histories of the National Competition Policy to date.

Given that a policy is a matter of government, its history can be confined to what made it in particular happen. At some point in time a need to implement certain reforms was recognised within government with the result that they were set out as obligations in the Agreements. Of course it is impossible to say when that was, even were it possible to say that there is a government entity which ‘recognises’. Further, each element of the policy would have a different timeline: access to services was indeed a concern deriving from early competition law, legislation reviews as a process were relatively novel while structural reform had its origin in the 1970s. Yet there is an identifiable point in time where the will to reform coalesces into action. This is coincident with the federalism debates of the early 1990s.

With the starting point so nominated, the history of the Agreements may be restructured under the following headings:

1. ‘Precursors’, which deals with the various governmental actions of similar ilk to those agreed and occurring before the speeches in which the need to reform was recognised.
2. ‘Recognition of Need’, the nominated ‘identifiable point in time where the will to reform coalesces into action’.
3. ‘The Hilmer Committee’, the report of which was seminal to the National Competition Policy and is in this section analysed in terms of its contribution to the National Competition Policy in the form of the Agreements.
4. ‘Post Hilmer Negotiations’ is which the process of the adoption of the recommendations of the Hilmer Report and the extent to which they were deviated from or adopted in the Agreements are discussed.

This, then, is a map of a period of time, projected to show most detail between the early 1990s and 1995, yet sketching in events beforehand. It is the map presented in this thesis. Its map key reveals the features mapped are, in the main, speeches, reports and
legislation. There is no claim that this is the only map possible, merely that it suffices for the purposes at hand.

Precursors

As detailed in Chapter 2, the elements the National Competition Policy were:

- an extension of competitive conduct regulation
- prices oversight of government business,
- competitive neutrality,
- structural reform of public monopolies,
- legislation reviews, and
- access to services;

In addition, a number of reforms defined in terms of the subject industry were appended to the general policy. All were embedded in the Agreements in a complex of procedures and processes, and institutional reform. As will be described below, they were each viewed by the Hilmer Committee as a matter of the promotion of ‘competition’ and thus all could be dealt with together as the subject of a single wide-ranging policy. A viable question arises from that as to whether alternative or additional rationales for them were crowded out: the extent to which these are visible is considered in the discussion of implementation over the chapters following this one.

Most, if not all, of the nominated elements of the National Competition Policy had already been the subject of government attention prior to the Agreements, although sometimes in a different context and frequently not explicitly considered as a matter of competition policy. They are the subject of this section of the chapter. Moreover, the first three elements are directed at ‘government business enterprises’; in the Agreements this concept is defined for the purposes of competitive neutrality, although assumed for the purposes of prices oversight and avoided for structural reform.\(^3\) In the immediately prior decades ‘government business enterprise’ had come to the fore as the operative concept mediating government participation in markets. It is considered first.

\(^3\) Competition Principles Agreement, cl 4. See Chapter 2.
'Government Business Enterprise'

Starting this discussion of the matter at the extreme of breadth, between the grundnorm of executive government and the unregulated actions of individuals lies a vast array of institutions. These can be spontaneous or planned, the consequence of law or merely the effluxion of time, concerned with government or with private benefit for good or evil, recognised or secret. Indeed, simple private agreement is an institution conceptually not that far from ‘company’. It is not surprising, then, that there has been considerable discussion of the vehicles of government action. Within that discussion there are a number of themes and considerable terminological confusion.

The themes which arise within the literature are as to accountability and responsibility, matching purpose or function with form, the technicalities of form, and the relationship between these things. The terminological confusion lies not so much in the description of form, but in the labelling of the processes of change; in particular, ‘corporatisation’ and ‘privatisation’ vary in meaning from being descriptive of mere organisational change to referring to specific legal forms of institutions. The focus on ‘government business enterprise’ arises in this context.

In 1954, Harold Seidman, speaking at a United Nations conference on Organisation and Administration of Public Enterprises in the Industrial Field, while acknowledging that countries seek organisational solutions with varying organisational and legal status,

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7 Ibid 11-12.
operational authority and financial independence according in accordance with their own constitutional system, political tradition government structure and economy, identified three ‘separate and distinct stages of institutional development’:

1. Organisation on the same basis as other government activity;
2. Autonomous corporations with almost complete freedom from executive and legislative controls; and
3. Public corporations subject to executive and legislative controls of a new type specially devised to meet the needs of a business enterprise.  

In almost every country, Seidman states, somewhat undercutting his developmental argument, there are (at least in 1954) examples of each stage. His first stage is one where no distinction was made between ‘between public enterprises and traditional government functions’. His argument was that the exigencies of business enterprise lead to the perception that where there is no distinction ‘public enterprise often became synonymous with excessive red tape, inexcusable delays, inadequate service, and general insensitivity to consumer needs.’ The pendulum then swings to the freedom from control of the second stage, yet that inevitably lead to the perception that public accountability is lacking. And so to the hybrid form persisting as the normative ideal until the 1980s.

The concerns of Seidman’s essay, accountability, form and efficiency, have been repeatedly echoed since then. However, he did not start at the conventional point in the argument, that there are government interventions in business and the form of these is problematic. Seidman is careful to distinguish between the ‘general run of government programs’ and ‘public enterprises’. His criteria for making the distinction are:

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9 Ibid.

10 Ibid.

11 Ibid.
1. the government is dealing with the public as a businessman rather than a sovereign;
2. users, rather than the general taxpayer, are to pay for the cost of goods and services;
3. expenditures necessarily fluctuate with consumer demand and cannot be predicted accurately or realistically kept within annual limitations;
4. expenditures to meet increased demand should not in the long run increase the net outlay from the treasury; and
5. operations are being conducted within areas in which there are well established commercial trade practices.\(^\text{12}\)

In contrast to Australian competition policy, these criteria do not assume the nature of ‘business’, ‘commercial activity’, or ‘the private sector’.

The *Competition Principles Agreement* refers to ‘significant Government business enterprises which are classified as “Public Trading Enterprises” and “Public Financial Enterprises” under the Government Financial Statistics Classification’.\(^\text{13}\) While now outdated,\(^\text{14}\) the intention of the reference is clear: to determine which institutions should be subject to competitive neutrality principles and which not by applying some set of definitive criteria. Given that compliance would necessarily increase the prices charged by the institutions, bright line distinctions between those institutions to which they applied and those they did not were critical if all governments were to be held accountable for the application of the principles. In respect of prices surveillance and structural reform, the requirements of the *Agreement* were subject to the discretion of the various governments and thus the need for definition lessened.

A firm idea of exactly what a government business enterprise is (or was) was not formulated for Australian polities until the late 1980s, although later, during the

\(^{12}\) Ibid, 183-4.

\(^{13}\) *Competition Principles Agreement*, cl 4 (see Chapter 1, n 14).

\(^{14}\) The Government Financial Statistics Classification, if it ever existed under that heading, is now the *Standard Economic Sector Classification (SESCA)* issued by the Australian Bureau of Statistics from time to time. It can be found at <www.abs.gov.au> (last accessed 31 July 2014).
currency of the National Competition Policy, many such definitions came to be articulated, generally around market orientation, sourcing income or recovering costs from individual consumers, and absence of regulatory functions. Most jurisdictions resiled from defining that to which the disciplines of competition policy would be applied by reserving that function for specific nomination by legislation or regulation.

There are examples of both approaches: in a report to the Special Premiers’ Conference of July 1991, the predecessor of the Council of Australian Governments, the Task Force on Monitoring Performance of Government Trading Enterprises made no attempt at all to determine the subject (‘Government Trading Enterprises (GTEs)’) of what it was talking about, nor did the Joint Committee of Public Accounts in 1992 in its Report 315 Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises. On the other hand, the new 1987 New South Wales Government commissioned a series of reports exploring corporatisation as an instrument for the improvement of the public sector in New South Wales. Two significant reports, from 1988 and 1989 respectively, deal with the issue of classification of state organisations for the purpose of identifying their appropriate form were A Policy Framework for Improving the Performance of Government Trading Enterprises, and Classification and Control of State Organisations. The latter report

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15 Financial Management Act 1996 (ACT), s 3;


‘Recognising these factors, leaders and representatives have agreed that a framework for national performance monitoring be established for GTEs. The system will initially concentrate on a core of larger and more significant enterprises in each jurisdiction. At the State/Territory level the enterprises will include those involved in energy, rail, water, major ports and urban public transport. Commonwealth enterprises to be covered include Telecom/OTC, Australia Post, Australian National Line, the Federal Airports Corporation and the Pipeline Authority. This core group will be expanded progressively once the system is operational and may, in due course, extend to Local Government enterprises.


of the Classification Task Force set up for the purpose classified government organisations on the basis of the source of their income – whether it was from user charges or government tax revenue, and on their market status – whether they were operating in a market characterised by competition or monopoly.

This was applied to identify the following types of government organisation

A. Public Service: Fully or almost fully subsidised monopolistic bodies such as the Department of Mineral Resources, Business and Consumer Affairs, Department of Main Roads, or central agencies such as Treasury and the Premier's Department.

B. Community Service: Partly subsidised monopolistic bodies such as Registry of Births, Deaths and Marriages.

C. Community Business: Partly subsidised semi-competitive bodies such as the SRA (passenger service), UTA or Home Care Service.

D. Commercial Service: Self-sufficient monopolistic bodies such as the Sydney Water Board, Elcom or Maritime Services Board.

E. Commercial Business: Self-sufficient semi-competitive bodies such as the County Councils or the TAB.

F. Commercial Enterprise: Self-sufficient fully-competitive bodies such as the GIO, State Bank and State Brickworks.20

Notable within this approach is that government is taken to subsist as a function within markets; that is to say that there is no idea of government as outside the discourse of market.21 This can be contrasted with Seidman’s first and fifth criteria, where

19 Classification Task Force, Classification and Control of State Organisations 1989

20 Policy Framework, above n 18, 6. The organisations nominated are New South Wales state organisations.

21 The New South Wales Classification Task Force appended a discussion of ‘theory’, all of which was explicitly economic theory: above n 19, 39, Appendix “C”.
government is distinguished from the discourse of market. They are incommensurable concepts within Seidman’s analysis, whereas the Classification Task Force and the Steering Committee before it (although it used a discussion paper issued by the former) abandon the idea of government function. The function of the body becomes subordinated to its location within society conceived of as a set of markets.

The reconsideration of the structures, functions and performance of government organisations that took place in New South Wales developed its ‘five principles of corporatisation’ as a set of propositions indicating when ‘the full benefits of GTE [Government Trading Enterprise] reform [would be] realised’.22 These provided the foundation for structural reform by establishing the nature of the bodies which could be deployed to break up the vertical structure of integrated industries in which governments had stakes, and set the scene for the establishment of competitive neutrality principles.

**Regulation of Competitive Conduct**

The National Competition Policy operated on Australia’s competition law as it was in 1995. This was defined by sec 1(1) of the *Conduct Code Agreement* to be Part IV and related sections of the then *Trade Practices Act 1974* (Cth.). Nowadays that is Part IV of the *Competition and Consumer Act 2010* (Cth) plus Part IIIA and includes the *Competition Code* and state legislation – all of which were the result of changes implemented under the aegis of the National Competition Policy.

In 1995, and it has not varied much since then, Part IV set out a series of proscribed business practices, some ‘*per se*’ as having a deleterious effect on competition, and others proscribed only if they ‘substantially lessened competition’. Appropriately it was titled ‘Restrictive Trade Practices’, distinguishing it from ‘Unconscionable Conduct’ in Part IVA, ‘Consumer Protection’ in Part V and ‘Liability of Manufacturers and Importers for Defective Goods’ in Part VA.

22 Ibid ii.
The proscribed practices\(^{23}\) included (loosely) acting as a cartel,\(^{24}\) misusing market power,\(^{25}\) and acquiring too much market power.\(^{26}\) There were a number of exceptions


\(^{24}\) This includes:

- Making or giving effect to a contract, arrangement or understanding that substantially lessens competition (s 45(2)(a)(ii)).
- Providing, in a contract, arrangement or understanding between competitors plus maybe others, for a boycott in acquiring or supplying (s 45(2)(a)(i), referring to s 4D which defines ‘exclusionary provision’).
- Fixing or controlling prices in a contract, arrangement or understanding (s 45A) which, together with bid rigging, restricting output, allocating customers and bid-rigging were shifted to a separate division, Division 1, Cartel Conduct, ss 44ZZRB-44ZZRV, and criminalised in 2009 by the Trade Practices Amendment (Cartel Conduct and other Measures) Act 2009 (Cth).
- Engaging in conduct with someone else, which causes a third person to boycott a fourth person, and which causes a substantial lessening of competition in the market in which that fourth person operates (a ‘secondary boycott’) (s 45D). Due to their close relation to industrial law, the secondary boycotts provisions have always been controversial. They have been amended on a number of occasions, most recently in 1996 by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) in which causing substantial loss or damage or affecting international trade were added as proscribed purposes for secondary boycotts.

\(^{25}\) Sections 46, 47, 48 and the old version of s 49.

Under s 46, ‘misuse’ means to take advantage of that market power for the purpose of damaging or eliminating an existing or potential competitor, or deterring or preventing entry into a market or competitive conduct. Section 46 has long been thought a difficult provision and it too has been frequently amended, most recently in order to explicitly provide for predatory pricing: *Trade Practices Legislation Amendment Act (No 1) 2007* (Cth) and *Trade Practices Legislation Amendment Act 2008* (Cth), the latter in order to settle issues to do with recoupment. There have been other changes, early on to the degree of market power the exercise of which was the subject of proscription and also to guide Courts in their assessment of market power.

‘Exclusive dealing’ under s 47 is where a person sells or refuses to sell unless the person to whom they are selling

- accepts restrictions which substantially lessen competition on
  - from whom they acquire other goods or services or
  - to whom they can resupply, or
- acquires goods or services from someone else (‘third line forcing’),

or buys or refuses to buy unless the person from whom they are buying accepts some restriction on their right to sell to someone else.
and exemptions from enforcement, including specified exemptions in s 51, authorisation on public interest grounds for some, but not all, of the practices, notification of exclusive dealing under s 47 or conduct relating to the export of goods or services and informal clearance for acquisitions and mergers subject to s 50. Administration was placed in the hands of the Trade Practices Commission, which was established by the Act. This comprised administrative action, court enforcement and

The drafting of s 47 is notoriously bad; it was excoriated as follows by Kirby J in Visy Paper Pty Ltd v ACCC (2003) 216 CLR 1 at 24:

The language of the provisions of the TPA applicable to this case is obscure. Indeed, it represents a significant challenge for interpretation. It is in need of redrafting by reference to concepts and purposes. It requires the negotiation of too many cross-references, qualifications and statutory interrelationships. This imposes an unreasonable burden on the corporations and their officers subject to the TPA, the ACCC enforcing the Act and courts with the responsibility of assigning meaning to, and applying, its provisions.

It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the TPA that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one’s way through the maze created by the statutory language. Even then, there is a substantial danger of losing one’s way in the encircling gloom.

Section 48 provides for resale price maintenance, which is not selling something to a reseller unless the reseller does not resell that thing below a certain price (the practice is defined in ss 96-100); Unjustifiable discrimination in the prices charged for goods or services provided in respect of those goods, or even the prices charged for the services provided in respect of those goods (s 49) – this was not enforced and was repealed in 1995 by the Competition Policy Reform Act 1995 (Cth). A new provision as to dual listed company arrangements was inserted as s 49 by the Trade Practices Legislation Amendment Act (No 1) 2006 (Cth)

Section 50: Acquiring shares or assets if substantial lessening of competition would result.

Matters specifically authorised or approved by legislation of the Commonwealth, the States or the Territories, contracts, arrangements or understandings relating to employment matters, agreed restrictions on work post employment (the common law restraint of trade’, partnerships, protection of goodwill, and licensing or assignment of intellectual property rights, apart from misuse of the market power such intellectual property rights conferred.

S 88.

S 93, which merely allowed the practice to continue unless and until the Trade Practices Commission intervened.

S 51((2)(g).
other compliance measures, and information dissemination. The Trade Practices Commission also had the roles of determining applications for authorisation, research and law reform advice.\textsuperscript{31} In many respects the actions of the Trade Practices Commission were reviewable by a tribunal set up for the purpose: the Trade Practices Tribunal (now the Australian Competition Tribunal).\textsuperscript{32}

Naturally, there were many further machinery provisions, extensions for particular reasons (such as Trans-Tasman Trade), and definitions (notably of market power). The whole can be dense and complicated\textsuperscript{33} a tendency made worse by the necessity of complying with the Constitution. Commonwealth laws regulating markets in Australia must be made within the powers conferred by the Constitution.\textsuperscript{34} Section 51, which provides for the legislative powers of the Commonwealth, does not confer a specific power to do so.\textsuperscript{35} Accordingly, the validity of Trade Practices Act 1974 (Cth), and the Competition and Consumer Act 2010 (Cth) subsequently, rest on other powers; namely, s 51(i) trade and commerce with other countries and amongst the States, (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth, and (xxix) external affairs. The consequence was considerable complexity\textsuperscript{36} as drafters strove to connect particular provisions with one or more of these subject matters. It also meant that considerable portions of market activity were

\textsuperscript{31} Part 2.

\textsuperscript{32} Part 3.

\textsuperscript{33} See above n 25 with regard to s 47.


\textsuperscript{35} Australia’s first attempt at competition law, the Australian Industries Preservation Act 1906(Cth) was rendered ineffective by a combination of restrictive interpretation and, relevantly here, constitutional invalidity: see, in respect of the former, Adelaide Steamship Co v AG (Cth) (1912) 15 CLR 65 (HCA); [1913] AC 781 (PC); and of the latter, Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330. Reliance for constitutionality was placed on the corporations power, s 51(xx). The second attempt, Trade Practices Act 1965(Cth), also relied on the corporations power and although the case overruled Huddart, Parker & Co Pty Ltd v Moorehead, the High Court of Australia nevertheless found the Act unconstitutional: Strickland v Rocla Pipes Limited (1971) 124 CLR 468.

\textsuperscript{36} Although complexity was disciplined by the refusal of the High Court to allow the constitutional validity of the Trade Practices Act 1965(Cth) due to the lack of severability of the complex provisions providing the link between the provisions of the Act and s 51(xx) of the Constitution: Strickland v Rocla Pipes Limited (1971) 124 CLR 468.
left unregulated; for example, that conducted within a State or Territory by non-corporate bodies. Removal of these gaps was the subject of some aspects of the National Competition Policy, although clarification was not.

Looking at the history of these provisions reveals that the position taken by the Hilmer Committee on competition policy in its distinction between banned practices and assessment of the public interest was already inherent to the law. The immediate inspiration for the Trade Practices Act 1974 (Cth) was a statement by Sir Garfield Barwick, read in Parliament on 6 December 1962. The statement set out a scheme ‘to control monopoly and restrictive practices in the business community of Australia’. It explicitly rejected the American and British approaches of concentrating on monopoly power, the former with the comment, ‘[i]ndeed, one suspects that behind the original American legislation was the fear that industry, if it obtained sufficient dimension, would be a threat to government and likely to overawe and control the legislature.’

The Barwick statement went on to broadly outline the philosophy of the proposed

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37 This history starts relatively recently with the origins of the Competition and Consumer Act 2010 (Cth). Useful accounts of earlier epochs can be found in Robert Merkin and Karen Williams, Antitrust Policy in the UK and the EEC (Sweet and Maxwell, 1984) 4-8; J H Agnew, Competition Law (Allen and Unwin, 1985) 1-6.

38 Commonwealth, Parliamentary Debates, Legislative Assembly, 6 December 1962, 3102 (Mr Freeth, Acting Attorney-General, reading a statement of Sir Garfield Barwick, Attorney General).

39 Ibid.

40 Ibid, 3104. This is a substantial understatement. There is no doubt at all that the motivation for the Sherman Act was at least as much political as economic: Hovenkamp, H. ‘Antitrust Policy after Chicago’ (1985) 84 Michigan Law Review 213; or even the delightful R. Hofstadter, ‘What Happened to the Antitrust Movement?’ in The Paranoid Style in American Politics and Other Essays (Vintage, 1967) 188. Hofstadter identified ‘three kinds’ of ‘goals of antitrust’: economic goals seeking maximum efficiency through competition, the political goals of ‘block[ing] private accumulations of power and protect[ing] democratic government’, and the social and moral goals where ‘the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people the fundamental stimulus to national morale’: 199-200. As Giorgio Monti puts it in EC Competition Laws (Cambridge University Press, 2007) 4: ‘it is helpful to think about the factors that influence the shape of competition law and the decisions that stem from those rules on the basis of the interaction of three components: a political decision about the aims of competition law; and economic theory about how markets behave, how and when they fail, and how market failure may be remedied; and an institution in charge of enforcing competition law.’
legislation: ‘The Government believes that practices which reduce competition may endanger those benefits which we properly expect and mostly enjoy from a free-enterprise society’, thus focussing the proposal on competition. Yet it also acknowledged that there were some restrictive practices which would be in the public interest either generally or in the particular case.

This approach of distinguishing proscription of the practice from consideration of the public interest in maintaining the practice was that adopted in the Trade Practices Act 1974 (Cth). While the recommended notification and registration system was not adopted, a bureaucratic solution to exempting the public interest was, through ‘authorisation’ and ‘notification’. The difference was in the strength of the proscription: practices under the Trade Practices Act 1974 (Cth) were prohibited unless they could be shown to be justifiable in the public interest, whereas under the Barwick proposal the reverse was true. Moreover in the Act the courts were given the role of enforcement of the prohibition, whilst the exemptions were to be conferred by an administrative body.

Oddly enough, it was a bastion of the other side of politics, Sir Lionel Murphy, who steered the 1974 Act into being. His rhetoric has a very similar sound to that of Sir Garfield Barwick’s statement, even mentioning the latter with approbation, but not

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42 A more detailed, yet still conceptual, comparison is provided in Brunt (1976) above n 41, 87-89.

focussing on competition as an unquestionable good. Nevertheless, the distinction between competition and the public interest was maintained:

the Bill deals in a comprehensive way with those practices which have been injuring the community and which have led to private price fixing, to contracts, combinations and conspiracies in restraint of trade, to monopolisation, exclusive dealing, price discrimination, anti-competitive mergers and conduct which is recognised all round the world as being against the proper operation of the economy. These practices were dealt with by Sir Garfield Barwick when he was Attorney General. He is now Chief Justice of the High Court.\(^{44}\)

Between its enactment 1974 and 1993, the *Trade Practices Act 1974* (Cth) changed little.\(^{45}\) Maureen Brunt, the doyen of Australian trade practices law, in reviewing the operation and effectiveness of the *Trade Practices Act 1974* (Cth) in 1994\(^{46}\) identified as the most important interpretive developments that it became an ‘economic law’. That meant it became a law where the objects are economic and not moral, yet where specification of admitted economic concepts is subject to the statute and the usual procedures of statutory interpretation.\(^{47}\) In other words, while there is a complex

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\(^{44}\) Commonwealth, *Parliamentary Debates*, Senate, 24 October 1973, 1 (Senator Lionel Murphy)

\(^{45}\) Possibly the most radical changes were:

1. The extension of the Act to bind the Crown (*Trade Practices Amendment Act 1977* (Cth)).
2. Tightening up the anti-cartel provisions in s 45, especially by adding a per se prohibition on price fixing is s 45A (*Trade Practices Amendment Act 1977* (Cth)).
3. The criteria for prohibition of secondary boycotts were shifted around in 1978 (*Trade Practices Amendment Act (No 2) 1978* (Cth)) and 1980 (*Trade Practices (Boycotts) Amendment Act (No 2) 1978* (Cth)) as they have since then.


interplay between economics and interpretive constraints in judicial interpretation to the Act, the danger that Brunt had previously foreseen, that it would become subject to judicial marginalisation through the inheritance of the English common law tradition and practices, never eventuated. It avoided the fate of the Australian Industries Preservation Act 1906 (Cth). This also supports the separation of competition policy from public interest.

Just as importantly, the administrative bodies have not worked in conceptual opposition to either economists or the Courts. The dual system of adjudication and administrative discretion for exemption does allow for different ways of thinking to be adopted. Yet for the most part, according to Brunt (admitting to somewhat benign view) the administrative bodies, both Commission and Tribunal, use the structure-conduct-performance approach in their work and ‘there has been a kind of dialogue between the administrative bodies, the courts, lawyers, economists and the Parliament to achieve clarity and sense’.48 To put this another way, the conceptual framework of competition policy as established by Sir Garfield Barwick remained hegemonic.

**Prices Oversight of Government Business**

Governmental oversight, even prescription, of prices in an economy has a long history. *Lex Julia de Annona* of about 18BCE in the Roman Augustan period against merchants raising market prices is commonly cited in this respect but 2000 years earlier Hammurabi’s Code also provided numerous examples of set prices. Since then there would be hardly a society which has not had at least some controls on some prices at some stage.

Over those two, or perhaps four, millennia, Governments have intervened in prices by either direct control, whether by specifying a price or a formula from which a price may be derived, or by requiring information to be provided, from which various determinations of, say, acceptability, and decisions as to possible direct control can flow. The information can be requisitioned by demanding notification of price change to

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48 Brunt, above n 41, 319.
an administrative agency, monitoring of prices by an agency or inquiry as to pricing in specific markets.

In Australia all these techniques have been variously deployed (although only in Australia’s case for a couple of centuries).\textsuperscript{49} Prices have been fixed or set at minimum or maximum levels by numerous statutory authorities marketing particular products, industry-specific regulation has set prices,\textsuperscript{50} governments have directed the provision of services at set prices, and there have been various oversight mechanisms.\textsuperscript{51} Prior to \textit{Strickland v Rocla Pipes Limited}\textsuperscript{52} the Commonwealth was considered not to have the power, other than in wartime, to directly control prices but subsequently the power to regulate corporations under the \textit{Constitution}, s 51(xx) was considered sufficient. Hence much early direct regulation was effected by the States. Post \textit{Strickland}, however, the Commonwealth moved to provide for general oversight in the form, first, of the \textit{Prices Justification Act 1973}, which remained in force until 1981, and the \textit{Prices Surveillance Act 1983}. The latter remained in force until 2003, when it was replaced by similar provisions in Part VIIA of the \textit{Trade Practices Act 1974} (Cth), now of the \textit{Competition and Consumer Act 2010} (Cth).

Prior to the \textit{Hilmer Report} there was little distinction between prices of products and services provided for or by Government businesses and those of other businesses.\textsuperscript{53} Certainly there was a change in focus, away from prices as something to be concerned about in themselves to prices as the product of market forces and hence possibly symptomatic of market ills – in other words, of the presence or absence of competition.

\textsuperscript{49} Productivity Commission, \textit{Review of the Prices Surveillance Act 1983}, Report No 14, 2001, ch 2 provides a most useful overview of prices control and oversight in Australia. Ironically, this report is a Commonwealth legislation review under the \textit{Agreements}.

\textsuperscript{50} In particular the \textit{Petroleum Pricing Act 1981} (Cth). See Table 2.1 in Productivity Commission, \textit{Review}, above n 49, 13.

\textsuperscript{51} \textit{Prices Justification Act 1973} (Cth), \textit{Prices Regulation Act 1949} (NT), \textit{NSW Prices Regulation Act 1948} and \textit{Prices Act 1948} (SA).

\textsuperscript{52} (1971) 124 CLR 468.

\textsuperscript{53} One partial exception is New South Wales, where a Provisional Prices Tribunal and Government Pricing tribunal was established. However, it was not about government pricing as such, rather it was directed at utility pricing, such as electricity, water and public transport.
This can be seen in the changing justification for intervention in prices: in 1983 it was a matter of a prices and incomes policy in itself whereas by 1993 it was seen to be a matter of competition policy. Nevertheless, the Australian Competition and Consumer Commission is still required in its decisions as to prices surveillance to have regard to:

(a) the need to maintain investment and employment, including the influence of profitability on investment and employment;
(b) the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices;
(c) the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

Only the second of these has a connection with competition policy. No matter, however, the rationale prior to the Hilmer Report, the subjects of control remained undifferentiated at that time; moreover the shift to competition as a rationale implied that whether that subject was a government business or otherwise was irrelevant to the basis of the need for control. That is not to say that the Hilmer Committee moved away from the trend: their recommendations, as will be discussed below, were about the likelihood of a failure of competition in the markets in which government businesses operated and also about ensuring government businesses were subject to market disciplines.

**Competitive Neutrality**

Given there was thought to be a category of institutions, the ‘government business enterprise’, which ought to be subject to competition policy, the question arises as to how the normative latter proposition arose. There is little trace of an explicit Australian ‘competitive neutrality’ policy prior to the government instrumentality reform

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55 *Competition and Consumer Act 2010* (Cth) s 95G.
movement in New Zealand. Most of the concerns with government trading organisations, instrumentalities, business enterprises and so forth were about accountability, responsibility and performance, although this is not to deny that concerns about a ‘level playing field’ with private enterprise may have been acted upon in individual cases, including corporatisations and privatisations.

Oddly enough, the idea of subjecting government instrumentalities to the market arose from perceptions that government was crowding out the private sector through excessive taxation and deficit financing leading to high interest rates. The public sector was seen to be inefficient and unproductive, its functions should be performed by the private sector to the extent possible. In other words, efficiency would be served if the private sector did much of what the public sector tried to do. This ushered in the era of ‘microeconomic reform’: the reform of the internal (‘micro’) organisation of government.

56 See Michael Taggart, ‘Corporatisation, Privatisation and Public Law’, (1991) 2 Public Law Review 77, 77 & 79. Competitive neutrality under the New Zealand State Owned Enterprises Act 1986 appears to be a broader thing that in the Hilmer Report’s sense, and mainly to be solved by corporatisation and privatisation: the operation of the enterprise as a public company. Much more emphasis is on allowing State enterprises to operate unfettered by requirements that place them at a disadvantage, although unfair commercial advantages were eschewed. Roger Wettenhall provides an explanation of this: New Zealand did not have the transition period between departmental organisation of state intervention in the economy and the public enterprise reform movement of the late twentieth century; accordingly the concerns were more broad-brush and did not take for granted issues which the Australian reform movement did; see ‘Corporations and Corporatisation: An Administrative History’ (1995) 6 Public Law Review, 7, 9.


New Zealand was an early adopter of microeconomic reform. Competitive neutrality was introduced as a matter of the assessment of managerial performance. New South Wales followed suit fairly rapidly, in 1989 nominating competitive neutrality as one of ‘five principles of corporatisation’. While this was still a matter of internal disciplines on management, the entire conceptual framework was addressed by the Steering Committee on Government Trading Enterprises. This conceptual framework was couched in microeconomic terms, those of productive and allocative efficiency:

The main way a GTE [Government Trading Enterprise] affects the community's overall welfare is through the efficiency of its commercial performance in undertaking those activities. The concept of economic efficiency refers to the extent to which society's scarce resources (of people, knowledge, physical capital and environmental resources) are able to satisfy competing wants.

While management performance was seen as a matter of productive efficiency, allocative efficiency ‘relates to whether the levels of goods and services produced by organisations are consistent with the mix of goods and services which will yield maximum consumption benefits to society over time’. This focused consideration on whether the organisation received benefits or suffered detriments not available to private sector organisations, to the extent that they were not justified in the public interest. It was this that came to be known as ‘competitive neutrality’.

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61 Wettenhall, above n 56, 9-10, referring to a speech by the New Zealand Minister of Finance in 1985.

62 Ibid 10. In Queensland, the government adopted an approach to corporatising government owned enterprises which specifically mentioned ‘competition with alternative providers on equal terms’: Queensland Treasury, Commercialisation of Government Service Functions in Queensland. Policy Framework, 1994, 3, although this was one of four ‘key principles in commercialisation reform, the others being, ‘clear specification of objectives; an appropriate level of management responsibility and autonomy; strict accountability for performance’.

63 Policy Framework, above n 18, 19.

64 Ibid 11.

65 Ibid 12.
Structural Reform of Government Monopolies

While, again, there was no generally applicable State or Commonwealth policy about structural reform, in the decade prior to the 1990s there was considerable reform of individual utilities and other monopolies. Indeed, the activity was sufficiently widespread that the Agreements referred to some of it as outside their purview and sub nom ‘other reforms’.

Examples of pre 1993 structural reform of government monopolies included as to the gas industry in Victoria, ports and cargo handling in New South Wales, Western Australia, Victoria and Queensland, the electricity industry in New South Wales, Queensland, the Northern Territory and Western Australia, water in Victoria and New South Wales, post and telecommunication services, marketing of various agricultural commodities in most States, the airline industry, rail in New South Wales and Victoria, aged care in Tasmania, educations and training in New South Wales and Victoria.66

That there was a great deal of such activity is hardly surprising. It was a trend predating conscious ‘microeconomic reform’ and adopted on a world scale, although not universally so.67 Australia’s closest models, the United States of America and the United Kingdom, international institutions such as the Organisation for Economic Co-operations and Development, and the World Bank and the Asian Development Bank, plus the public service68 and much of the economic profession69 (although there were


67 The chief exceptions in the list of developed nations are the ‘corporatist countries of Northern Europe’: Stephen Bell, Ungoverning the Economy (Oxford University Press, 1997) 128.


69 Bell, above n. 67.
dissidents\textsuperscript{70}) all promoted, even proselytised, commercialising, corporatizing and privatising much of the erstwhile activities of the public sector.

**Legislation Reviews**

A formal process of Legislation review to remove unnecessary impediments to competition was an invention by the Hilmer Committee. This is not to say that in the years leading up to the advent National Competition Policy many pieces of legislation had not been reviewed in various jurisdictions and changed in favour of competitive models of organisation; after all, structural reform of various industries was well established. However, the explicit focus on impediments to competition was new.

**Access**

Access to essential facilities is an old issue in competition law: in some situations there is a ‘natural monopoly’ which allows a single supplier or purchaser to dominate a market and hence charge or give non-competitive prices. A ‘natural’ monopoly is generally thought of one where the entire market can be supplied by a single institution at a lower cost than having more than one supplier (or purchaser). Sometimes an additional criterion, that it is uneconomical to duplicate the facility, is added. The access issue is how to ensure that prices do not reflect the monopoly power of the institution.

There are at least three established ways of dealing with the problem of access. They are (i) to provide for industry specific regimes for access to the facilities, (ii) to provide a general regime, and (iii) to consider access to be a matter of the general proscription against the abuse of market power. The Hilmer Committee chose the second as most appropriate for the Australian economy, but there are still specific regimes in place for

\textsuperscript{70} For example, see Ben Fine and Dimitri Milonakis, *From Economics Imperialism to Freakonomics* (Routledge, 2009), or LeeBoldman, *The Cult of the Market: Economic Fundamentalism and its Discontents* (ANU ePress, 2007). There are many others.
telecommunications\textsuperscript{71} and electricity\textsuperscript{72} and gas, \textsuperscript{73} and a variety of State regimes. The existence of general and specific regimes for access did not and does not preclude reliance on s 46 of the \textit{Competition and Consumer Act 2010} (Cth) or its predecessor\textsuperscript{74} in relation to the use of market power for a prescribed purpose, although the mere charging of monopoly prices is not one such purpose.

\textbf{Recognition of Need}

To summarise the position as the start of the 1990s, there was considerable governmental activity concerned with the reform of the public sector in some of the jurisdictions comprising the Australian polity. Structural reform in a variety of industries was progressing apace; government organisations were being reformed to clarify objectives, enhance accountability, ensure managerial competence and authority, and where possible to compete without disadvantage or advantage with the private sector. Problems of misuse of natural monopoly power were being addressed. Price control was easing, being replaced with surveillance. All this was part of a general movement within Australia’s political economy against ‘big government’ – ‘big’ in terms of its financial burden on the economy, its excessive regulation both in terms of freedom to act and costs of compliance, its constraints on financial system, and its protectionism.

\textbf{Economic Rationalism}

By 1990 speeches of Premiers and the Prime Minister paid considerable attention to microeconomic reform. It is a clear element in Prime Minister Bob Hawke’s 1990 speech to the National Press Club in which he complains of the ‘balkanised’ nature of

\textsuperscript{71} \textit{Competition and Consumer Act 2010} (Cth) Part XIC.

\textsuperscript{72} National Electricity Law, implemented by the \textit{National Electricity (South Australia) Act 1996} (SA).

\textsuperscript{73} National Gas Law, implemented by the \textit{National Gas (South Australia) Act 2008} (SA). It was previously known as the Gas Code and was implemented by the \textit{Gas Pipelines Access (South Australia) Act 1997} (SA).

\textsuperscript{74} \textit{Trade Practices Act 1974} (Cth) s 46.
the Australian Economy,\textsuperscript{75} a claim echoing a notorious comment of his Treasurer Paul Keating in 1986, that Australia ran the risk of becoming a ‘banana republic’. Bob Hawke was quite explicit as to the need for competition within the economy on 12 March 1991 in his speech ‘Building a Competitive Australia’.\textsuperscript{76}

The need for reforms, variously called microeconomic reform, structural reform, economic and industry policy, or competition policy, figured large in the debates and machinations surrounding the Premiers’ Conferences of the early 1990s. Even while the politics was thrashed out, steady progress was made on what should be done in these areas. Morgan talks of ‘narrowly bounded debates within the microeconomic reform “policy community”’ at this time.\textsuperscript{77} It is a little difficult to work out exactly who did what in her explanation, the idea of ‘policy community’ being somewhat of a construct,\textsuperscript{78} but clearly the claim is that various bureaucrats from Treasury, Finance, the Structural Adjustment and Expenditure Review committees of federal cabinet, the Industries Assistance Commission and its successor the Productivity Commission, and the then Trade Practices Commission engaged in a one-way conversation with the more general policy community. Moreover, the extant government reports, particularly from the Industry Commission,\textsuperscript{79} reveal a strong polemic, much in the way of a mantra, repeated in almost every discussion. The mantra is about efficiency in achieving the social or economic objectives of government. ‘Efficiency’ is divided into productive and allocative varieties, both of which require the disciplines of operation in a market, either literally or in terms of organisational design principles. The only constraint on

\textsuperscript{75} Robert J. L. Hawke, \textit{Towards a Closer Partnership}, Speech by the Prime Minister, Canberra, National Press Club, 19 July 1990

\textsuperscript{76} National Press Club, 12 March 1991.


\textsuperscript{78} The analytical structure of policy making adopted for her study is discussed by Morgan at ibid. 45-7, although without explicit mention of ‘policy community’. As discussed in Chapter 9, Morgan’s analysis for present purposes (but not necessarily for hers) renders invisible many matters of significance to a thick descriptive account. A relevant example here is the dynamics of federalism; another is the translation gap between the polemic of efficiency and the unified action list of the \textit{Hilmer Report}.

\textsuperscript{79} The ‘push for ‘microeconomic reform’ in the Industries Assistance Commission is discussed in Productivity Commission, \textit{From Industry Assistance to Productivity: 30 Years of ‘the Commission’} 2003, 58-62.
the pursuit of ‘efficiency’ is ‘the public interest’, in accordance with the hegemonic thinking as to competition law discussed earlier. The polemic is taken up in the *Hilmer Report*. All of this fits in with Pusey’s account of economic rationalism in Canberra.\(^{80}\)

As observed in Chapter 1 in relation to government material assessing competition policy, the Public Service is required by s 10(1)(a) of the *Public Service Act 1999* and its predecessors\(^ {81}\) to be ‘apolitical, performing its functions in an impartial and professional manner’, and under s 10(1)(f) it is required to be ‘responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and program’. Policy arises out of politics, the public service provides advice and implements it: this is the system of separation of powers so famously observed of England in the eighteenth century by Montesquieu\(^ {82}\) and which allegedly obtains in Australia and much of the Western World.

Montesquieu’s picture has been seriously challenged.\(^ {83}\) While this is hardly groundbreaking commentary – the lack of reality of the image is even the subject of much popular comedy – it is of significance to competition policy. The particular formations of thinking and discourse within the public service, or even elites within the public service, are a part of the context in which the National Competition Policy arose. They are claimed to have had significant impact on it, even to have made it inevitable.

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\(^{80}\) Pusey, above n 68. See also Lindy Edwards, *How to Argue with an Economist* (Cambridge University Press, 2002).

\(^{81}\) In particular the *Public Service Act 1922* (Cth) as amended from time to time; and the *Administrative Arrangements Act 1987* (Cth). There is a particularly useful timeline in Kathy MacDermott, *Whatever Happened to Frank and Fearless?* (ANU E Press, 2008) Appendix, 151-9.


In this vein, Michael Pusey provides a critical account of the advent of ‘economic rationalism’ into the Commonwealth public service in the 1980s.\textsuperscript{84} He concludes that there has been a ‘triumph’ of a particular perspective which has come to dominate (at least) Canberra with its particular ‘political-administrative discourse’.\textsuperscript{85} In contrast to Lindy Edward’s version of these events, which is considered below, Pusey’s ‘economic rationalism’ is a complex model of the relation between state, economy and society, with world ordering pressuring the national economy. It is summarised in the following diagram:\textsuperscript{86}

He says of it:

The presumption of economic rationalism is that the reproduction of society turns increasingly, or even exclusively, on a strengthened mode of system integration in which the burden of coordination is passed from the inferior medium of coordination of state bureaucracy to the supposedly better one of the economy.\textsuperscript{87}

\textsuperscript{84} Pusey, above n 83, ch 5. There are many corresponding but later accounts, including MacDermott, above n 81 and Lindy Edwards, \textit{How to Argue with an Economist} (Cambridge University Press, 2002).

\textsuperscript{85} Ibid 10.

\textsuperscript{86} Pusey, above n 83, 210.

\textsuperscript{87} Ibid. 18.
The ‘rationalism’ lies in the replacement of (Habermasian) ‘deliberative capacity’ within the political administrative system with a scientism that seems to turn arbitrariness into givenness and imperiously asserts its own exclusive evaluative criteria for what will, in the wake of its ‘reforms’, count as intelligence, ability, and efficacy within and beyond Canberra. What wins is a kind of ‘dephenomenonising’ abstraction that tries to neutralise the social contexts of program goals in every area whether it be education, industry support, public health, or water resource management. What counts, further, is the speed, elegance, and agility with which one can create a purely formal and transcontextual commensurability of reference across goals that are then treated as objects of decisions that will be made on extrinsic criteria ever further removed from real tasks and situations.  

Within this

The choices and decisions of individuals are coordinated through the market economy and its capacity for delivering ‘efficient and effective outcomes’ depends on a relationship with the state that already goes beyond the libertarian presumption that the ‘freedom to’ pursue one’s own individual purposes equates, on the other side of the same coin, with a ‘freedom from’ state interference.  

Further:

Culture and identity dissolve into arbitrary individual choices and, moreover, institutional arbitrariness is no longer a sign of failure but is instead put forward with deadly seriousness as a necessary condition, at

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88 Ibid 10-11.
89 Ibid 240-1.
the steering level, for the smooth and rational operation of a self-referential system.\textsuperscript{90}

This has been challenged as a ‘statist explanatory approach’ focussing on state elites and assuming too great a role for state autonomy and discretion,\textsuperscript{91} not to mention assuming a large coincidence of transitions to economic rationalism throughout the various polities of Australia. This critique is somewhat unfair as Pusey’s account is intended as a model within which Australian politics functions, providing ‘mid-level’ concepts to counteract the vacuity of post-modern discourse. However it is all too easily taken to be a description of the actual modalities of thought of the actors in politics – even Pusey falls into that trap. Be that as it may, even the staunchest of critics acknowledges the influence of dominant discourses.

A somewhat simpler, even simplistic, account of a possible dominant discourse in Canberra is provided by Lindy Edwards. She describes ‘economic rationalism as

The label slapped on a set of ideas that gripped Australian public policy circles through the 1980s and 1990s. Some people use the term to describe putting economic considerations above all other values. Others use it to describe an ideological commitment to small government and free markets. My use of the term incorporates both of the above. ... The ideas are a simplification of neo-classical economics that combine to yield a worldview.\textsuperscript{92}

After reviewing basic microeconomics, Edwards goes on to set out the ‘five rules of thumb that economic rationalists take’ from the microeconomics:

- The problem they are trying to solve is the allocation of scarce resources.

\textsuperscript{90} Ibid 21.


\textsuperscript{92} Edwards, above n 84, 4.
• The market targets our resources at making the goods and services we value most.
• The price of a particular good determines how much of it is made.
• In the end there will be similar profit levels across different sectors of the economy.
• Government should not distort the market. We should let the market operate freely to create maximum wealth, and then redistribute the wealth afterwards to achieve any social goals.

Edwards proceeds to describe how ‘economic rationalists deploy these principles:

... economic rationalists charge forth and apply these principles with impunity. They use them as their rule of thumb for understanding the world. Central agency bureaucrats apply them to every issue that comes across their desks. They permeate the assumptions of almost all of the policy advice given to the Prime minister, the Treasurer and the Minister for Finance.

While Edwards’ account is somewhat overwritten, in the instant study there does indeed appear to be a remarkable coincidence of explanation in policy documents. These views stress the importance of competition in achieving optimal outcomes in the economy and in disciplining and providing incentives for government business enterprises.

At this point in this analysis, as before, care has to be taken to maintain the approach of reflexive thick description.93 The imminent danger lies in the extent to which the

93 Even Pusey, above n 83, 13, cites Clifford Geertz (for Pusey the meaningful insight is to be found in The Interpretation of Cultures (Hutchinson, 1975) 312-13) at this point in his analysis, although with rather different result:

In a search for an appropriate way of analysing the ‘politics of meaning’, Clifford Geertz long ago declared that the scholar has no choice but ‘to build the theoretical scaffold at the same time that he constructs his [sic] analysis’. In his judgment that was the only way of holding analysis between the two poles of ‘vacant generality’ and blank description’. ... Yet now, to survive, we must make sense of the old and the new meaning of politics. That task still asks for an approach that is, in Geertz’s rather perfect formulation, ‘at once circumstantial enough to carry conviction and abstract enough to forward theory’.
substance of the dominant perspective, in Pusey’s view being ‘economic rationalism’, should be counted as structure in which the National Competition Policy was negotiated. In predictive accounts such as Pusey’s and descriptive accounts such as Morgan’s and Edwards’, economic rationalism is seen as causative of policies, such as the National Competition Policy, in which the policy can be seen to be implicated in or even derived from the dogma. However, accepting wider contexts of, say, Simeon’s ‘funnel of causality’ where there may be multiple influences on the development of policy, from personal influence to hegemonic ideology, leaves economic rationalism as one influence amongst many. Hence the discussion here is confined to an acknowledgment of the probability of policy-forming elites and the possibility of discursive hegemony in the public service, together with an indication of what the substance of that discourse might be. The account is of the context of what happened, rather than of the possible causes or of the deductions from theoretical understanding of policy formation. That is left to later.

**Federalism**

As mentioned in Chapter 1, the development of the National Competition Policy was coincident with changes in Australia’s federal practices, in particular, the development of the Council of Australian Governments. Indeed it is possibly misleading to say, as it is indeed said above, that the *Agreements* were made ‘coincident with’ or ‘in the context of’ the Council of Australian Governments; it could equally be said that the exigencies of the development of the National Competition Policy required the Council of Australian Governments to be established, as happened on 11 May 1992. Putting it most accurately, as is argued here, each formed the other.

The argument in this thesis is that so far in relation to the National Competition Policy there has been too much approach and not enough circumstance. Pusey proceeds to construct just such a ‘theoretical scaffold’.


95 Heads of Government Meeting 11 May 1992, *Communique*. This is rather difficult to track down and hence a copy is included as Appendix 3 to this thesis.
The main apparent mechanisms of intergovernmental relations at the turn of the 1990s had been Premiers’ conferences, ministerial councils and financial bodies such as the Loans Commission and the Grants Commission. While Sharman maintains\(^96\) that the role of these fora was substantially political in that they allowed the executive officers in charge of either governments or particular policy areas to speak out representing their constituencies, commenting on national affairs and defending those interests, this is to downgrade the substantial collective appearance projected by the outcomes of such conferences. That collective appearance was achieved by the development of substantial bureaucracies, variously located, supporting the achievement of the collective aims of the conferences and commissions.\(^97\)

Sharman’s account, written in the late 1980s, is of a complex range of activities and focuses on ‘executive federalism’, ‘characterised by the channelling of intergovernmental relations into transactions controlled by elected and appointed officials of the executive branch’.\(^98\) This is still as yet tied to a model of conflict: Hollander, citing Painter, calls it ‘“arm’s length” federalism’ and describes it as ‘conflictual in style, parochial in motivation and divergent in outcome with the states jealously guarding their remaining powers in the fact of Commonwealth attempts at encroachment’.\(^99\)

Most later commentators describe a further change that took place in the years immediately prior to the establishment of the Council of Australian Governments. This change at the very least maintained the role of the executive and probably enhanced it. Furthermore, most commentators on the Council of Australian Governments root the establishment of that institution in this change. It was, in Painter’s term, a change to ‘Collaborative Federalism’.\(^100\)

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\(^96\) Ibid, 27-8.


\(^98\) Ibid, 25.


\(^100\) Ibid.
Painter, like many others, gives a particular date for the inception of the change: 19 July 1990. On that day Bob Hawke, then Prime Minister, gave a speech at the National Press Club in which he excoriated lack of coordination between states, the entanglement of essential services in bureaucracy, and a lack of mobility, portability and uniformity, concluding with characteristic hyperbole that the Australian economy was ‘balkanised’. This represented a commonplace point of view, especially in the business community (the latter, however, went further and allied it with the public choice theory of ‘government failure’ discussed later). However, Bob Hawke proceeded to proselytise a ‘New Federalism’. It comprised two parts: the first was program rationalisation focussing on microeconomic reform, financial relations, delivery of services, social justice, industrial relations and the environment. The second part was constitutional reform – although this was to languish and die. The centrepiece of the first was indeed microeconomic reform, the substantial part of which was to become the National Competition Policy. This illustrates the extent to which competition policy came to be tied into federalism.

A series of ‘Special Premiers Conferences’ were called to set about the tasks set by Bob Hawke’s ‘New Federalism’. These were to take place in July and November 1991, and in May 1992, although the course of events was not a smooth as this suggests. In any event, in the last of the meetings it was agreed that a Council of Australian Governments would be established ‘as a permanent body for on-going consultations between the Prime Minister, Premiers, Chief Ministers and the President of the Australian local Government Association’. It was to meet at least once a year and would be in addition to the financial Premiers’ Conference; in this way splitting off the contentious issue of financial relations from more constructive policy possibilities.


102 Robert J. L. Hawke, Towards a Closer Partnership, Speech by the Prime Minister, Canberra, National Press Club, 19 July 1990.

103 Painter, above n 99, 4.

104 Heads of Government Meeting 11 May 1992, Communique, 1-2 (a copy is appended to this thesis).
Much has been written about this transition in the nature of federalism, although there is little debate as to exactly what happened, nor even as to causes. As to causes, the consensus seems to be that over the preceding decades the division of sovereignties created by the Constitution had been rendered increasingly complex by Australia’s increasingly national character, by the perceptions of the functions of government changing into conceptions at odds with the divisions written into the Constitution, and by the growth of new functions entirely unthought-of at the time of the Constitution’s development. Moreover, what government was supposed to do changed. The way these complexities were handled was changing too, as policy development came more out of bureaucratic processes and negotiation than hitherto, yet there was no procedure of intergovernmental discourse or pooled authority provided for in the Constitution, especially as interpreted by the High Court. As later decisions in Wakim\(^{105}\) and Hughes\(^ {106}\) were to demonstrate, constitutional limitations extended to attempts to pool courts’ jurisdictions and even the conferral of powers on officers of the executive. Hence intergovernmental consultation and committees at a variety of levels had proliferated in order that legislative, policy and executive coordination might nevertheless exist. This is not to say that there were no contests of will over powers and competencies, as the existence of the latter two, very expensively litigated, cases illustrate.

Politics too played a part;\(^ {107}\) in late 1991 Hawke was replaced as Prime Minister by the less consensus-oriented Paul Keating\(^ {108}\) and the party complexion of the various States varied.\(^ {109}\) Indeed, Hawke’s 1990 speech was arguably simply an attempt to bolster his own standing in the face of Keating’s (ultimately successful) leadership challenge.\(^ {110}\) In the early 1990s all State Premiers were Labor, apart from Nick Greiner of New South

\(^{105}\) *Re Wakim; ex parte McNally* (1999) 198 CLR 511 declaring the vesting of State Courts’ jurisdiction in federal Courts unconstitutional.


\(^{107}\) See, generally, the account offered by Painter, above n 99, chapter 3.

\(^{108}\) In October 1991 he gave a speech to the National Press Club asserting a strongly centralist posture.

\(^{109}\) See esp the table in Painter, above n 99, 46.

\(^{110}\) Painter, above n 99, 37.
Wales, yet there was considerable acrimony over finances and a desire for reform of the vertical fiscal imbalance. The States proposed a ‘Council of the Federation’ and at one stage even reached agreement on a shared national income tax system. The planned Special Premiers’ Conference for November 1991 was in fact cancelled, although the State and Territory leaders held their own meeting and agreed on a set of federal principles: cooperation in making national principles in the national interest, subsidiarity, structural efficiency and accountability. In the face of the demands from the States and Territories for structured institutions of collaboration, Keating conceded the need for some form of arrangement and out of this the Council of Australian Governments was born. It met for the first time on 7 December 1992.

The Council of Australian Governments is described in its website as ‘the peak intergovernmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association’. This reflects the Communique from the Heads of Government Meeting on 11 May 1992, which stated:

Leaders agreed to establish a ‘Council of Australian Governments’ as a permanent body for on-going consultation between the Prime Minister, Premiers and Chief Ministers and the President of the Australian Local Government Association.

The Council was to meet at least once a year, which has been the approximate case, in addition to the financial Premiers’ Conference.

The issues which became the National Competition Policy were stated to be a focus of the new Council: its role was to be:


113 At the time of writing, the role of the Council of Australian Governments is summarised as:

The role of COAG is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments (for
• Increasing co-operation among governments in the national interest; [The broad protocols for the operation of Ministerial Councils, of which as at May 1992 there were more than 40, were nominated as a matter for consideration in the first meeting.]

• Co-operation among governments on reforms to achieve an integrated, efficient national economy and single national market [singular in the original];

• Continuing structural reform of governments and review of relationships among governments consistent with the national interest; and

• Consultation on other major issues by agreement such as:
  - International treaties which affect the States and territories and which have not been resolved through the agreed processes;
  - Major initiatives of one government which impact on other governments;

example, health, education and training, Indigenous reform, early childhood development, housing, microeconomic reform, climate change and energy, water reform and natural disaster arrangements). Issues may arise from, among other things: Ministerial Council deliberations; international treaties which affect the States and Territories; or major initiatives of one government (particularly the Australian Government) which impact on other governments or require the cooperation of other governments. (<http://www.coag.gov.au/about_coag/index.cfm> as at 1 September 2011)).

Competition policy is here relegated to one (‘microeconomic reform’) instance of ‘policy reforms that are of national significance’, although this appears lately to have been reversed with competition policy appearing more prominently.

At the time of editing, with a new Government in power, the role of the Council of Australian Governments had simplified to, ‘The role of COAG is to promote policy reforms that are of national significance, or which need co-ordinated action by all Australian governments.’ However ‘[m]icro-economic reform linked to national competition policy in the mid-1990s’ now takes pride of first place in the Council of Australian Governments’ ‘strong record of achievement’ and most of its record is comprised of ‘reforms to increase productivity, raise workforce participation and mobility and improve the delivery of government services’. See <http://www.coag.gov.au/about_coag> (last accessed 1 June 2014).
- Major whole-of-government issues arising from Ministerial council deliberations.

The second and third of these are the substance of the National Competition Policy.

The May 1992 Heads of Government meeting had business other than simply setting up the Council of Australian Governments; most of that business was the sort of thing envisaged for the new body\textsuperscript{114} but it is to be doubted that Commonwealth-State Financial Arrangements was so. This was kept separate from Council of Australian Governments business, although the necessity for objective calculation of the tranche payments under the \textit{Implementation Agreement} led to a regularisation of the manner by which various grants to States were made.\textsuperscript{115}

What the Council of Australian Governments was and did in 1995, and the role it performed is more easily comprehended when seen in its own historical context. That goes, as it obviously must if it is a matter of the relations between governments in a federation, right to the foundation of the Australian federation. The \textit{Constitution} itself in section 101 provided for an Inter-State Commission ‘with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder’. Despite this express wording, the legislation constituting the Inter-State Commission, the \textit{Inter-State Commission Act} 1912 (Cth.), was held by the High Court of Australia to be invalid as infringing the separation of powers implied into the \textit{Constitution}.\textsuperscript{116} Yet there was too

\textsuperscript{114} This included an agreement to eliminate regulatory impediments to a national market in goods and services, which certainly is microeconomic reform as envisaged by the National Competition Policy and is a precursor to legislation reviews, and road, rail, electricity generation, transmission and distribution reform which is certainly the subject of later Council of Australian Governments meetings. Vocational training, aboriginal affairs and environment matters are matters not obviously part of the role of the Council of Australian Governments as envisaged in May 1992, although if one looks at the Subject Index of Council of Australian Governments Meeting Outcomes (<http://www.coag.gov.au/coag_meeting_outcomes/issues_by_subject.cfm>, (last accessed 31 August 2011)) they are frequently discussed thereafter, in amongst a plethora of other subjects.

\textsuperscript{115} See the discussion in Chapter 2 above.

\textsuperscript{116} \textit{New South Wales v Commonwealth} (1915) 20 CLR 54.
much business to be done *ex ante* between the various governments for there to be no relations at all apart from the *ex post* judicial determination of disputes. This was especially so with regard to finances: revenue raising and revenue distribution.

Most commonly recognised due to its longevity and as an early example of the machinery of intergovernmental relations is the Loan Council, established in 1923 to deal with competitive borrowing by Australian governments. During 1927-8 a financial agreement between the States and the Commonwealth was ratified by all Parliaments and subsequently the *Constitution* was modified by referendum to render agreements with respect to the public debts of the States binding when ratified by the Commonwealth Parliament alone. The original agreement remained operational until December 1992 when it was replaced by a new Financial Agreement. Of interest in this are three matters: the first is that the agreement was made in a series of Premiers Conferences, implying that there was already an institutional structure, even if *ad hoc*, for dealings between the States and the Commonwealth; the second is that arrangements were made between the Commonwealth and the States by agreement and that the binding force of such agreements was already an issue – this is the subject of discussion in Chapter 2; and, third, is that the Loan Council, initially voluntary but subsequently established in the initial Financial Agreement and continued in existence by the Agreement appended to the *Financial Agreement Act 1994* (Cth.), remains as an operating mechanism in the form of a Ministerial Council to co-ordinate borrowing within the federation and thus is an example of the complex mechanisms of federalism which have obtained in Australia throughout its history.

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118 *Constitution* s 105A.

Nevertheless, Galligan, Hughes and Walsh wrote that there was, at least in 1991, ‘relative neglect of [the study of] intergovernmental relations’.\textsuperscript{120} Later in the same publication, Sharman, substantially filling for the time being the gap thus identified at least in terms of the then recent past, states that ‘[t]he growth of intergovernmental relations – as the interaction between the component governments of a federation are now frequently called – is commonly observed to be one of the most significant changes to have affected federal government since the war [World War II]’.\textsuperscript{121} This is despite the evidence adverted to above of extensive consultation at earlier Premiers’ Conferences and the like.

In the June 1993 Council of Australian Governments meeting, the bureaucratisation of intergovernmental relations reared its head in relation to ‘microeconomic reform’. It was agreed the ‘momentum for [microeconomic] reform needs to be maintained in the interests of improving the competitiveness of Australia in the international economy’ and hence a ‘working group of Commonwealth, State and Territory senior officials (chaired by the Department of the Prime Minister and Cabinet) should report to the next meeting of the Council of Australian Governments with an agenda for further micro-economic reform to be undertaken at a national level’.\textsuperscript{122} It did not do so. The Hilmer Committee reported and its much broader proposed micro-economic reform agenda was laid on the table.

Prior to the February 1994 meeting, all premiers and Chief Ministers, except Richard Court, the Premier of Western Australia, expressed agreement with the Hilmer Committee proposals. The Business Council of Australia, the peak industry lobby group, made strong representations to all governments to agree on competition

\textsuperscript{120}Galligan, Hughes and Walsh, above n. 117, 4. This is a little unfair, given that the whole of the Fall (sic) 1990 edition of \textit{Publius} was dedicated to recent developments in Australian federalism.

\textsuperscript{121}Sharman, above n. 117, 23. More recently, there have been a series of characterisations of Australia’s version of federalism: see for an account of these, Robyn Hollander, ‘National Competition Policy, Regulatory Reform and Australian Federalism’, (2006) 65 \textit{Australian Journal of Public Administration} 33, 33-6.

policy. However, even after the Western Australian doubts had been assuaged, the issue of the fiscal imbalance intruded: if competition policy were implemented, there would be a substantial loss of revenue for the States, revenue which would be picked up by the Commonwealth by other means. Hence the matter was referred to yet another committee of senior officials (although it might have been the previous one, constituted in the June 1993 meeting), but this was to be a standing committee ‘to manage this continuing agenda of micro-economic reform’. Specific mention was made of reform to the maritime sector and the legal profession.

The February 1994 meeting agreed to implement the Hilmer Report. However, it saw that various matters needed to be worked through in more detail. These were the arrangements for the new administrative bodies (especially appointments), the financial arrangements, the nitty-gritty of legislation, and the overall ‘practicalities of applying the Hilmer Report’. Nevertheless, from this point on the external face and record of progress towards the National Competition Policy was the Council of Australian Governments; that is not to say that negotiation and formulation did not take place elsewhere – it did, through the reports of the Industry Commission and its successor the Productivity Commission, in a Leaders Form in February 1995, through the pressure from the Business Council of Australia and in the usual circus of policy development. All of this is detailed below; suffice it for now to assert that by February 1994 if it was going to happen, it was going to happen in the Council of Australian Governments. The Council of Australian Governments was the context of its existence.

To summarize, the development of the Council of Australian Governments took place in a contested sphere of politics, both in terms of political parties and within the jigsaw of federalism. It was a product of a sense that federalism itself as it had hitherto been

123 Painter, above n. 99, 49.


125 The Leaders Forums of the 1990s are rather shadowy, having little by way of documentary evidence of their existence. As far as can be ascertained they were meeting s of the State premiers and Territory Chief Ministers designed to formulate common positions in the absence of the Commonwealth.
effected was a drag on the efficiency of the economy \(126\) and also that in many respects the structure of the Australian economy needed reform but that the federal division of powers was rendering that difficult to remedy. There was a national interest in reform but there was only loss to those who might undertake it. Finally, the processes of federalism were carried out by a burgeoning bureaucracy at both State and Commonwealth levels; the ready availability of working groups and committees of officials lead to their dominance in much of the policy formation process. It is not surprising then that the agreements which form the National Competition Policy spring suddenly out of the May 1995 meeting as fully fledged policy instruments; their formulation takes place in the corridors of power between the submission of the Hilmer Report in August 1993 and the May 1995 meeting. If one looks to the conception of what was needed in relation to reform as illustrated by the Communiqué of the June 1993 meeting and the radically more comprehensive Agreements and bearing in mind the extraordinary complexity of financial relations involved between the governments, one can see that much had had to have been done. Yet the evidence of when and where is scant. This thesis turns to that development in the next section – the sequence of events leading to and contents of the Hilmer Report itself requires prior attention.

**What happened**

In the midst of the stand-off between the Commonwealth and the States over the nature of federalism in late 1991, the Prime Minister wrote to the Premiers and Chief Ministers proposing an independent review. In the November 1991 meeting of State Premiers and Chief Ministers a process was agreed under which a ‘small steering committee of Commonwealth, State and Territory officers’ would be ‘set up to oversee the review to be undertaken by an agreed independent consultant’. This independent review would be ‘of the Trade Practices Act … to determine its capacity to secure a national competition policy and to identify alternative models for regulating market behaviour’\(127\).

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It is worth noting here that the idea of a ‘national competition policy’ at this point in the development of the National Competition Policy is of a ‘policy to create and safeguard market structures and behaviour which prevent anti-competitive practice, ensure markets operate efficiently and to protect the interests of consumers’.

This does not encapsulate the ideas of regulatory reform, competitive neutrality and structural reform which later loomed so large in the National Competition Policy. Those ideas appear separately and in dilute form elsewhere in the 1991 meeting’s *Communiqué*: in the nomination of some of its ‘major decisions’ as ‘regulatory reform’, although this was more to do with uniform standards than reviewing legislation against competition principles; in referring to the reform what were then called Government Trading Enterprises; and in support for the removal of ‘impediments to competition’, without defining exactly what this meant. Oddly enough, the most cogent reference is in the Attachment to the *Communiqué*, in which the ‘Principles for Reconsidering the Agreed Allocation of Roles and Responsibilities among Levels of Government in Australia’ are elaborated. Principle 3, the ‘Structural Efficiency Principle’, ties economic efficiency to microeconomic reform of all governmental activities; the industry structure of health care and education were singled out as examples. However, the discussion is muddled and segues into a call for more cooperative intergovernmental approach and reform of the vertical fiscal balance.

In any case, the 1991 outcomes, limited as they apparently were, authorised the Prime Minister to commission an independent inquiry. He did so in August 1992 and its report has become known as the *Hilmer Report*, after its Chairman, Fred Hilmer. The Terms of Reference of the inquiry reflect the agreement, stating that the Committee was to inquire into and advise on the scope of the (then) *Trade Practices Act 1974*, market behaviour and structure then outside the scope of that Act, and other matters ‘directly related’ to the application of the competition principles as market conduct, the removal of barriers to trade and competition, and the reduction of complexity and administrative duplication arising from the increasingly national operation of markets. As the account below will demonstrate, the report far exceeded those terms. In any event, the reporting period for the committees was extended until August 1993 and it finally reported to the ‘Heads of Australian Governments’ on 23 August of that year.

128 Ibid.
The Hilmer Report

Not only is the *Hilmer Report* an identified precursor of the National Competition Policy as set out in the *Agreements*, but it is also a representative example of the elaboration of the concept ‘competition policy’ as formulated in 1993 or thereabouts. By contrast, most alternative accounts of Australian competition policy go further and refer to it as a source for both the substance of the policy and for its rationale. In the context of this thesis it is neither, rather it simply represents a step in the formulation of the *Agreements* as the National Competition Policy and hence as a text is merely excellent evidence of what was thought of as ‘competition policy’ at the time.

The Terms of Reference

The Terms of Reference for the Hilmer Committee are appended to this thesis and therefore do not need to be repeated. However, they do need to be analysed because to do so indicates the achievement, for better or worse, of the Committee. While various theoretical emphases, many recommended processes and, indeed, to some extent, the formulations of the elements themselves change in the time between presentation of the Committee’s *Report* and signing of the *Agreements*, despite the contention here that the *Report* does not represent the policy itself, and for whatever it might have been worth, the *Hilmer Report* created out of the disparate and confused trends, theories, policies and actions articulated in its confused and repetitious terms of reference, a single, clear policy direction with recommended implementation processes laid out.

The Terms of Reference commence with a statement of four agreed principles to be given effect by a ‘national competition policy and law’. The first three are about competitive conduct rules, in other words are about the sort of proscriptions to be found in the then *Trade Practices Act 1974* (Cth), although, at a stretch, they could be

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130 Appendix 4. They can be found in Annex A of the *Hilmer Report*: National Competition Policy Review Independent Committee of Enquiry (Fred Hilmer, Chairman) *National Competition Policy* 1993, 361-3.
interpreted to mean that the government as a market participant should conduct itself, including legislate, so as not to behave anti-competitively. Indeed, the second principle indirectly refers to government businesses by asserting that universal and uniform market conduct rules should apply regardless of ownership. Paragraph 4 expands on this by instructing the Committee to take into account ‘in exercising its function’ not only the principles stated earlier, but also legislation other than the *Trade Practices Act 1974* (Cth) affecting market behaviours and structure, the fact that government business and trading enterprises may operate in a context of natural monopoly and ‘current moves to reform government trading enterprises’.

The last enumerated principle talks to developing an open, integrated domestic market for goods and services through the removal of unnecessary barriers to trade and competition and through the reduction of complexity and administrative duplication. The phrase ‘unnecessary barriers to trade and competition’ is key here, because it does not exclude barriers erected by government action. In this way, it allows the application of the particular theories of microeconomic reform which conflate government with other private action without recourse to alternative discourses, except those implicated by the strong ‘unnecessary’. Most of the *Hilmer Report’s* recommendations rely on that principle for legitimacy.

But these are simply ‘principles’ which the Committee of Review was to ‘give effect to’ and ‘take account of’ in inquiring into and giving advice as to legislative changes and ‘other measures’. Specific targets were nominated: expanding the scope of the *Trade Practices Act 1974* (Cth) and determining other possible means for addressing market behaviour and structure. The next paragraph, 3, further expanded and particularised this by indicating that authorisation and exemption procedures (the latter also in respect of current exemptions in substance) in the *Trade Practices Act 1974* (Cth) should be reviewed, as should price regulation especially of government businesses. Yet also nominated for particular attention was ‘the need for, and approaches to, the transition of government regulatory arrangements – including any associated revenue impact on States – to more competitive and nationally consistent structures’. This, again, allowed for a broad-ranging look at ‘government regulatory arrangements’ in terms of particular ideas of government and market.
Presumably the reference in the second general target to ‘structure’ was to the intent of s 50 of the *Trade Practices Act 1974* (Cth), relating to the acquisition of market power by takeover or merger; interestingly, the obvious such alternative means is to provide a general disaggregation power such as exists in the United Kingdom under the *Enterprise Act 2002* (UK) and there is no hint of discussion of such a power in the *Report*. Alternatively, and again at a stretch, this reference to ‘structure’ could be taken to be about reform of vertically integrated government monopolies such as utilities.

The nominated targets of the Committee’s inquiries and advice, however, also included a general target: ‘other matters directly related to the application of the principles’. This once again allowed into the picture the implications of microeconomic reform theory. This aptly sums up the dual nature of the Terms of Reference: on the one hand they specified reasonably tightly the precursor trends of policy implementation as matters to be reviewed; on the other overarching licence was given to implement a general review of government from a specific theoretical framework. The Hilmer Committee used their latter broad licence under the guise of targeted policy formulation.

**Submissions**

There were some 139 submissions to the Hilmer Committee. Many are not available. However, a perusal of the 39 available in the Commonwealth Parliamentary Library,

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131 Chapter 1 of Part 4 of the *Enterprise Act 2002* provides for ‘market investigations’. The Fair Trading Commission can make a reference to the Competition Commission if it thinks there are monopoly problems in a market. The Minister can intervene if he or she thinks there are public interest concerns. If there are such problems or concerns, the Competition Commission can make a variety of remedial orders, including disaggregation of the business. Appeal is limited. This echoes the powers available to the US Supreme Court under the *Sherman Act* – deployed notoriously to disaggregate AT&T (‘Ma Bell’) into the Regional Bell Operating Companies (the ‘Baby Bells’): *United States v AT&T* 552 F. Supp. 131 (DDC 1982).

132 There is no central record of these submissions. However, the Commonwealth Parliamentary Library holds a 4 volume set of 39 submissions. Included in the index to the submissions in this set as a handwritten addition, is one from ‘AOTC’, probably Telstra, which is not on the list provided in the Report itself. A more complete set of submissions may be held in the Commonwealth Archives, although there appears at the time of research (December 2012) to be no catalogue record. In the following discussion, the submissions are referenced simply by author and number.

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taken with a reading of the Report’s references to submissions, reveals the quite startling fact that there appears to be no substantial challenge to competition as a principle of government. Even the submission from the Australian Council of Trade Unions states, ‘Whilst the ACTU does not demur from the view that there may be benefits from competition …’.133 (To be fair, it goes on to place limits on that proposition.)

At least five government departments lodged submissions which unreservedly supported competition policy as a means of enhancing the efficiency and effectiveness of the Australian economy.134 There were a number of other submissions to this effect.135 In all of these competition was seen as an unalloyed good. Not one of the others said competition was bad in itself, although some, mainly State governments and sectoral organisations said competition was good but, as a policy competition, has limits. These limits included that markets might need development before the rigours of competition were applied,136 by co-operation as a general principle137 and by societal

133 Australian Council of Trade Unions, Submission no 113, Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, National Competition Policy 1993, 2. For convenience immediately hereafter, submissions to the Hilmer Committee are referred to simply by Author and number.

134 They were the Department of Industry, Technology and Regional Development (Commonwealth) (no. 101), the Department of Health, Housing, Local Government and Community Services (Commonwealth) (no 84), the Department of Finance (Commonwealth) (no 61), the Department of Arts and Administrative Services (Commonwealth) (no. 83), the Department of Primary Industries and Energy (Commonwealth) (no. 50).

135 These included (unsurprisingly for at least the first), the Industry Commission (no. 6) , the Australian Chamber of Commerce and Industry (no. 100), the National Farmers Federation (no. 90), the Australian Overseas Telecommunications Authority (no. 139), the Australian Mining Industry Council (no. 39), the Australian Capital Territory Government (no. 109), the South Australian Government (no. 98), and the Law Reform Commission of Victoria (no. 2).

136 Australian Telecommunications Users Group (no. 111), the National Farmers’ Federation (no. 90), Department of Industry, Technology and Regional Development (Commonwealth) (no. 101), the Queensland Government (no. 104).

137 The Australian Council of Trade Unions (no. 113), and the Australian Council of the Professions (no. 12)
objectives, including equity. Sectoral organisations argued for ring-fencing justice, statutory marketing authorities and unions. Naturally there were many submissions about the technicalities of trade practices law and the implementation process.

The Australian Council of Trade Unions offered the only substantial critique of competition policy, although there were a number that set out visions of the theory behind it. It conceded that competition may bring benefits but asserted that competition was not the sole important variable in the determination of the most efficient and productive direction for an economy. The degree and quality of cooperation were also important, especially in labour markets. Thus it argued that competition policy might meet head-on freedom of association.

The startling omission is an argument that competition is bad in itself. There was not even an argument that even if competition has good effects, it also has bad effects. Competition is seen by some as the most important principle of good government of the economy and all others as good, except where it doesn’t work in which case it should not be used – that it has a province of arguable boundaries.

138 The Australian Capital Territory Government (no. 109), the Communications Law Centre (no. 116) and the South Australian Government (no. 98). The Industry Commission argues that competition policy was incapable of dealing with equity issues (no. 6).

139 The Victorian Bar Council (no 33), The Law Council (no. 65), the Australian Chamber of Commerce and Industry (no. 100).

140 The Australian Dairy Farmers’ Federation (no. 10), the Bar Council (no 33), the Northern Territory Government (no. 91), the Australian Council of Professions (no. 12), the Queensland Sugar Corporation (no 51) the National Farmers’ Federation (no. 90).

141 The Australian Council of Trade Unions (no. 113). The Industry Commission argued the contrary: Industry Commission (no. 6).

142 The Industry Commission (no. 6), the Australian Council of the Professions (no. 12), the Australian Bureau of Agriculture and Resource Economics (no. 95), and the South Australian Government (no. 98).
The Report

In Chapter 1, ‘Towards a National Competition Policy’, the Committee sets out its approach:

**Section A** reviews the concept of competition and its relationship to community welfare and considers the bounds of competition policy.

**Section B** provides an outline of the evolution of national competition policy in Australia, including the new pressures for developing a more comprehensive competition policy framework that is truly national in application.

In other words, the concept of competition is first defined; second, why it is good is set out, and, third, how far it should be taken as a policy imperative explored. This leads into a discussion of ‘competition policy’ and what it encompasses. What has been done in the past is the fifth step and why more should be done now is the last.

Looking at each of these six steps in turn, the following definition, attributed to F G Dennis,\(^{143}\) commences the elaboration:\(^{144}\)

Competition may be defined as the ‘striving or potential striving of two or more persons or organisations against one another for the same or related objects’.

Four aspects of this definition are explored (‘have been found to be particularly important by recent economic research’); (1) as to ‘striving or potential striving’ and (2) ‘two or more persons or entities’, both of which are about how many competitors are necessary for competition to occur – whether it is necessary to have ‘two or more persons’\(^{145}\) and whether large numbers of competitors are necessary;\(^{146}\) (3) as to ‘against

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\(^{143}\) This proves to be Kenneth Dennis, *Competition in the History of Economic Thought* (PhD Thesis, Oxford University, 1975).

\(^{144}\) *Hilmer Report*, above n 129, 2.

\(^{145}\) No – all that is necessary is that the market must be open to potential rivals; ibid.
one another’ and ‘related object’ both of which are about the implicit product or service in the definition – whether competition as a concept is limited to competitors providing identical products or services; 147 and (4) whether competition only takes place in respect of price. 148 All of these have a negative answer, which somewhat undermines the cogency of the definition.

The segue to the second step in the Committee’s approach to ‘competition policy’, why competition is good, is this: ‘The relationship between competition and community welfare can be considered in terms of the impact of competition on economic efficiency and on other social goals.’ ‘Good’ here is ‘community welfare’. The second step taken by the Hilmer Committee is, thus, to discuss the idea of efficiency as an economic concept and its role in enhancing community welfare. To this end, the report sets out three forms of efficiency and how each is enhanced by competition:

- Technical or productive efficiency where improvements in managerial performance, work practices and the use of material inputs are enhanced by competition.
- Allocative efficiency where competition results in resources being allocated to their highest valued use.
- Dynamic efficiency where competition provides incentives to respond to changes in technology and consumer demand.

The described enhancements in the various forms of efficiency are said to lead to community welfare improvement in the following ways: increase in the productive base of the economy leading to higher returns to producers and higher real wages; new and better products on offer to consumers; new jobs and new industries; better adjustment to change and the capacity to adjust to unforeseen change hence a more resilient and robust economy. There is no discussion of whether competition is bad in itself. Nor is there discussion of whether notions of competition might be socially contingent.

146 Again, no – a small number of competitors may produce more economic benefits in a given situation: ibid 3.

147 And again, no – competition is really about meeting consumer needs, hence competition is between products or services which can substitute for one another: ibid.

148 Yet again, no – competition may be in respect of other elements of value, such as service, quality or timeliness of delivery: ibid.
That competition is a Good Thing is accordingly merely asserted through a sketch of the theory behind it. Yet there is much to be said for the argument that competition in itself is much more problematic than allowed. As is apparent in in the discussion of the submissions to the Hilmer Committee above and in Chapter 7, all arguments to that effect, to the extent there were any, were ignored in the formulation and implementation of the National Competition Policy. Indeed, that the rules nominated as ‘competitive conduct rules’ are necessarily about competition is not universally accepted. In the Commonwealth House of Representatives second reading debate on the Trade Practices Bill 1973 the parties took opposite sides on this, with the liberal opposition clearly considering the rules to be about promoting competition, but the government arguing for them on more complex grounds:

The Government seeks to guarantee the rights of small business, to protect the consumer, to prevent exploitation and profiteering and to prevent the unregulated and improper growth of foreign owned industry.¹⁴⁹

Even the label ‘competition law’ is relatively recent, although in the 1973 debates there is reference to competition policy and competition law by the opposition. The European Union had ‘competition law’. But the reference in Australia was to ‘trade practices’ and ‘restrictive trade practices’ were what Part IV of the Trade Practices Act 1974 (Cth) regulated. Nor did it ever have law under the label of ‘Antitrust Law’ as did the United States of America, although there is occasional reference to Australia’s ‘anti-trust law’. The Hilmer Committee avoided the term ‘trade practices’, referred to ‘competitive conduct rules’.¹⁵⁰ Apart from textual references, perhaps the earliest recognition of ‘competition law’ was in the titles of textbooks, which started about 1990.¹⁵¹ The

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¹⁴⁹ Commonwealth, Parliamentary Debates, Legislative Assembly, 7 November 1973, 1 (Mr Riordan).

¹⁵⁰ Hilmer Committee, above n 130, Part I.

¹⁵¹ Stephen Corones started the trend in 1990, with Competition Law and Policy (Law book Co, 1990), although he continued in his textbook, the major one in the area, with ‘restrictive trade practices’: Restrictive Trade Practices Law (Law Book, 1994) until 1999, when it became in its second edition, Competition Law in Australia (LBC Information Services, 1999). Other textbooks began switching
Agreements referred to ‘competition laws’ but defined them by reference to Part IV of the *Trade Practices Act 1974* (Cth). Now ‘competition law’ is all but universally accepted. Yet that to which ‘competition law’ refers was not always as fixed as it is now, nor did it have its import or functions defined as it is now.

That the practices now proscribed are anti-competitive and therefore should be proscribed on the basis of *quod est demonstratum*, is again intensely theory contingent. As above, they can equally be regarded as bad in themselves, due to conceptualisations of abuse of power or reduction in the entrepreneurial function, or even as a matter of moral fibre.152 After all, in the sixteenth century the operation of markets were protected by statutory prohibitions on engrossing, forestalling and regrating153 – all now encompassed by perfectly acceptable practices of wholesaling and arbitrage. Cartels themselves are problematic in common law understandings of *laissez faire*, as their acceptability under the *Mogul Steamship Case*154 demonstrates. And there is incomplete consensus in economics about proscription of various conducts: rules against predatory pricing, resale price maintenance and even cartels themselves have all been subject to criticism from within economics.155

The *Report* discusses, as the third step in its elaboration of a concept of competition policy, whether competition, being generally good, enhances community welfare in all circumstances. It acknowledges two where it might not. The first is where competition does not necessarily lead to efficiency enhancement: these are situations of ‘market failure’. The situations of market failure listed are where market participants have imperfect information and natural monopolies. The second is where there is some other social goal with which competition is inconsistent. The report nominates as an example across at this time; see, for example, John Duns and Mark J Davison, *Competition Law. Cases and Materials* (Butterworths, 2000).

152 Hofstadter, above n 40.


154 (1888) 21 QBD 544.

where ‘the government may wish to confer special benefits on a particular group for
equity or other reasons.’ It is a half-hearted example, as the report continues to provide
three cases where the government does so but promptly avers, ‘[i]n each of these cases,
however, it is possible for governments to achieve objectives of these kinds in ways that
are less injurious to competition and the welfare of the community as a whole.’

The fourth step in the Hilmer Committee’s elaboration is to make the connection, which
formulates ‘competition policy’, between the concept of competition and action by
governments. Thus:

In its broadest sense, competition policy encompasses all policy dealing
with the extent and nature of competition in the economy. It permeates a
large body of legislation and government actions that influence
permissible competitive behaviour by firms, the capacity of firms to
contest particular economic activities and differences in the regulatory
regimes faced by firms competing in the one market.

Competition law (as opposed to competition policy), being the rules of the kind set out
in Part IV of the Trade Practices Act 1974 (Cth), is stated by the Report to be the
traditional ‘cornerstone’ of competition policy. Nevertheless, the Committee expands
the province of competition policy to include unjustified regulatory restrictions on
competition, inappropriate structures of public monopolies, denial of access to essential
facilities, monopoly pricing, and competitive neutrality. In these areas, it says,

… [competition policy] seeks to facilitate effective competition in the
interests of economic efficiency while accommodating situations where
competition does not achieve economic efficiency or conflicts with other
social objectives. These accommodations are reflected in the content and

156 Ibid., 6.

157 Ibid., 6; footnote removed. The footnote excises from consideration competition from international
sources and consumer protection policy. Both are acknowledged to affect competition and efficiency, but
are excluded because, in the first case, it is a matter of trade policy. No reason is given in the second case,
other than that most submissions treated consumer protection as a different area of policy and to do so
seemed consistent with the Committee’s terms of reference.
breadth of application of pro-competitive policies, as well as in the sanctioning of anti-competitive arrangements on public benefit grounds.\textsuperscript{158}

Having set out nature and the province of competition policy, the Report moves first, as its fifth step in its elaboration of the concept, to an examination of the legal history of competition law in Australia, albeit with due acknowledgment of US forbears. It starts this by reciting the fate of the \textit{Australian Industries Preservation Act 1906} (Cth) – ‘substantially limited by a restrictive interpretation of the Commonwealth’s constitutional powers’ – then refers to the various unsuccessful attempts to introduce \textit{Sherman Act}\textsuperscript{159} style legislation. The Report cites ‘growing disquiet with the cartelization and concentration of Australian industry’ – with ‘restrictive business practices’ – as the motivation for attempts in 1962,\textsuperscript{160} and 1965\textsuperscript{161} to legislate against them. With a ‘new interpretation’ of the \textit{Constitution} in 1971\textsuperscript{162} Commonwealth legislation was passed that year\textsuperscript{163} setting up an administrative investigation scheme. A change in government in 1972, brought new legislation, based on a prohibition model, in the form of the \textit{Trade Practices Act 1974}. The Report proceeds to enumerate the various changes made to the Act in 1977,\textsuperscript{164} 1986,\textsuperscript{165} and 1992,\textsuperscript{166} and the various then current reviews.

Then comes a history of governmental policy and action under the rubric: ‘Developments in Wider Competition Policy’. In contrast to its history of competition

\footnotesize{\textsuperscript{158} Ibid.}

\footnotesize{\textsuperscript{159} 1890 ch 647, 26 Stat 209, 15 USC ss 1-7.}

\footnotesize{\textsuperscript{160} This is somewhat misleading: see the discussion of Sir Garfield Barwick’s statement in Commonwealth Parliament in Chapter 3 above.}

\footnotesize{\textsuperscript{161} \textit{Trade Practices Act 1965} (Cth).}

\footnotesize{\textsuperscript{162} The \textit{Concrete Pipes Case: Strickland v Rocla Concrete Pipes Ltd} (1971) 124 CLR 468, allowing \textit{inter alia} more extensive deployment of the corporations power in sec 51(xx) of \textit{The Constitution}}

\footnotesize{\textsuperscript{163} \textit{Restrictive Practices Act 1971}}

\footnotesize{\textsuperscript{164} \textit{Trade Practices Amendment Act 1977} (Cth).}

\footnotesize{\textsuperscript{165} \textit{Trade Practices Revision Act 1986} (Cth).}

\footnotesize{\textsuperscript{166} \textit{Trade Practices Legislation Amendment Act 1992} (Cth).}
law, the Report only considers the decade prior to its submission. It starts with this polemic:

Over the last decade, Australians have come to appreciate the necessity of building a flexible, dynamic and efficient economy, and of the important role competition can play in meeting these goals.\(^{167}\)

It proceeds to list as examples:

- Trade policy, under which the average level of effective assistance to manufacturing was reduced between 1981-2 and 1991-2 from 25% to 15% of the value of manufacturing output.
- Commercialisation, corporatisation and privatisation of rail, electricity, gas and water utilities.
- Reform of statutory marketing arrangements for agricultural products.
- Removal of various restrictions on many professional services and occupations.

These are, of course, the precursors discussed above.

The Report exaggerates when it claims that these are examples of policy motivated by the need to be competitive. After all, the development of competition policy as a thing in itself to be pursued separately from other policies a recommendation arising from the considerations of the Committee. By definition, then, the need to be competitive was not as yet fully articulated nor was it seen as separate from other elements of economic rationalism.\(^{168}\) To be sure, they were activities conducted in a context of a prevailing orthodoxy and competition had a place in that orthodoxy, but there were other motivations and reasons. Hence commercialisation, corporatisation and privatisation were more about management structures than about exposing entities to competition.\(^{169}\) Similarly, reform of statutory marketing arrangements and the removal of restrictions on professional services and occupations were just as much about power elites as about

\(^{167}\) Hilmer Report, above n 129, 11.

\(^{168}\) See above 10-12, 99-106.

\(^{169}\) See above 79-99 under ‘Government Business Enterprise’,
efficiency.\textsuperscript{170} The Hilmer Committee in its \textit{Report} thus promulgates a particularly narrow version of the concept of competition as much as it overstates the influence of competition even in the then prevailing orthodoxy.

The sixth and final step taken by the Hilmer Committee in elaborating its concept of competition policy is to set out why more should now be done and what that should be. First in this is its ‘case for developing a national competition policy’. It claimed reform should be:

- Broader rather than case by case, leading to a consistent approach which would be cheaper and quicker to implement.
- National because Australia is a national market and hence duplication and complexity can be reduced.
- Applied to matters within state powers to prevent anomalous exemption and extra-jurisdictional affects.

This, then, is the crucial step which runs counter to much of the academic discourse about policy development. It is a case for a grand vision, an attempt to achieve change across a broad class of situations using a single framework. It is not ‘muddling through’,\textsuperscript{171} or a case of a ‘funnel of causality’.\textsuperscript{172} Nor is it, as Sparrow puts it, ‘picking an important problem and fixing it’.\textsuperscript{173} It is more like a Puseyesque discursive hegemony,\textsuperscript{174} implemented without concern for alternative ways of thinking or even for political resistance. As it turned out, the confidence was warranted, apart from the issue of State sovereignty and even that turned to the policy’s advantage. Ultimately, however, resistance to hegemony\textsuperscript{175} developed in the form of One Nation.

\textsuperscript{170} Ibid.


\textsuperscript{173} Malcom K Sparrow, \textit{The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance} (Brookings Institute, 2000)

\textsuperscript{174} Michael Pusey, \textit{Economic Rationalism in Canberra} (Cambridge University Press, 1991) 2. See the discussion above.

The Committee then proceeded to outline what competition policy implied. Taking the ‘Agreed Principles for a National Competition Policy’ as set out in its Terms of Reference and decided on by the Premiers and Chief Ministers at their Adelaide 1991 meeting, despite their competitive conduct emphasis, it settled on the six principles adverted to above in Chapter 1:

7. To slightly modify and broaden the application of the generally applicable conduct rules, found in Australia in Part IV of the *Trade Practices Act 1974*.

8. To reform regulatory restrictions on competition; the report outlined the applicable principles and processes.

9. To reform the industrial structure of existing public monopolies.

10. To impose conditions of competitive neutrality between governments and private businesses.

11. To provide a general access regime.

12. To more narrowly focus the existing prices oversight mechanism.

As discussed above, it is hard to see how the Terms of Reference give rise to these six principles. In any case, it saw three main ‘challenges’ in implementing them.

First, was balancing the benefits of competition against other factors. In one of its most stunning and radical strictures, the Committee stated that it was ‘satisfied that the general desirability of permitting competition was so well established that those who wish to restrict or inhibit competition should bear the burden of demonstrating why that is justified in the public interest.’ As discussed below, no justification was given for this, other than that it was already reflected in the agreed principles dealing with anti-competitive market conduct. It was the product of the Committee’s failure to consider competition as a phenomenon with diverse ethical and social consequences, of its assumption that the only sense of the concept is that in economic theory.

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Second, was implementing competition policy with its substantial but sometimes dispersed benefits in the face of smaller and focussed interest groups. Independent executive bodies, transparency and advertising of national benefits are the response. Oddly enough, this is a more justifiable conclusion from one of the more controversial schools of economic thought. Public choice economics analyses the political process as market functions: the ‘challenge’ faced in the recommendation in the Report is expressed in public choice terms. As such, the comment simply posits political difficulties and what could be done about them, were they to exist. Moreover, competition policy itself should be subject to the same reading: the question that results is, ‘Who benefits from competition policy?’ Nevertheless the public choice approach is evident throughout the Report and its impact is further considered below.

The final challenge the Committee saw in implementing its six principles lay in accommodating the interests of all nine governments in the Commonwealth of Australia: Apart from where co-operation is possible or only a single government is involved, the committee proposed participation by all governments in the ‘key policy-making institutional arrangements’. One of the major conclusions of this thesis is that the National Competition Policy was driven as much by federalism as by anything else, hence this ‘challenge’ is the inverse of what could well be said: that competition policy was the means by which co-operation could be achieved.

The second and third of these ‘challenges’ involve a particular understanding of the nature of regulation. The Committee did not propose a full-blown ‘Public Choice’ approach179 in its understanding of the nature of regulation, although what they say bears its imprint:

… where anti-competitive consequences flow from government regulation, the public interest justification generally rests on policy judgements of elected governments and parliaments. These decision-makers are entrusted with defining and implementing the public interest, and must evaluate a range of competing considerations. While perceptions of public interest requirements evolve over time, regulations remain in place unless reviewed. Regulation that confers benefits on particular groups soon builds a constituency with an interest in resisting change and avoiding rigorous and independent re-evaluation of whether the restriction remains justified in the public interest.

Governments intervene in markets for many reasons and in many ways. At one level, all such interventions affect competition. Taxation policy, for instance, often deliberately discriminates between various classes of businesses or business activities, potentially affecting their relative competitive positions. Similarly, regulation impacting on business costs affects the relative competitive position of Australia and its firms. In this sense, almost no regulatory activity is neutral in its implications for competition.180

The Committee went on to identify the forms of regulations impacting most directly on competition. They were:

1) Regulatory Barriers to Entry
   a) Barriers creating a monopoly
      i) Public Utilities
      ii) Monopolies over Budget funded services (including welfare services)
      iii) Rural marketing
      iv) Other Government-sanctioned monopolies, such as intellectual property rights, and reservations of transport of some commodities to rail

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180 Hilmer Report, above n 129, 191, references removed: they were to submissions.
b) Restrictions that Operate by Reference to the Number of Producers or Product, usually by licensing.

c) Restrictions that Operate by Reference to Standards or Qualifications

d) Barriers Operating against Interstate Goods or Service providers, despite section 92 of the Constitution. These extend from differential regulatory requirements between States to State infrastructure decisions and national policies which inhibit interstate trade.

e) Barriers Operating against Foreign Goods or Service providers

2) Restrictions on Competitive Conduct; such as price controls on sectors of the economy or ethical standards on professions.\textsuperscript{181}

It recommended in relation to these:

I There should be no regulatory restrictions on competition unless clearly demonstrated to be in the public interest. Governments which choose to restrict consumers' ability to choose among rival suppliers and alternative terms and conditions should demonstrate why this is necessary in the public interest;

II Proposals for new regulation that have the potential to restrict competition should include evidence that the competitive effects of the regulation have been considered; that the benefits of the proposed restriction outweigh the likely costs; and that the restriction is no more restrictive than necessary in the public interest. Where a significant restriction on competition is identified, the relevant regulation should be subject to a sunset period deeming it to lapse within a period of no more than five years unless re-enacted after further scrutiny in accordance with Principle III.

III All existing regulation that imposes a significant restriction on competition should be subject to regular review to determine conformity with Principle I. The review should be performed by an independent body, involve a public inquiry process and include a public assessment of the costs and benefits of the restriction. If retained after initial review

\textsuperscript{181} Ibid 191-200.
the regulation should be subject to the same requirements imposed on new regulation under Principle II.

IV To the extent practicable and relevant, reviews of regulation undertaken pursuant to Principles II and III should take an economy-wide perspective of the impact of restrictions on competition.

It is extraordinary that the underlying principle, that competition is always to be preferred in regulating, is not explicitly justified in the Report. To be sure, that competition is a Good Thing is amply considered in Chapter 1 on the usual grounds, but the step to Principle I above is merely asserted at p 190, albeit as a matter of simple belief:

The Committee believes that the time has come to progress regulatory reform more broadly, and to do so by reversing the onus of proof in considering the desirability of reforming particular regulation. Consistent with the principles already agreed between governments in relation to market conduct, the Committee considers that there should be no regulatory restriction on competition unless clearly demonstrated to be in the public interest.

And later at p 206, in relation to Principle I above:

This principle is unexceptional but gives formal recognition to the new consensus over the proper role of competition in building an efficient and dynamic economy capable of delivering improved living standards. The principle recognises that while it may be appropriate to restrict competition in some circumstances, this should not be done lightly.

Just about the only justification that can be found is provided at page 205, where it is mentioned as an antidote to rent-seeking:

Where such regulation is in place, the challenge is to overcome the resistance of protected groups. This might be facilitated by governments accepting the principle that there is a presumption that competition is
desirable, placing the onus on those proposing continuation of a restriction to demonstrate why it is justified in the public interest. Experience shows that improving the transparency of the costs and benefits of particular restrictions is usually a vital part of reform processes, and a common commitment to such processes could expedite reform across the economy.

However this seems hardly sufficient for the introduction of a complete new criterion for acceptable regulating.182

**Summary**

The *Report* of the Hilmer Committee sets out a set of consistent and coherent policy recommendations despite confused, contradictory and vague Terms of Reference. The recommendations are founded in an economic understanding of ‘competition’ and its societal benefits, and a theoretically contingent and unreflective approach to government. Only the slightest nod to social history is afforded, with an only marginally more comprehensive legislative background to relevant (in a narrow sense of the word) statutes. All of its core propositions about what is good (or bad) in and for society are assumed: there is no discussion of social theory, other than a statement of public choice economics. It is couched in simple persuasive language.

It appears from what came later that the *Hilmer Report* was just what most of the then Governments in Australia wanted. It also served business well.

**Post Hilmer Negotiations**

The Hilmer *Report* was released on 25 August 1993 and the *Agreements* were signed on 11 April 1995. What happened between those two dates? Were the recommendations of the former fully accepted into the latter? Was there any debate? What about? Did

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182 This is taken up by Morgan in above n 77, Chapter 1,. Morgan argues that competition is thereby raised to a footing equal to the rule of law. This is considered in Chapter 8.
any Governments demur and, if so, how were they brought into line? These are the questions this section tackles.\textsuperscript{183}

A comparison between the \textit{Report} and the \textit{Agreements} reveals major areas of difference within the overall thrust:

- The inclusion of a definition of the ‘public interest’;
- The institutional structure of implementation;
- The detail and means of expansion of application of the competitive conduct rules; and
- The articulation of the principles upon which federalism would be accommodated with competition policy.

Yet other than these matters there is a startling correspondence. The ‘elements’ of competition policy in the \textit{Agreements} are those set out in the \textit{Report}, the rationale never deviates and issues for debate are predicted to be so in the \textit{Report}.

The first step towards the \textit{Agreements} was taken in February 1994 when the Council of Australian Governments agreed ‘to the principles of competition policy articulated in the Hilmer Report’. Agreement was only to the ‘principles’, not being expressed to be an acceptance of the recommendations. In the intervening period Richard Court, the Premier of Western Australia, had attacked the Commonwealth for usurping and abusing States’ rights, a position with which Premiers Kennett (Victoria) and Brown (South Australia) agreed.\textsuperscript{184} Financial distributions under the vertical fiscal imbalance were also contentious, with Prime Minister Keating resisting any challenge to the Commonwealth’s supremacy. Looming large in this debate was the prospective loss to State and Territory finances as a result of lessened revenues from erstwhile state monopolies. However, only Premier Court actually expressed disagreement with the principles. The Business Council of Australia was particularly vocal in support and may have exerted considerable pressure on Premiers and Chief Ministers to overcome their reluctance to accede to any threat to their revenues.

\textsuperscript{183} For a detailed analysis of the process of negotiation of the National Competition Policy in terms of network analysis, see Elizabeth Harman, ‘The National Competition Policy: A Study of the Policy Process and Network’ (1996) 31 \textit{Australian Journal of Political Science} 205.

\textsuperscript{184} Martin Painter, \textit{Collaborative Federalism}, (Cambridge University Press, 1998), 49.
The *Communique* of the February 1994 meeting set out what was agreed and what was yet to be decided. In the former category was that recommendations or legislation arising from the *Hilmer Report* would apply to ‘all bodies, including Commonwealth and State government agencies and authorities. This has two limbs: the old constitutional restraints on the application of the *Trade Practices Act 1974* (Cth) to bodies other than corporations were to be demolished, and it was to be extended to State government instrumentalities. A transitional period was allowed for in the latter expansion. Also agreed was a rejigging of administrative bodies so that competitive conduct and price surveillance would be the province of a single instrumentality – the Australian Competition and Consumer Commission. All this was to be encompassed in new legislation on which ‘State Territory and Commonwealth Governments will commence work’ with a view to its consideration at the August meeting of the Council of Australian Governments.

Two matters were expressed to be matters for further work: ‘the practicalities of applying the Hilmer Report’ and ‘assistance to the States and territories for loss of monopoly rents and the process for managing adjustment’. The former was to be a matter of ‘report to the next council meeting’ and the latter for consideration by the Commonwealth.

The precise process set out in the meeting *Communique* in order to formulate the required legislation, decide on the practicalities of implementation and deal with financial implications is somewhat opaque. The Council agreed to establish ‘a standing committee of senior officials’ to ‘manage [a] continuing agenda of micro-economic reform’. Whether this was the one set up in the June 1993 meeting is not clear. Either the new working group or its predecessor was specifically tasked with reporting on detailed proposals for further reform of the maritime sector and the legal profession. Whether the working group was to deal with the matters for further ‘work’ or even to manage the intricacies of drafting the envisaged legislation was not specified.

Despite the ambiguity of the *Communique*, it appears that the Heads of Government knew what they wanted in terms of process. Two working groups were subsequently set up: a legislative drafting group to deal with the proposed legislation and the micro-
economic reform group referred to in the *Communique* as to be established. Both were coordinated and supported from within the Commonwealth Public Service, albeit the one from within Treasury and the other the Department of the Prime Minister and Cabinet. The former was supervised by the latter. In the meantime, the Parliamentary Library paper by John Kain, discussed in Chapter 1, was made available to the officials and the Council of Australian Governments. No doubt it contributed to discussions, although there is no trace of it. Certainly such doubt as it cast on the foundations of the Hilmer Committee’s recommendations was ignored.

The Commonwealth dominated the process of formulating the policy. Churchman vividly describes the subordinated position of State and Territory representatives on meetings: in a context requiring an uncommon combination of skills and knowledge, State officials, often with multiple other responsibilities, were often not either lawyers nor familiar with competition policy or law and sometimes both, faced a ‘phalanx of Commonwealth officials of varying degrees of seniority, some of whom were working full time on this project’:

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185 The account that follows draws substantially on the account provided by Susan Churchman, apparently a member of the microeconomic reform group: see Susan Churchman, ‘National Competition Policy – its Evolution and Implementation: A Study in Intergovernmental Relations’ (1996) 55(2) *Australian Journal of Public Administration* 97. Morgan adds somewhat to the account, having interviewed a number of participants: Morgan, above n 77, 67-73. A contrasting description is provided by Painter, above n 184, 50, where he maintains that ‘[c]loser attention to the communique’ reveals ‘the issues were referred to functional ministerial councils, out of the grasp of central agency reform enthusiasts’. He suggests that the 1993 working group ‘would have a “monitoring” role’. Closer attention does not bear out Painter’s view, although Churchman’s description seems somewhat focussed on her apparent role in the Legislative Drafting Group rather than its supervising Micro-economic Reform Group. See also P G H Carroll, *Federalism and Intergovernmental Relations: COAG, the NCP, and RIS*, Proceedings of the Public Policy Network Summer Conference 2007, 1-2 February 2007, Oaks Plaza Pier Hotel, Glenelg, Adelaide, SA EJ (2007).

186 Churchman lists familiarity with the particular policy issues and how to translate them into law, legal issues such as the division of powers under the *Constitution*, and knowledge of various complex legal concepts: ibid., 97-8.

187 Churchman’s own examples (ibid 98) of the powerlessness of the States and Territories in view of ‘constitutional realities’ underlines the point: neither is in fact substantially correct. Clearly the resources of the South Australian government did not extend to checking all claims by Commonwealth officials.
Great wads of newly drafted or redrafted material would hit the fax machines a couple of days before the meeting, and we would have to analyse it for possible issues and get any necessary legal and policy advice before flying out for the next meeting. Usually, this would have to be done in conjunction with meeting a number of unrelated responsibilities, all with their own deadlines and political imperatives. This could lead to a certain imbalance in the degree of preparedness at the meetings.

Nevertheless, as Churchman dryly remarks, ‘The ease with which the Commonwealth view prevailed among officials did not necessarily translate into political support.’ A package of legislation and draft intergovernmental agreements were ready for the August 1994 Council of Australian Governments meeting but was not adopted. Painter nominates the outcome a ‘face saving formula’ in view of substantial discord over fiscal relations. In March 1994 the Premiers had ventured a scheme for maintaining their revenues under the guise of competitive neutrality by taxing government-owned state enterprises as if they were privately owned. At a ‘Leaders Forum’, of which there is little record, the State and Territory leaders, while acceding to the principles of competition policy as set out in the Hilmer Report, asserted a claim to revenue losses resulting from their implementation. The discord spread to the institutional structure of implementation and the ability of the States and Territories to exempt from conduct regulation.

The upshot of the disputes in mid-1994 was a Communique which blandly stated:

The Council agreed that higher productivity levels were essential to Australia’s growth and competitiveness. Competition is a key stimulus to productivity improvement. The Council agreed that an effective national competition and legal framework were crucial to underpin enhanced economic performance.

188 Ibid.

189 Painter’s unreferenced account is about the only one extant: Painter, above n 184, 51.
The *Communique* specified that agreement to be as to extension of the conduct regulation, structural reform, legislation reviews, limited price surveillance, access regulation for essential facilities only and with ‘participating State/Territory regimes to be taken as being effective if they meet agreed principles’, and a limited province for the ‘Australian Competition Council’ (nominated to have previously been the National Competition Council, but which indeed did remain the National Competition Council). There were a number of transitional arrangements. Necessary draft legislation (amended from the proposals) and draft agreements in relation to the Conduct Code and Competition Principles were agreed to be released.

Despite commentators’ assertions, much of what became the National Competition Policy had in fact been agreed by August 1994. Painter is, therefore, somewhat overstating it when he refers to the *Communique* as representing a ‘face saving formula’. While the sticking issue of fiscal relations still overshadowed competition policy, the Commonwealth conceded that a share of increased revenue resulting from competition policy reforms should accrue to the States, Territories and Local Government. (The last of these makes its first appearance at this point.) The matter was, in true bureaucratic style, referred away: an assessment of the benefits of the reforms was to be made ‘by the Industry Commission on a brief provided by Heads of Treasury’. In this way the path to a resolution was cleared.

Yet once Council of Australian Governments made public the intentions of the various Governments with regard to microeconomic reform, resistance made itself known. Morgan provides an account, deriving from a 1997 interview with the then Director of the New South Wales Council, of the formation of a ‘dissenting coalition’ of key unions, and consumer, environmental and social welfare groups. This coalition, according to Morgan, ‘sensing that the political momentum of the reforms was too great to succeed in blocking them’, focussed on moderating the impact of the default position of preferred competition in legislative reviews by proposing that the ‘public interest’ be

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190 As the *Communique* puts it: ‘The Council agreed that the Australian Local Government Association would participate in the further consultations on competition policy that are now to occur and in the preparation of the advice to the Council flowing from these consultations’: Council of Australian Governments (COAG) Meeting 19 August 1994, *Communique*, <http://www.coag.gov.au/coag_meeting-outcomes/archive.cfm> (last accessed 20 July 2014).
defined. It would operate as a regulatory device, or process, under which ‘[b]roadening the range of concerns that had to be explicitly addressed would therefore make proportionately more difficult any final political decision to ignore ‘social’ concerns in favour of ‘economic’ ones’. Unfortunately the terms of the clause do not bear out this interpretation. They are permissive rather than regulatory and incorporate too much (the ‘competitiveness of Australian businesses’ and the efficient allocation of resources) to the contrary.

To be sure, the ‘dissenting coalition’ may have sought articulation of exactly what was that which argued against competition, but it is to impose a theoretical structure to say that it was a regulatory device calculated to influence the process of regulatory formation in favour of social concerns. Indeed, in the end it performed quite the opposite function. At the same time as the development of the clause, the institutional structure of inter-governmental transfer or to redress the fiscal balance was determined as was the relative provinces of the various levels of government. Together these stances enabled the sort of defences to claims of alleged harm as discussed in Chapter 7 under which no level of government bore responsibility for the process.

Nevertheless, Morgan’s observation that the clause resulted in a degree of ‘political malleability’ at the same time as there was a fixing of the institutional structure of

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191 Morgan, above n 77, 68-9. Morgan is not clear in her description of the impact of the public interest clause: ‘This clause mitigated, at least in theory, the strength of the rebuttable presumption in favour of ‘marketisation’ and maximum competition in regulatory policy choice.’ It does, however, refer to legislation reviews. The Hilmer Committee, according to a 2001 interview with Professor Hilmer, did not believe such a clause was appropriate, both because it would strengthen the (rent-seeking) hand of those arguing against competition in legislation reviews and, conversely, because politicians would in any case be involved in decision-making. Oddly enough, by 1998 in the implementation phase, having the public interest defined appealed as much to those in favour of micro-economic reform as those against it. At that time the National Competition Council asked the Centre for International Economics, a private economic research agency, ‘to set out as clearly as possible a framework covering the National Competition Policy legislation review and reform process, including implementation of recommendations’: Graeme Samuel, ‘Foreword’ in Centre for International Economics, Guidelines for National Competition Policy Legislation Reviews, Centre for International Economics, Canberra, 1999, v,. The resulting document set out the procedures Governments might undertake in undertaking reviews. Indeed, there are a number of other, mainly government publications dealing with the processes of legislative review: E.g., Office of Regulation Review 1998, A Guide to Regulation (second edition).
competition policy is astute. The clause could be and was drawn upon in the political debates to represent that the imposition of micro-economic reform was not to be absolute. Yet the institutional structure which provided the impetus to reform was powerful and fiscal difficulties were solved through the terms of the *Implementation Agreement* and the process of rendering calculable the amounts at stake. Moreover, the establishment of the National Competition Council provided an independent arbiter.

The States were bound to the *Agreements* by the promise of money, but compliance had to be measured in an unbiased way where justice was seen to be done. While the National Competition Council’s original role as formulated by the Hilmer Committee was much broader, it did not include assessment. The Hilmer Committee assumed a referral of power by the States would overcome constitutional issues, but was clearly mistaken with regard to at least legislative reviews. As the National Competition Council was formulated to deal with the issues of Commonwealth-State rivalries and institutional capture, it was the ideal body to assess compliance with the Agreements.

**1995 Industry Commission Report**

The referral of assessment of the benefits of the reforms to ‘the Industry Commission on a brief provided by Heads of Treasury’ is mentioned above. To do so was an essential step in solving the problem over fiscal arrangements which had almost threatened the development of the National Competition Policy: the States and Territories foresaw that some of the actions taken in compliance with competition policy would lead to diminished revenue to them and increased revenue to the Commonwealth. For example, if a utility which remits funds to a State is sold, the State

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192 *Hilmer Report*, above n 129, pp 318-340. It recommended (at p 338) that:

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

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


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loses that revenue but the Commonwealth receives additional revenue from tax on the profits of the utility (this is to ignore the reduced interest payments on the debt which the sale enabled the State to repay – the matter is complex). Moreover, what the Commonwealth wanted would cause the States and Territories pain, both in terms of political popularity and to the residents of those States and territories by way of the personal, social and financial costs of structural adjustment. Precisely how much should be paid to salve the pain was the nub of the matter, once the Commonwealth had conceded the point. But assessment of personal and social costs is difficult, hence the decision was taken in the August 1994 Council of Australian Governments meeting to distribute the benefits and allow the implementing governments determine how much would be paid to those of its residents who bore the costs. This was an unremarked reinforcement of the federal arrangements represented by the National Competition Policy – one of the most important concessions of the Commonwealth.

The full terms of reference for the Industry Commission were provided, as agreed, by heads of Treasury of the various Governments on 23 September 1994, with the first draft to be ready by 30 November and Final report by 20 January 1995. The terms of reference were confined to providing estimates of revenue growth, although this was of course net. Even were the Industry Commission to have been inclined to do so, a doubtful proposition in the first place, no scope was provided for questioning that competition policy reform would lead to benefits through ‘sustainable increases in living standards and greater national output and income’ leading to greater government revenue. Competition policy and ‘related reforms’ were to ‘contribute to a domestic market environment that facilitates improvements in the productivity of capital and labour and leads to lower prices and/or better quality goods and services’. The ‘related reforms’ were specific reforms to the electricity, gas and water industries, road transport, ports, providing mutual recognition for goods and occupations, and providing for a national approach to partially registered occupations.194

The task set the Industry Commission was onerous and time lines were extremely tight. The Industry Commission repeatedly states this: for example, ‘[t]he Commission has

sought to provide the highest quality information possible in the time available", 195 ‘over the very tight frame available, the Commission could not investigate every possible reform and every possible implication’. 196 Moreover, the Commission strongly qualified its advice: ‘The point to be made is that, if the implications of this package of reforms are difficult to tie down in principle, a modelling exercise cannot manufacture certainty out of the unknown’. 197 There were simply too many ‘unknowns and intangibles in implementation’ because the reforms were ‘more about concerted strategies to foster a climate for improved economic prosperity than they are about implementing specific, known and tangible changes’. 198

Despite its persuasive arguments about the implausibility of definitive results, the Commission managed to come up with the following:

- Australia’s GDP would grow by 5.5 per cent or $23 billion a year. This is about an additional $1500 spending per year per household.
- The benefits of reform would be widely distributed. The majority of industries would gain and, since so much was to be reformed, the loss from one reform would be offset by gains from another.
- There would be large revenue gains for both levels of government, although exactly how much was too problematic even for the Industry Commission to state with certitude. It did make a heavily qualified approximation (it looks more like a guess) of $5.9 billion for the Commonwealth and $3.0 billion to the States, Territories and local government.

It produced these results by modelling the impact of the reforms. The Council of Australian Governments had specifically asked the Industry Commission to explain how its methodology and assumption used to derive its estimates 199 and this it does, although there is no explanation of the epistemology of modelling as such. An economic model called HILORANI was deployed, chosen because it was good enough...
and other better ones were still not fully tested out. There was no time to do so. As the Industry Commission puts it:

ORANI is a large-scale multisectoral model of the Australian economy. It is large in scale because it embodies considerable microeconomic detail on the nature of production and demand in the economy. It is called a multisectoral model because it treats the economy as a system of inter-related industry sectors. The model captures the interdependencies between industries that arise from the purchase of each other’s output of goods and services. It also captures the industry linkages that arise from competition for available resources, such as labour and capital. Finally, it captures the dependence of Australian demands for industry outputs on prices and domestic incomes, and the dependence of foreign demands on Australian prices relative to those overseas.

Some amendments have been made to the standard version of ORANI to produce a special purpose version, HILORANI, that has been used for this exercise. Amendments have been made to the model’s industry breakdown, its database and its theoretical structure.\textsuperscript{200}

Effectively a ‘model’ is a set of formulae which indicate the responses to changes in various industries within a particular economy. The formulae are developed from observation and theory. Hence acceptance of a model’s results is predicated on belief in:

- the epistemology of economics,
- the theory accepted into the particular model,
- the data used to produce the constants in the model,
- the plausibility of the tests deployed to determine if the model functions well,
- the data inputted to establish the base point from which change is to be measured, and
- the data derived as that resulting from the changes.

\textsuperscript{200} Ibid 389. Reference deleted.
The Industry Commission’s qualifications on its estimates arises from uncertainty as to some of these, but not all. However, it was not asked to do more that of which it was capable and it never moves outside the area of estimating probable consequences.

The Council of Australian Governments had also asked the Industry Commission to review the estimates of productivity gains in the Australian economy from micro-economic reform made by other studies. This it did in Part C 3. Its conclusion was that:

The main message to come out of the studies are that there is a lot of uncertainty about the likely direct impacts of microeconomic reforms, but the eventual benefits to consumers in all cases are significant. Also the broader the range of reforms, the greater the likelihood that that all sectors of the economy will benefit. In a number of studies it can be inferred that governments gain considerable economic benefits from the reforms, which can be taken in various combinations of greater revenues, expenditures or savings (lower PSBR).\textsuperscript{201}

In a substantial \textit{coda}, the Commission stated:

The studies mostly abstract from the difficult timing issues, such as the phasing in of the reforms, the rate at which economic agents react to those reforms, the duration and magnitude of adjustment costs, and the length of time before the full gains from the reforms are achieved on an ongoing basis. These timing issues are important in determining whether the discounted long-term benefits exceed the short-term costs of reform. Again, the broader the package of reforms, the more likely this will be, because the losers from one set of reforms will be the gainers from many other reforms.\textsuperscript{202}

\textsuperscript{201} Ibid 495. ‘PSBR’ is ‘public sector borrowing requirements’.

\textsuperscript{202} Ibid 495-6
This *coda* repeats more explicitly the qualification on the Commission’s own results mentioned above. It has two aspects which resonate down the history of the National Competition Policy: who wins and who loses, and can they be aggregated – the Kaldor Hicks efficiency problematic; and assessment of the costs of its implementation. Neither of these is directly dealt with by the Industry Commission in this report, nor perhaps should they have been, given they were not within its terms of reference, but how the Industry Commission’s opinions were read later is quite a different matter. Equally, its methodology of assessing benefit is not later questioned.

Most importantly, the Report did what was required: it placed an independently generated monetary figure on the proposed reforms. Later, the figure was shown to be substantially inflated yet that was not taken to destroy the credibility of the Industry Commission, subsequently called the Productivity Commission. The figure provided, $23 billion a year, was that which informed the amounts distributed under the *Implementation Agreement*. That someone could provide a figure calculated to the satisfaction of the Treasuries of all Governments was what mattered. To have done so solved the problem of the fiscal imbalance and allowed the National Competition Policy to proceed.

**Conclusion: Origins**

Resistance to proposals, the fiscal imbalance, jealousies over jurisdiction, and the possibilities of bureaucratic independence together made an acceptable solution possible. Of course, it is quite possible that what that was a solution to had been forgotten by then. Yet these were the immediate ingredients of the formation of the National Competition Policy as set out in the *Agreements* signed in April 1995. Prior to then there had been a mixture of particular policies and driving ambition to reform Australia’s federal polity, governmental structure and performance, and private sector conduct. ‘Competition’ was only one concept in a prevailing discourse, albeit one pregnant with theory and implication. Yet it came to dominate. Through it the other reform ambitions were rendered possible of realisation.

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In all of this, there was no concerted attack on competition as a good thing in itself. The only attacks were on its use as a regulatory device in certain circumstances, and on the impact of proposals on federalism and finances. The latter two were satisfactorily worked out in the *Agreements*, although that settlement had to be reasserted from time to time. The narrowness of remaining resistance played out through the whole of the implementation of the National Competition Policy. When it boiled over in the Australian Commonwealth Senate in the latter half of the 1990s, the focus on effect becomes particularly visible in the terms of reference of the consequent inquiry: they were simply into the ‘Socio-Economic Consequences of the National Competition Policy’.  

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204 The report of which was *Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, Riding the Waves of Change*, 2000.
Chapter 4
Implementation: The Institutions of the National Competition Policy

Chapter 2 sets out that to which the Agreements\(^1\) comprising the National Competition Policy committed their parties and what evidence there is of implementation; the context and history of the development of the Agreements occupies Chapter 3. The next three chapters, including this one, investigate what was done in pursuance of those obligations in terms of context, time and the elements of the National Competition Policy. This Chapter is concerned with the establishment of the institutional structure in which implementation took place. Chapter 7 describes responses, resistance to and the defence of the policy. Chapter 8 concludes the thesis, summarizing the many observations made as the thick description is worked through.

Mainly for reasons of discursive completeness and convenience, rather than some conclusion from theory, Chapter 2 argues that Australia’s National Competition Policy should be taken to be comprised of a particular suite of intergovernmental agreements. Yet they were far more than simply a set of abstract obligations to do certain things. Surprisingly, this obvious fact has been mostly overlooked in the literature.\(^2\) After all, the Agreements were between governments somewhat sovereign\(^3\) in nature, were probably unenforceable in law but secured by large sums of money, and relied for efficacy on the possibility of unbiased bureaucratic assessments of performance. In

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1 See above Chapter 1 n 14.

2 The literature which acknowledges that there was more than mere obligations tends nevertheless to ignore much of what Chapter 3 explores: the dilemmas of sovereignty in Australia’s form of federalism, the ambitions which drove the development of the policy, the conception of the possibility of objective assessment and so forth. On the other hand, there is some recognition of the interplays of bureaucratic agency and federalism’s fiscal structures.

3 ‘Somewhat sovereign’ is here offered as a suitably oxymoronic descriptor of the status of Australia’s component entities, Diceyan sovereignty confined by a common Constitution yet independently autochthonous in the K. C. Wheare sense. See the discussion in Chapter 2.
other words, in understanding them and their implementation, their form, institutional framework and internal dynamics are as important as the substance of the obligations. This is critical to an understanding of implementation.  

**Overall Institutional Framework**

As was observed of the *Agreements* in Chapter 2, the institutional framework for the implementation of the National Competition Policy comprised five levels: the Council of Australian Governments as representing (but not *in toto*) what might be called metagovernmental arrangements, governments negotiating between themselves and determining the meaning or content of the policy, legislatures to change the law, administrations to implement those actions which were not changes in legislation or regulation, and bodies (including the public service) to assess, recommend and advise. Much of this pre-existed the *Agreements* and therefore has already been discussed in Chapter 3 as precursor to or product of the development of the National Competition Policy, or has been assumed to be knowledge common (in both senses) to readers of this thesis. For present purposes, little changed in this context over the period of the National Competition Policy, apart from that considered below.

One of the major bodies of the third level, the Productivity Commission, did not exist on signature of the *Agreements*. It was formally established in 1998. On the other hand, its form was a simple adaptation of that of its predecessor, the Industry Commission. Yet the changes that were made were the result of debate and controversy cotemporaneous with, and perhaps arising from, the early implementation of the National Competition Policy. For that reason its form and structure are worthy of investigation as an aspect of implementation.

Second, the only body established in accordance with express terms in the *Agreements* was the National Competition Council. This body, as is obvious from much in previous

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4 A number of terms are available to describe the bodies set up to (broadly) administer the National Competition Policy. ‘Organisations’, ‘bodies’, ‘state structures’ and so forth are candidates. At the risk of confusion with other disciplinary understandings of the terms, ‘institution’ is here used as it implies a established form, an external creation and a relationship with the state with its policy formation, implementation and law enforcement functions.
chapters and as mentioned above, performed crucial functions in the federal aspects of implementation and also in reporting and advising. Hence it will be dealt with following consideration of the Productivity Commission. Finally, various bodies and processes were established by the Commonwealth State and Territory governments within the various public services to implement particular elements of the National Competition Policy and they will be dealt with as they become relevant.

The Productivity Commission and Predecessors

The Productivity Commission was formed from a merger between the Industry Commission, the Economic Planning Advisory Commission (earlier it was a ‘Council’) and the Bureau of Industry Economics. It was established in accordance with a promise by the then putative Prime Minister, John Howard, in 1995: as a matter of administrative arrangements in June 1996 with legislative legitimacy following in 1998 through the Productivity Commission Act 1998 (Cth).5

The Productivity Commission and its predecessors were heavily involved in the development and implementation of competition policy. Indeed, the Productivity Commission’s immediate predecessor, the Industry Commission, provided secretariat services to the Special Premiers Conferences and to the Council of Australian Governments.6 The Industry Commission also provided the 1995 assessment of the benefits to be gained from the implementation of competition policy which enabled the

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5 The Industry Commission was informally (‘administratively’) operating as the Productivity Commission in the two years prior to the latter’s establishment: Productivity Commission, From Industry Assistance to Productivity: 30 Years of ‘The Commission’ 2003, 87. Indeed, reports were issued in the name of the Productivity Commission before it came into existence. This was challenged (with some glee) by Mr Latham: Commonwealth, Parliamentary Debates, Legislative Assembly, 18 November 1996, 7035 and defended on budgetary, convenience (it was going to happen anyway), and election commitment grounds. See also Commonwealth, Parliamentary Debates, Legislative Assembly, 11 February 1997, 630 (an equally gleeful Mr Gareth Evans).

6 Productivity Commission, From Industry Assistance to Productivity: 30 Years of ‘The Commission’ 2003, 76.
Implementation Agreement to be formulated.\textsuperscript{7} Many of the reports of the Productivity Commission were directed at dealing with issues arising from the implementation of the National Competition Policy. And the Productivity Commission provided the final review at the end of the term of the National Competition Policy.\textsuperscript{8}

The Industry Commission was established under its own Act in 1989.\textsuperscript{9} The picture prior to that is a little less clear. While the Productivity Commission’s 2003 autobiography\textsuperscript{10} concedes that on its establishment, the Industry Commission took on the functions of both the Industry Assistance Commission and the Inter-State Commission, and later the Business Regulation Review Unit, it tends to downplay the latter two. Partly this appears to be because their staff represented less than ten per cent of the amalgamated staff and 20 percent of the total budget. The Business Regulation Review Unit was tiny, consisting of just four staff, compared to the Inter-State Commission with sixteen, and was effectively merely an administrative unit within the Department of Industry, Technology and Commerce.

The Industries Assistance Commission was a creature of the 1970s, inquiring into the assistance that should be given to industries, but ensuring that the economy-wide


\textsuperscript{9} Industry Commission Act 1989 (Cth).

\textsuperscript{10} Productivity Commission, From Industry Assistance to Productivity: 30 Years of ‘The Commission’ 2003 is a history of the Productivity Commission published on the thirtieth anniversary of the formation of the Industries Assistance Commission. The history sought, in the words of the Foreword written by the then Chairman of the Productivity Commission, Gary Banks, ‘to be a brief “document of record”, eschewing historical interpretation (enticing though it may be). Disentangling the two is not always easy, of course, and we may not always have succeeded.’ With the caveat in mind, bolstered somewhat by the considerations in Chapter 1 hereof that it is impossible to separate the two, the history is an excellent resource. The existence of the caveat is, however, the main point of much of what this thesis says about the Productivity Commission. This is that the Productivity Commission was captured by a school of thought to the exclusion of alternative thinking. This is, of course, Pusey’s point about the public service in Canberra as a whole (Pusey, Michael, Economic Rationalism in Canberra (Cambridge University Press, 1991) but is more defensible here due to the structure of the Commission.
implications of its recommendations were considered. This is what distinguished from its predecessor, the Tariff Board.\textsuperscript{11} Later, the work of the Industries Assistance Commission inverted, so to speak, to concentrate on the general structure of protecting industry rather than the best way of protecting particular industries.\textsuperscript{12}

Soon after the establishment of the Industries Assistance Commission, ‘the need for a tool that quantified the effects of change in a range of factors (e.g., the level of trade and government policies) on other industries and on the economy as a whole’ was ‘perceived’ and with other agencies and academic institutions sponsored the development of large scale multisectoral models of the economy – the ORANI model discussed in Chapter 3 as that deployed to quantify the effect of National Competition Policy reforms.\textsuperscript{13} It was later extended for multi-period analysis into the MONASH model and further to distinguish State and Territory regional economies\textsuperscript{14} and used in the Productivity Commission’s 2005 Assessment of the National Competition Policy. It also developed and deployed other models, such as the Salter model of the world economy.

In contrast to the relatively uncontroversial transition from Industries Assistance Commission to Industry Commission, the assimilation of the Inter-State Commission provoked questions in Parliament and media comment.\textsuperscript{15} This was partly about the perceived disregard for the constitutional position of the Inter-State Commission as mandated by s 101 of the Australian Constitution, although enabling legislation, the Inter-State Commission Act 1912 (Cth) had already once, after 1920, fallen into

\textsuperscript{11} Ibid, 22.

\textsuperscript{12} See, for example, Industries Assistance Commission, \textit{Approaches to general Reductions in Protection}, Report no. 301, 1982.


desuetude only to be revived in the *Inter-State Commission Act 1975* (Cth); even this was not proclaimed until 1983 and the Commission established in 1984. The controversy was also about the intergovernmental functions of the Inter-State Commission, both as envisaged in the *Constitution*, subject to the *Wheat Case*, and purportedly in practice, as a guardian of s 92 of the *Constitution*, freedom of inter-state trade. Much of its work was about the transport industry, which was of the ilk of the work of the Industries Assistance Commission, although its remit was taken by the Inter-State Commission to be as much about social issues: safety, town and regional planning, the economic and social life of cities and local communities and environmental matters. After reporting the controversy, the Productivity Commission’s autobiography moves on with the innocuous segue ‘[i]n any event ...’, thus ignoring the substantive issue of purpose and function. Again, the description of the Inter-State Commission in a text box is similarly dismissive:

For most of the years since federation there has been no Inter-State Commission. An ISC was first established in 1913 by the Labor Government to deal with intense lobbying between free traders and protectionists. Its last report was forwarded to the Government in 1917. In 1984, an ISC once again commenced operation. With its independence guaranteed by the Constitution, its role was to advise the Commonwealth Government on matters relating to interstate transport and wider trade-related matters. The ISC’s central theme was:

… the improvement of the efficiency and equity of interstate transport arrangements and the development of a balanced national transport strategy and the infrastructure for implementing that strategy. (ISC 1989, p. 2)

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16 *New South Wales v Commonwealth* (1915) 20 CLR 54

The ISC investigated a variety of transport-related issues, including road user charges, waterfront reform and the efficiency of interstate transport arrangements.

The Industry Commission itself was similar to many such bodies, being a committee with a chairperson with the powers to employ staff. Its function was to hold inquiries and make reports to the Minister on matters referred to it by the Minister. It was given a variety of powers to do so, including to compel attendance at hearings (ss 18-9), compel answers to questions (subject to self-incrimination) (s 20), to take possession of documents (s 20, 23), as to false and misleading evidence (s 21) and so forth. In its reports, the Commission was required by s 8 to have regard to ‘the desire of the Commonwealth Government:

(a) to encourage the development and growth of Australian industries that are efficient in their use of resources, self-reliant, enterprising, innovative and internationally competitive; and
(b) to facilitate adjustment to structural changes in the economy and to ease social and economic hardships arising from those changes; and
(c) to reduce regulation of industry (including regulation by the States and Territories) where this is consistent with the social and economic goals of the Commonwealth Government; and
(d) to recognise the interests of industries, consumers, and the community, likely to be affected by measures proposed by the Commission.

Under s 8(2) the Commission was also required to have regard to matters notified to it in writing by the Minister. Under s 8(3) it was required, when inquiring and reporting, also to inquire into and report in the same report on ‘the social and environmental consequences of any recommendations it makes’. All of this was and is unexceptionable in the context of the sort of inquiries envisaged: it was the normal sort of Commission set up to make the normal sort of enquiries as to the economy. The matters about which it was to be concerned and have regard to were broad ranging and

representative of the sorts of things that were thought to of concern to governments: efficiency, progress, innovation, overregulation, and the social and environmental consequences of change. The last was emphasised by the requirement in s 28 that at least one of the Commissioners ‘be a person who has knowledge of, and at least 3 years’ experience, in an employed or voluntary capacity, in, environmental matters’. Despite these emphases, from 1987 the relevant Minister was the Treasurer,\(^\text{19}\) and connections between the Department and Commission staff were close; for example, A S Cole, the chair of the Commission from 1990 to 1991 was appointed as Secretary of the Department of Treasury on his resignation, similarly, S T Sedgwick was appointed on resignation as Secretary of the Department of Finance.

The Bureau of Industry Economics had similar purposes and functions to those of the Industry Commission: investigation and reporting on economic policy issues. It was ‘established administratively’ – it did not have an enabling Act of Parliament, and was specifically tasked with conducting research of an economic nature.

The Economic Planning Advisory Commission was a very different beast. It was created as a community forum established to be a representative body, a ‘channel of information’, to investigate and provide the Minister with advice as to economic and social issues, and to promote public debate on those issues. By 1994 the Council had been replaced by a more conventional ‘Commission’; indeed, the Commission was constituted by a single Commissioner.\(^\text{20}\) Its functions appear to have been retained by the 1994 changes, although close examination reveals substantial limitations were been placed on them:

\(^{19}\) The Industry Assistance Commission on establishment was the responsibility of the Department of Prime Minister and Cabinet, unlike its predecessor, the Tariff Board which was under the Department of Trade. By the end of 1974 responsibility had passed to the Special minister of State and then successively the Departments of Business and Consumer Affairs, Administrative Services and Industry and Commerce. The degree to which industry lobby groups could influence policy and impact of protectionist sentiments in the various departments is controversial. It is reasonably clear that the shift to the Industry Assistance Commission being the responsibility of the Treasurer was as a result of the desire to separate it from sectoral interests located in or having connections with departments and also a desire to relate it more to national economic policy: Productivity Commission, above n 6, 26-7.

\(^{20}\) Prime Minister and Cabinet (Miscellaneous Provisions) Act 1995 (Cth) s 5.
(a) to investigate, or assist in the investigation of, matters relating to medium and long-term economic and social issues and provide, or assist in the provision of, information and advice to the Minister in respect of those matters; and

(b) to promote public debate on, and public understanding of, economic and social issues; and

(c) at the request of the Minister, to undertake special projects in respect of matters relating to economic and social issues; and

(d) to seek, and report to the Minister on, the views of persons, and groups of persons, in industry, the trade union movement, and the community generally, in connection with the preparation of the annual Commonwealth budget.

The consultative function was thus limited to the preparation of the ‘annual Commonwealth budget’, and ‘medium and long-term economic and social issues’ were to be simply investigated without regard to consultation. More general consultation was limited to ‘promoting debate, and public understanding of,’ those issues – spreading information about and testing ideas and proposals, rather than discovering them in the public consciousness. It is this limited idea of consultation which is subsumed into the powers and functions of the Productivity Commission, rather than the previous wider democratic or consultative, even Habermasian, ideal.

The *Productivity Commission Act 1998* (Cth) provided the Productivity Commission with a statutory structure, establishment, purposes and functions. Much of this was similar to that of the Industry Commission and everything substantive has remained the same since 1998. In full, the functions of the Commission are stated in s 6 to be:

(a) to hold inquiries and report to the Minister about matters relating to industry, industry development and productivity that are referred to it by the Minister; and

(b) to provide secretariat services and research services to government bodies as directed by the Minister; and

(c) on and after 1 July 1997, to receive and investigate complaints about the implementation of competitive neutrality arrangements
in relation to Commonwealth government businesses and business activities and to report to the Minister on its investigations; and

(d) to provide advice to the Minister about matters relating to industry, industry development and productivity, as requested by the Minister; and

(e) to undertake, on its own initiative, research about matters relating to industry, industry development and productivity; and

(f) to promote public understanding of matters relating to industry, industry development and productivity; and

(g) to perform any other function conferred on it by this Act; and

(h) to do anything incidental to any of the preceding functions.

This elaborates somewhat on the stated functions of the Industry Commission, which was simply required to ‘hold inquiries and make reports to the Minister in respect of such matters relating to industry as are referred to it by the Minister’. There is a much greater emphasis on productivity. In contrast to that narrowing to the economic, the ‘general policy guidelines’ in s 8 are somewhat broader, although only to the extent that they reflect some of the political controversies to do with the National Competition Policy that then raged, as will be discussed later in this Chapter. The ‘guidelines’ for the Productivity Commission are:

(a) to improve the overall economic performance of the economy through higher productivity in the public and private sectors in order to achieve higher living standards for all members of the Australian community; and

(b) to reduce regulation of industry (including regulation by the States, Territories and local government) where this is consistent

21 Industry Commission Act 1989 (Cth) s 6. The Productivity Commission itself in its autobiography considered that its functions were considerably broader than those of the Industry Commission, as did the Government in Parliament. However, the Productivity Commission conceded that its functions were ‘focused more on productivity performance of industry and industry development’: Productivity Commission, From Industry Assistance to Productivity: 30 Years of ‘The Commission’ 2003, 94. It viewed the trajectory of change was best described in terms of a change from protectionism to efficiency and community welfare: ibid, 45.
with the social and economic goals of the Commonwealth Government; and

(c) to encourage the development and growth of Australian industries that are efficient in their use of resources, enterprising, innovative and internationally competitive; and

(d) to facilitate adjustment to structural changes in the economy and the avoidance of social and economic hardships arising from those changes; and

(e) to recognise the interests of industries, employees, consumers and the community, likely to be affected by measures proposed by the Commission; and

(f) to increase employment, including in regional areas; and

(g) to promote regional development; and

(h) to recognise the progress made by Australia’s trading partners in reducing both tariff and non-tariff barriers; and

(i) to ensure that industry develops in a way that is ecologically sustainable; and

(j) for Australia to meet its international obligations and commitments.

The first of these ‘guidelines’ was not in the equivalent section of the Industry Commission Act (1989) (Cth.) reflecting the new emphasis on productivity; the last five, (f) to (j) were also new, reflecting concerns expressed in Parliament\(^{22}\) about regional

\(^{22}\) As expressed in debate in the Senate (Commonwealth, Parliamentary Debates, Senate, 1 September 1997, 6087 (Senator Sherry, Deputy Leader of the Opposition in the Senate):

(1) [The Senate] expresses its concern at the monopolisation of economic advice under the Treasury portfolio, with the abolition of Economic Planning and Advisory Council and the Bureau of Industry Economics meaning the disappearance of independent sources of economic and industry policy advice to the Prime Minister and to the Minister for Industry, Science and Tourism;

(2) expresses its concern that the centralising of economic and industry policy advice under one Minister increases the risk of the Government adopting inappropriate policies in these areas;

(3) expresses its concern on the basis of the interim Productivity Commission's now completed reports on Micro-Economic Reform and the Motor Vehicle Industry, that the new Productivity Commission will be far more preoccupied with advancing the
communities, environmental concerns and the perceived tendency of Australian governments to sacrifice Australia’s international trading position on the altar of theoretical purity (although the last is tempered by the reference in (j) to ‘international obligations and commitments’ – relevantly largely about free trade rather than a more mercantilist position).

Earlier concerns about the environment had led to one commissioner of the Industry Commission being required to have knowledge of and experience in environmental matters. This was continued for the Productivity Commission by s 24(3), although the criterion was changed, again to a more productivity focused terminology: ‘at least one Commissioner must have extensive skills and experience in applying the principles of ecologically sustainable development and environmental conservation’.

Concerns raised in Parliament and elsewhere about the epistemology of the Industry Commission’s work\(^{23}\) were also reflected in the Productivity Commission Act 1998 (Cth). Section 8(3) requires the Productivity Commission to reflect on what it is doing when it relies on economic models:

\[
\text{The Commission, in all reports on matters referred to it, must provide a variety of viewpoints and options representing alternative means of}
\]

\[\text{Government's political and ideological agenda than with balanced, sensible and technically sound advice assisting industry development; and}
\]

\[\text{(4) expresses its strong preference for an alternative structure for industry and productivity related advice to Ministers, one that:}
\]

\[\text{(a) is provided by a diverse range of fully qualified and experienced individuals and organisations, not operating solely under a Treasury umbrella;}
\]

\[\text{(b) fully involves industry, trade union and relevant community groups in the development of advice; and}
\]

\[\text{(c) has full regard to the larger economic, social and especially regional consequences of the advice given.}
\]

\(^{23}\) Largely these were that the Productivity Commission would be simply advise what Treasury wanted it to advise. This was variously described as a ‘dry economic agenda’ (Commonwealth, \textit{Parliamentary Debates}, Legislative Assembly, 11 February 1997, 630 (Mr Gareth Evans), and variously as neo-classical economics. Mr Latham distinguished that from ‘institutional economics’ Commonwalth, \textit{Parliamentary Debates}, Legislative Assembly 11 February 1997, 641-3 (Mr Latham) and there was critique of the models used.
addressing the issues in the report. If the report relies on formal mathematical economic modelling, the Commission must either:

(a) if practicable—utilise at least 2 different economic models, with the assumptions and results of those models made explicit in the report; or

(b) if it is not practicable to utilise at least 2 different economic models, appoint, and report on the views of, an independent reference panel on the modelling.

These concerns also informed the composition of the Commission; in addition to the environmental Commissioner, another was required to ‘have extensive skills and experience in dealing with the social effects of economic adjustment and social welfare service delivery’. This is somewhat offset by the further requirement for one Commissioner to ‘have extensive skills and experience acquired in working in Australian industry’.

Consultative processes were advertised in the second reading speech to the Productivity Commission Bill 1996, when the Prime Minister’s Parliamentary Secretary noted that

The Productivity Commission will be the government’s principal advisory body on all aspects of micro-economic reform. It will continue to pursue the current functions of the IC, EPAC and BIE, but it will also have a broader charter. It will continue to have open and transparent consultative processes which engage industry and community groups in informed debate on important public policy making.

Yet there was no mandated consultative process. Nor was the body seen as a development of the Economic Planning Advisory Council; quite the opposite, as it


25 Ss 24(5), 26(5).

26 Commonwealth, Parliamentary Debates, Legislative Assembly, 4 December 1996, 7720 (Mr Miles).

27 This point was repeatedly made in Parliamentary debate, both Gareth Evans and Mark Latham noting not only was there refusal of advice originating from the consultation process, but also that the establishment of the Productivity Commission was reducing all advice to the Government to one stream:
was left to develop its own processes in formulating its advice. There was no requirement to hold public hearings, but it was empowered to do so as well as hold public seminars, conduct workshops, form working groups and so forth if to do so was thought necessary. A draft report for public consultation was indicated to be a good idea but not a necessary process. Overall, then, there was very little guidance as to how the Productivity Commission was to go about its business. Whether the putative Productivity Commission would be biased in its work was repeatedly raised in Parliament during the extensive debates over the Productivity Commission Act 1996 (Cth). If the Public Service generally could be said to have a prevailing discourse as mooted in Chapter 3, the same might be able to be said more specifically of the Productivity Commission; if so, the Commission’s research services and advice to the government would be biased in accordance with the perspective permitted by that discourse. In Parliament this bias was referred to as ‘dry economics’ or ‘neo-classical economics’. It is the epistemological argument earlier referred to: that the focus in the Productivity Commission’s defined functions and powers as summarised in the second reading speech and as universally acknowledged in all its Annual Reports (including when it was in the guise of the Industry Commission), is on ‘productivity’ and ‘effectiveness’ or ‘efficiency’. The task of the Commission is and

Commonwealth, Parliamentary Debates, Legislative Assembly, 11 February 1997, 630 (Mr Gareth Evans) and 641-3 (Mr Latham).

28 Ibid.

29 Section 6 of the Productivity Commission Act 1998 (Cth), as quoted in the text above, provided that its business would be to hold inquiries as referred to it, the result of which would be a public report, provide advice on Ministerial request, which would not result in a public report, and to provide secretariat and research services to government bodies.

30 See above n 22.

31 Ibid.

32 “[T]he Productivity Commission’s economy-wide perspective, its broad charter, public inquiry process and research functions will play a key role in promoting policies at both the government and business levels to improve the competitiveness and dynamism of Australian industry. The bill provides for an effective and broad-ranging institution to serve the needs of parliament, the people and government”:

Commonwealth, Parliamentary Debates, Legislative Assembly, 4 December 1996, 7723 (Mr Miles)

33 The Productivity Commission’s very name refers to productivity. As to the debates over the name, see Productivity Commission, above n 6, 22.
was to ‘research’ these matters. Essentially the argument is that a focus on those matters predetermines the epistemology of research (usually economic) and renders invisible or unimportant equally important ways of looking at understanding society for the purposes of government. To put this another way, the idea of ‘research’ presumes a science and a set of data on which to practice it. The Productivity Commission’s mission is, according to its Act, to formulate advice from research. Yet ‘advice’ is not defined or elaborated. Science has thought long, hard and inconclusively about what it produces, as has economics in relation to the significance of the difference between positive and welfare economics, yet this is ignored in the elision of ‘results of research’ with ‘advice’.34 In the elision lie many assumptions about society, particularly those brought about by the implications of ‘productivity’ and ‘effectiveness’ or ‘efficiency’ as teleology. This would be a matter of the nature of the Productivity Commission, to which of course there might be resistance, but if established as a matter of its institutional being would be structural within the implementation of the National Competition Policy.

The Productivity Commission was, of course, sensitive to the accusation of bias and spends a deal of space in its 2003 autobiography, let alone every Annual Report, defending itself.35 Its first defence is that it is simply presenting conclusions from its rigorous, yet independent and transparent, research processes. It is helping the community decide between competing goals through informed debate.36 ‘Productivity’ within this is a concept within its science rather than an assumed analytical structure.

Second, it maintains that its very nature is such that bias is not present, although it does not put the argument that way; rather, it claims that critical attention paid to it is unwarranted.37 It says of its structure:

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34 This point was made, albeit in a different way, by Mark Latham: Commonwealth, *Parliamentary Debates*, Legislative Assembly, 11 February 1997, 641-3.

35 Ibid.


37 Productivity Commission, above n 6, 1.
What makes the Commission unusual, if not unique, among public sector institutions around the world, is the combination of three core principles which it embodies:

- Independence. The Commission operates under the protection and guidelines of its own legislation. It has an arm’s length relationship with the Government, which can tell it what to do but not what to say.
- Transparency. The Commission’s advice and the information that it generates are open to public scrutiny.
- A community-wide focus. In providing advice, the Commission seeks to advance the interests of the community at large.\(^{38}\)

Third, it claims that it frequently and with community acceptance\(^ {39}\) deals with matters of ‘social, environmental and economic interaction’, although it concedes that it is required to ‘focus on ways of achieving a more efficient and productive economy’.\(^ {40}\) It says all that is required by this is that the issue have ‘microeconomic dimensions’. Of course, the object of research is not the means by which research is carried out, and Productivity Commission commentary frequently segues straight to its ‘strong analytical tradition’.

Finally, as indeed required by its Act,\(^ {41}\) it reflects on the nature and use of modelling techniques.\(^ {42}\) It concedes that models ‘are necessarily constrained in how well they capture the complexities of a modern economy’,\(^ {43}\) but refuses the notion that how they work at the level of detail is informative at the level of policy debate:

\(^{38}\) Ibid.

\(^{39}\) See especially ibid, ch 7.

\(^{40}\) Ibid, 3

\(^{41}\) Productivity Commission Act 1998 (Cth), s 8(3).


\(^{43}\) Productivity Commission, above n 6, 103.
‘[B]attles’ over the technical intricacies of competing models tended to confuse rather than inform debate over policy choices. Some agreement on the policy scenarios to be modelled and on the use of workshops to expose to expert assessment the modelling used by the Commission (and any other models used by participants) has helped to focus attention on commonalities and differences in projected outcomes.\textsuperscript{44}

This does not respond to the incommensurable argument: that the discourses differ and hence that the techniques of modelling cannot measure within some social perspectives.

While structural bias is a possibility, whether it is there or not and for how long can only be determined by an all-encompassing empirical study, beyond the scope of this thesis. In any event, given that personnel and practices change, and what they do varies what may be true in one instance may not be true in another. However, the possibility of epistemological bias means that the texts issued by the Productivity Commission should be viewed sceptically, bearing in mind the possibilities that research and conclusion are linked in many more ways than simple deduction.

When the 2005 \textit{Assessment} of the National Competition Policy\textsuperscript{45} is viewed through the lens of scepticism, a disjunct appears between the data and the conclusion. This is demonstrated in Chapter 5 of this thesis. Further, a reference to the Productivity Commission was made\textsuperscript{46} just as the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy was inquiring into the National Competition Policy and that reference was clearly designed to produce data to test the recommendations of the Inquiry. That and numerous other observations lead to the conclusion that the Productivity Commission was indeed captured by a particular point of view in respect of the National Competition Policy, and that Governments deployed it strategically to argue for certain changes knowing that the opinions were represented

\textsuperscript{44} Ibid.


as unbiased, even objective. This was particularly true of the defence here called ‘the falling man’ under which it was argued that because it takes time for effects to make their way through the economy the best assessment of probable effects should be that of the Productivity Commission.

In conclusion, the trajectory of development of the Productivity Commission can be seen to one where the sources of its intellectual foundations, it powers and its purposes are pared back versions of those of its constituent institutions. It lost the idea of consultation as the source of it worldview and replaced it with research on command. It lost diversity of form and function. Its purpose narrowed as it focussed on productivity as a measure of societal well-being. As is recounted in subsequent Chapters, this became obvious in the course of the National Competition Policy, as it was deployed by governments to counter community action, and as it refused to qualify its conclusions and justified previous positions in its final assessment of the National Competition Policy.

The National Competition Council

The National Competition Council was established\(^{47}\) by Part IIA of the then *Trade Practices Act 1974* (Cth.), (now *Competition and Consumer Act 2010* (Cth)) in accordance with the *Agreements*. Initially, it had the sole purpose of arbitrating between the Commonwealth as payer and the States and Territories (and local government through them) as payees of competition policy payments under the *Implementation Agreement*. Hence, although it was a creature of Commonwealth legislation, the *Agreements* substantially controlled appointments to the National Competition Council, and its work and workflow. Latterly, as the National Competition Policy fades from view (apart from in this thesis), the main function of the National Competition Council has devolved into making recommendations to the responsible Ministers of the Commonwealth, States and Territories as to the declaration of certain infrastructure services as essential and the certification of access to monopoly infrastructure regimes. The Competition Policy Review set up in December 2013 makes no mention of the National Competition Council or even of the manner in which

\(^{47}\) Technically it is now established in s 29A of the *Competition and Consumer Act 2010* (Cth).
federalism is to be accommodated. While matters are still under discussion, at the time of writing it appears that the National Competition Council has been sidelined. The story of the National Competition Policy thus includes a subplot of the rise and fall of a significant federal institution.

The provisions in the *Agreements* relating to the National Competition Council have already been discussed. In its establishing Act, these provisions can be seen to have been translated into a surprisingly direct form, given the difficulties in accessing dated and original versions of the Agreements.\(^{48}\) In s 29B(2A) conferrals of functions on the National Competition Council by State or Territory laws must be ‘in accordance with the Competition Principles Agreement’ and by virtue of s 29C appointments must not be made by the Governor-General unless ‘a majority of the States and Territories that are parties to the *Competition Principles Agreement*\(^{49}\) support the appointment’.

In a series of amendments to the then *Trade Practices Act 1974* (Cth) in 2006\(^{50}\) and 2007,\(^{51}\) provision was made for the conferral of functions, powers and duties on the National Competition Council by States or Territories, those provisions ensuring Commonwealth consent, that there was an agreement between the Commonwealth and the State or Territory, and, in further amendments made in 2007, that such conferral was constitutional.\(^{52}\) But prior to those amendments, and indeed before amendments made in 1997,\(^{53}\) the National Competition Council’s functions and powers were simply put:

\[29B. \hspace{0.5em} (1) \text{The Council’s functions include:}\]

\(^{48}\) Mind you, s 4 of the *Competition and Consumer Act 2010* (Cth.) defines each of the *Agreements* as being ‘that agreement as in force from time to time’.

\(^{49}\) Italics in original. Oddly enough, the previous mention of the *Agreement* was not in italics.

\(^{50}\) *Energy Legislation Amendment Act 2006* (Cth.)

\(^{51}\) *Australian Energy Market Amendment (Gas Legislation) Act 2007* (Cth.)

\(^{52}\) There are a series of rather tortuous provisions (ss 29B(2), and 29BB(2) - (5) which accommodate certain High Court decisions about the conferral of jurisdiction and powers between the Commonwealth and States. These decisions include *re Wakim; ex parte McNally*, (1999) 198 CLR 511; [1999] HCA 27; *R v Hughes 2000* (202) CLR 535; [2000] HCA 22

\(^{53}\) These amendments were effected by the *Gas Pipelines Access (Commonwealth) Act 1998* (Cth.) s3, referring to item 12 in Schedule 1.
(a) carrying out research into matters referred to the Council by the Minister; and
(b) providing advice on matters referred to the Council by the Minister.

(2) The Council may carry out a function conferred on it by a law of a State or Territory.

(3) In carrying out its functions, the Council may co-operate with a department, body or authority of the Commonwealth, of a State or of a Territory.

The 1997 amendments reflected the conferral of extra functions to do with developing a national market in gas and in particular, third party access to gas pipelines. As such it represents a precursor to the extended functions in relation to access to infrastructure (mostly gas pipelines) that were given to it and which received legislative amplification in 2006 and 2007.

The important point to take from these detailed events is that the conferral of functions, powers and duties on the National Competition Council by the States and Territories are severely controlled and subject to agreement and consent; the Commonwealth is not so constrained. However, the Commonwealth is the payer under the National Competition Policy and the States and Territories are recipients. Just as important as ensuring the National Competition Council’s assessments of progress in implementing the National Competition Policy were reasonable in terms of payer/payee relations was the recognition that the States were and are jealous of each other: fairness between them is always of paramount concern. Hence, while the payer/payee relation is a matter of the Agreement and principles on which appointments are made, fairness between the governments is a matter of scrupulous lack of apparent bias and the dedication of sufficient resources to the task. For that reason the workload and workflow was subject to stringent regulation in the Agreements and was not to be disturbed unless by substantial agreement.

The independence of the National Competition Council was secured by the appointments and dismissal procedures. The Conduct Code Agreement sets out quite a detailed procedure in clause 4 providing for notifications of vacancies, invitations for
suggestions, notifications of suggested appointees, notification of support, and appointment by the Governor General only if there is majority support from those Governments participating in the National Competition Policy. The time period of thirty-five days was allowed between notification and suggestion, and suggestion and support. The then *Trade Practices Act 1974* (Cth) was somewhat briefer:

29C Membership of Council

(1) The Council consists of the Council President and up to 4 other Councillors.
(2) Each Councillor is to be appointed by the Governor-General, for a term of up to 5 years.
(3) The Governor-General must not appoint a person as a Councillor or Council President unless the Governor-General is satisfied that:
   (a) the person qualifies for the appointment because of the person’s knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration; and
   (b) a majority of the States and Territories that are parties to the Competition Principles Agreement support the appointment.\(^{54}\)

Dismissal was even more critical for independence, although it is not mentioned in the Agreements. Section 29H provided for termination for misbehaviour, incapacity, bankruptcy, absence, and failure to disclose conflicts of interest (which are further defined in s 29K).

Such was the structure of the National Competition Council. What sort of institutional practices and procedures, and, in the terminology used above in relation to the Productivity Commission, epistemological biases developed during the currency of the National Competition Policy is a matter of review of what it actually did and said. This is a matter of the next two chapters. Certainly the National Competition Council, as is later described, was sensitive to the need to rigorously define its procedures for making

\(^{54}\) This remains unchanged in s 29C of the present incarnation of Australia’s competition law as the *Competition and Consumer Act 2010* (Cth.).
assessments. It should be noted, however, that, in contrast to the Productivity Commission, decisions of the National Competition Council were matters of the implementation of agreed criteria. Its role was to be fair between States and Territories as much as it was to determine progress. There was no complaint about bias. However, complaint did arise in respect of the enthusiasm with which it pursued its tasks. It took upon itself measurement of the public interest and whether that which the States and Territories protected was sufficiently in the public interest to be protected. This undermined the careful balance of sovereignty in the Agreements in favour of a view of competition not necessarily represented by the Agreements. The National Competition Council thus overreached itself and this led to constraints being placed on it and its eventual marginalisation as described above. To this extent the federal impulse trumped competition policy.

Conclusion: Implementation in terms of Institutions

The stories related in the Chapters which follow reveal differing trajectories for the two major institutions involved in the National Competition Policy. The Productivity Commission strengthened and prospered throughout, the National Competition Council’s trajectory reached its apogee at about 2000 only for it to be restrained and ultimately to fail to have much further influence of competition policy. The Productivity Commission transcended its origins to become a research institution of significance within Australian policy-making circles but only at the expense of diversity of view.

Each had had specific functions within the National Competition Policy. The Productivity Commission was not formally involved, yet its advice provided the foundations for the claimed legitimacy of what had been done and what was to be done. The advice was partial and self-justificatory: it failed to effect its purpose to conduct social research from a multiplicity of points of view. It viewed the world through the lens of economic theory and modelling. It could not recant its predecessor’s 1994 advice that the National Competition Policy could bring a substantial increase in economic welfare and thus it was not able to deny its capacity in the 2005 Assessment to draw evidence-based cause-effect relations between economic progress and the National Competition Policy.
On the other hand the National Competition Council was obligated by its function within the National Competition Policy to produce data which could withstand dispute. It was careful to measure against transparent and agreed standards. However, it overreached itself by taking on roles other than as provided by the Agreements. It took on the role of defining and proselytising competition policy and of judging Governments against a theoretical construct.
Chapter 5
Implementation: Sliced by Time

This Chapter and the next provide an additional two accounts of what was done and attributed to the National Competition Policy within the contexts previously described. Chapter 5 dealt with the institutional framework. This Chapter slices by time: it provides a historical account. The next chapter sets out what was done in terms of the elements of competition policy as identified by the Hilmer Committee and embedded in the Agreements.¹ The first tends to generality, the second to specificity. There is a little unavoidable repetition, mainly for completeness of each but also to cross-check for discursive incompatibility.

A description of the responses to the implementation of the National Competition Policy follows in Chapter 7. That Chapter completes the data provision aspects of this thesis. Conclusions are eschewed until after Chapter 8. The reason for this is to keep within a thick description modality, as described in Chapter 1, subject to the evidentiary limitations adverted to in Chapter 2.

1995-6

A year or so after the signing of the Agreements, the National Competition Council had been established, commenced operations and evinced a world view, the Productivity Commission was operational if not yet in existence, the access regime had been put in place Part IIIA of the Trade Practices Act 1974 (Cth), the Competition Code applied in all States except Western Australia and even it was merely being dilatory, all States had provided statements of their intentions as to legislation reviews, competitive neutrality and local government involvement, and infrastructure reform had continued. In terms of its principal function² under the Agreements, to assess governments’ progress in

¹ See Chapter 1, n 12.
competition policy reforms, the National Competition Council had defined what it meant by ‘satisfactory progress’.3

The National Competition Council took upon itself the role of promoting competition policy. Indeed, in some senses it saw itself as having the carriage of the policy rather than simply assessing activities against criteria, which is the most obvious reading of its role.4 Its Annual Reports, at least until towards the end of the ten years of the National Competition Policy, were focussed almost entirely on the implementation of the Agreements and associated reforms. It set out a ‘mission statement’:

The [National Competition] Council’s supporting mission statement — to help raise the living standards of the Australian community by ensuring that conditions for competition prevail throughout the economy, which promote growth, innovation and productivity — emphasises our role as part of the COAG team charged with delivering the benefits.5

This, in its Annual Report for 1995-6, is followed by a strong defence of competition policy and an attack on arguments to the contrary. Its self-proclaimed mission is reiterated, although this time with an emphasis on the National Competition Council as a part of a ‘team’ with governments: ‘... we see our mission as being part of the team charged with establishing the conditions for effective competition focused on improving the living standards of the Australian community.’ The idea of ‘team’, although rephrased into a more subservient conceptualisation, leads to a characterisation of its role as support and assistance in the common objective, including arguing the case for change:

Australian governments — Commonwealth, State and Territory — are joint stakeholders in the Council. In recognition of this, our first year has seen the establishment of contacts and work groups involving all nine

3 Appendix C, amplifying the Attachment to the Competition Principles Agreement.

4 And as admitted as the principal role apart from advice as to exceptions from the Trade Practices Act 1974 (Cth), and other work as agreed by a majority of stakeholder governments: Ibid, 28.

5 National Competition Council, Annual Report 1995-6, 1996, 2
governments. A principal objective has been to assist governments to develop policies and methodologies to increase the prospect that reforms occur in full and on time, through strategies such as communicating innovations in particular jurisdictions more widely, and promoting community awareness of the benefits of change.\(^6\)

In accordance with this mission, the National Competition Council felt it necessary to deal, albeit at this stage obliquely, with criticism of competition policy. Attacks on the National Competition Policy had already started and were growing. They manifested themselves in fiery debates in Parliament, especially that of Western Australia over producer boards and of the Commonwealth in respect of the establishment of the Productivity Commission. The National Competition Council’s response was to identify in the implementation of each element of the National Competition Policy failures to either communicate the reasons for reform\(^7\) or to put in place systems which would lead to greater confidence in the reform process.\(^8\) It saw that it had a ‘key implicit responsibility’ to ‘promote and explain the issues’. Moreover, in this it did not take an impartial stance:

> Unless the National Competition Policy reforms and their benefits are understood widely in the community, there is a high risk that people will equate competition reform with job loss in particular sectors, rather than see key benefits such as increased employment opportunities overall arising from a growing economy. Accordingly, we see explaining and promoting competition reform as one of our most important tasks.\(^9\)

That being said, it set for itself the ‘Key Performance Indicator’ that all State and Territory governments receive their full competition transfers, although in later years this received much less emphasis. By 2005, the National Competition Council had retreated to the position that, although it would do all it could to encourage and help

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\(^6\) Ibid 9

\(^7\) Particularly for legislation reviews: Ibid 14

\(^8\) Procedures for competitive neutrality complaints: Ibid 15

Governments to achieve the measures which would enable the Council to recommend full transfers, its main function was to assess whether they had done so. As it happened, some deductions were made in the final tranche – it failed to reach its self-set Key Performance Indicators.

The statements of intent referred to above were to become an important mechanism for the National Competition Policy. They were required by the Attachment to the *Implementation Agreement* and set out the commitments of each Government to competitive neutrality, legislation reviews (with a timetable) and the application of the *Competition Principles Agreement* to local government. They were used as that against which the National Competition Council was to measure progress and decide whether to recommend payment of the tranches of competition payments. Despite their stated intentions to the contrary, the National Competition Council expressed concern that some State and Territory Governments were backsliding even in their statements from what it considered had been agreed.\(^{10}\) There were some exclusions, and States and Territories did not appear to be placing priority on that legislation which gave the greatest gain. Both New South Wales and the Australian Capital Territory had even enacted restrictive legislation since the *Agreements*. In this expression of concern can be seen the difference between a National Competition Council merely assessing the performance of obligations assumed by the Governments and one which had assumed the carriage of competition reform.

Concerns were also expressed by the National Competition Council in relation to the statements in respect of competitive neutrality and prices oversight. As discussed in Chapter 2, the *Competition Principles Agreement* provided only a messy definition of the government businesses to which the principles would apply: they were to be those listed on the Australian Bureau of Statistics register of public trading enterprises and public financial enterprises. That they were to be ‘significant’ was an added criterion. But no description was provided indicating how a government business could be distinguished from simple government. In their statements States and Territories tended to identify businesses subject to competitive neutrality strictures by size alone. The expressed concern of the National Competition Council was that this excluded many business activities subsumed within general government; it identified fleet vehicle

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\(^{10}\) Ibid 13.
management, cleaning, refuse collection, construction, maintenance and printing. These were businesses which the National Competition Council considered could have substantial influence on the market in which they operated and for that reason should not be excluded.\textsuperscript{11}

1995-6, then, represented a both a year of beginnings and of completions; the former of the structures of competition policy, and the latter of the direct legislative work expressly required by the \textit{Agreements}. For those elements of the National Competition Policy needing more than simple legislation, policies and operational systems had begun to be put in place. The National Competition Council assumed a position of centrality in the implementation of competition policy, perhaps going beyond the role envisaged in the \textit{Agreements}. 1995-6 also represented the year in which the strength and form of opposition to competition policy became apparent and in which the institutions of the National Competition Policy began to develop their strategies of defence to this critique.

\textbf{1996-7}

Two years after the \textit{Agreements} were signed, work on getting the policy settings right for legislation reviews, competitive neutrality and local government involvement was continuing. Some 100 reviews from the review schedules developed by the various Governments had been completed, although few reforms had actually been made. Policies and mechanisms, varying amongst the jurisdictions, had been developed for applying competitive neutrality principles to stated activities of governments. Various government businesses had been broken up and also had their business roles separated from regulatory functions. Some had been corporatised, and many of these sold. The national access regime in Part IIIA of the then \textit{Trade Practices Act 1974} and some access regimes for specific infrastructure in several States had been approved within the system. The National Competition Council finalised its processes for making the assessments required under the \textit{Implementation Agreement}.

\textsuperscript{11} Ibid 14-15.
The assessment of progress of Governments in meeting commitments in respect of the National Competition Policy was the core task of the National Competition Council, even though, as discussed above, it had broadened this almost immediately after establishment. This resulted in a somewhat precarious position constitutionally, as the National Competition Council took the position that the National Competition Policy bound Parliaments rather than particular Governments:

[F]or the purposes of assessing jurisdictions’ progress in implementing the National Competition Policy [National Competition Policy], the Council views the NCP as a national commitment by all parties, binding not only government but also the parliament.12

The shakiness of the democratic ideal in this context is exemplified by the slightly earlier statement that, ‘In saying that [that reviews should be implemented] the Council recognises that some governments may need the co-operation of opposition parties to implement reforms.’13 Of course, this is tempered by the simple fact that the National Competition Council could but recommend as to competition payments. Thus, when it came to compliance the worst offender turned out to be the Commonwealth.14 The Commonwealth was not paid competition payments under the Implementation Agreement: it was presumed to receive the benefits of compliance through additional taxation receipts due to increased economic activity. That it, either as Government or Parliament, was bound to the Agreements did not seem to motivate it to comply. Hence, despite the posturing of the National Competition Council and consistent with the discussion in Chapter 3 as to intergovernmental agreements, jurisdictions were not in fact bound to the Agreements in any formal way; they merely risked adverse assessments and non-payment of the competition payments.

Competition Payments were the consideration for compliance with the Agreements. They were provided for in the Implementation Agreement thus:


13 Ibid 10.

14 Ibid 29.
There will also be three tranches of general purpose payments in the form of a series of Competition Payments.

- The first tranche of Competition Payments will commence in July 1997 and will be made quarterly thereafter.
- The annual payments from 1997-98 under the first tranche will be $200 million in 1994-95 prices.
- It will be indexed annually to maintain its real value over time.
- Commencement of the first tranche of the Competition Payments and the per capita guarantee is subject to the States meeting the conditions below.
- The second and third tranches of Competition Payments will commence in 1999-2000 and 2001-02. The annual Competition Payments will be $400 million, in 1994-95 prices from 1999-2000 and $600 million, in 1994-95 prices, from 2001-2002. These payments will be indexed in real terms.

The Competition Payments to be made to the States in relation to the implementation of National Competition Policy (NCP) and related reforms will form a pool separate from the FAGs pool and be distributed to the States on a per capita basis. Those Competition Payments will be quarantined from assessments by the Commonwealth Grants Commission.

- If a State has not undertaken the required action within the specified time its share of the per capita components of the FAGs pool and of the Competition Payments pool will be retained by the Commonwealth.

Prior to 1 July 1997, 1 July 1999 and 1 July 2001 the National Competition Council will assess whether the conditions for payments to the States to commence on those dates have been met.

The *Implementation Agreement* thus sets out the conditions for payments in both its text and in an Attachment. Further, during the latter half of 1996 and early 1997, various amendments were made to the timetable for implementation of commitments made outside the *Agreements* but within the National Competition Policy by virtue of their
inclusion as ‘Related Reforms’ in Council of Australian Governments deliberations were made. These were as to electricity reform, gas and road transport.\textsuperscript{15}

By July 1997 the National Competition Council had finalised the process by which it was going to make assessments of progress and had made its first assessment. There were a number of steps in this:

1. Define and promulgate what it meant by ‘satisfactory’. This was a set of detailed criteria in respect of each of the elements of the National Competition Policy formulated through consultation and agreement and set out in its Annual Report for 1995-6. It set this out in two steps; first, how it interpreted each requirement as set out in the Implementation Agreement and, second, what ‘satisfactory progress’ meant in that context.\textsuperscript{16}

2. Receive the statements published by all jurisdictions in July 1996 which outlined their commitments as to legislation reviews, competitive neutrality reform and the application of reforms to local government. These formed the touchstone for the assessment of ‘satisfactory’, although they themselves had been the subject of negotiation and agreement.

3. Once ‘satisfactory progress’ was defined, the National Competition Council would go about ‘gauging jurisdictions’ overall progress against their commitments’.\textsuperscript{17} This, according to the National Competition Council was a process of investigation, drawing on information from ‘other parties’, its own knowledge and investigations of specific reforms, and information from the jurisdictions themselves. It raised ‘particular slippages or shortcomings’ with the relevant jurisdiction.

4. Circulate a preliminary assessment to each government. This would set out where the National Competition Council thought that the government had not met its reform commitments. The governments could respond by providing

\textsuperscript{15} Relevant Agreements made within the Council of Australian Governments are reproduced as Attachment B and C to the First Assessment: National Competition Council, \textit{Assessment of State and Territory Progress with Implementing National Competition Policy and Related Reforms}, 1997.


\textsuperscript{17} National Competition Council, \textit{Annual Report 1996-7}, 1997, 28
further evidence of progress, explain what they had done and why, or modify their approach.

5. The States and Territories (the Commonwealth is not mentioned here) would provide a progress report on the implementation of the National Competition Policy reforms.

6. The National Competition Council then would assess these reports against commitments in the original statements. Further clarification might be sought and meetings of senior officials and Ministers held to discuss unresolved issues and any subsequent matters.

7. The National Competition Council would circulate a draft final assessment, providing an opportunity for last minute clarifications and revisions.

8. The National Competition Council finalises its recommendations and dispatches them to the Commonwealth Treasurer.

This process was adopted throughout the currency of the National Competition Policy. It is clearly highly bureaucratic, involving intense negotiation amongst public servants and politicians around the meaning of the terms of the various Agreements and commitments. In this, the National Competition Council averred that it saw ‘its job as one of encouraging reform rather than penalising non-performance’. It did not seek to trade off one area of good performance against shortcomings in others but said that it ‘had not legalistically demanded perfect compliance. It also deployed a graduated set of responses to avoid being seen to ‘punish’ and working towards compliance: it could simply defer recommendation pending further performance or it could recommend payment be deferred as well as recommend less than full payment. These were deployed extensively, especially in the last year or two of the National Competition Policy.  

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18 In this can be seen, although it is not explicit, the influence if not enactment of responsive regulation: see Ian Ayres, and John Braithwaite, Responsive Regulation. Transcending the Deregulation Debate. (Oxford University Press, 1992); John Braithwaite, (2011) 44 ‘The Essence of Responsive Regulation’ University of British Columbia law Review 475. In particular the graduated responses of discussion, notified preliminary determination and final sanction fir squarely into the schema.
The National Competition Council recommended that the first year of tranche payments under the *Implementation Agreement* be made in full, hence indicating general satisfaction with implementation of the National Competition Policy. As it said:

All governments have taken significant steps to meet their NCP commitments. As it is still early days, most activity to date has focused on getting the policy processes right. However, there have also been several ‘on the ground’ reforms, with some promising early results. The Council identified some matters which require greater attention by jurisdictions but, overall, it was able to recommend that all States and Territories receive the complete first instalment of their first tranche NCP payments.\(^{19}\)

Despite its recommendation, it was not entirely happy with what it called ‘progress’. It isolated some ‘shortcomings’ or ‘deficiencies’ as to:

- Legislation reviews, where
  - Some legislation was omitted from the schedules in the statements.
  - Some scheduled reviews were not carried out.
  - Some reviews led to unconvincing recommendations or for other reason were simply insufficient
  - Some recommendations were not carried out for unclear reasons
  - Some jurisdictions passed legislation which restricted competition without providing reasons.
- Infrastructure reform was proceeding too slowly and without sufficient review.

Accordingly, the second part of the first tranche payments, due in 1998-9, were made conditional on various jurisdiction-specific\(^{20}\) compliance issues:

- New South Wales: Requirements as to legislation reviews in respect of rice marketing, casino control and TAB privatisation, and applying competition principles to local government.

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\(^{19}\) National Competition Council, *Annual Report 1996-7*, 1997, 3

\(^{20}\) The *Implementation Agreement* is couched in terms of the States, but was signed by the Territories (and the Commonwealth) as well. The National Competition Council assessed on the basis that the Agreement referred to the Territories.
Victoria: Application of the national gas code and applying competition principles to local government.

Queensland: Application of the national gas code, applying competition principles to local government and requirements as to legislation reviews in respect of casino control.

Western Australia: Commitment to implementation of the National Gas Access Code, national gas reform commitments in respect of removing regulatory barriers to free and fair trade in gas, legislation reviews generally and applying of the competition principles to local government.

South Australia: Requirements as to legislation reviews in respect of casino control, application of the national gas code and applying competition principles to local government.

Tasmania: Application of competition principles to local government.

Australian Capital Territory: Application of the national gas code.

Northern Territory: Application of competition principles to local government.

Ultimately, all jurisdictions complied.

Meanwhile, criticism was strengthening. There was debate in the Commonwealth Parliament over the establishment of the Productivity Commission and furious opposition to elements of competition policy in Queensland and Western Australia. On 11 April 1997 Pauline Hanson launched the One Nation political party in Ipswich, Queensland.21 This party, although also concerned to combat policies as to Australia’s indigenous people, immigration and multiculturalism, was concerned to oppose key elements of competition policy, including ‘economic rationalism’ (a phrase which the National Competition Council expressly disavowed on many occasions), especially those aspects impacting in rural areas. It advocated protectionism, and support for small businesses and the rural sector.22 In both Western Australia and Queensland the focus of resistance was Statutory Marketing Boards and utility reform.

Oddly, but in line with submissions to the Hilmer Committee as previously discussed, submissions to inquiries in the first couple of years of the National Competition Policy

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22 There is a discussion of the appearance of One Nation in the media in Chapter 8.
mostly supported competition reform in principal, but were concerned about the impact on specific industries and regions. This response was to continue throughout the currency of the National Competition Policy, although the argument about impact became quite shrill between 1997 and 2001.

Whether or not it was a reaction to the mounting criticism, The National Competition Council contextualised the National Competition Policy as simply a plank in a broader policy platform. Otherwise, it asserted, in an accurate summary of the criticism that had been directed at the National Competition Policy, ‘[t]here is a chance that people will simply equate competition policy and micro-economic reform with job losses, breakdown in communities, reduced government accountability and impaired environmental quality.’

It conceded that competition reforms did impact on individuals, particular businesses and even regions as a whole. However, it said that living standards for Australians as a whole would increase. Later on in the implementation period it attempted to demonstrate this with a considerable amount of statistical data and anecdotal evidence. In 1997, it simply advocated that yet to come benefits should be fully realised, shared equitably and put to best use; the ‘falling man’ defence was as yet in development.

The broader policy platform directed at improving productivity of Australians involved, according to the National Competition Council, four separate issues beyond simply implementation of the National Competition Policy:

1. Specific, ongoing action to address issues such as social justice, the environment, tax reform, education and labour market reform;
2. Adjustment assistance for both individuals and communities;
3. Confining competition policy processes to its aims and, in particular, to keep them in the public interest and to include all public interests in the public interest test; and

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4. Clear and accurate explanations by Governments to the community of ‘the interface between the competition reforms, other aspects of government policy and overall community objectives’.\textsuperscript{25}

These issues and their further articulation remained constant themes in National Competition Council reports from this time on.

Overall, 1996-7 represented a year in which the institutions of the National Competition Policy settled into place, defined their functions and set about their business. The processes to be followed were developed and promulgated, and initial instances of reform took place. Opposition to reform arose and the defences to that opposition were formulated, although at this stage they were not very sophisticated. There seems to an element of surprise that the opposition was vehement and patient appeals to rationality seems to be the favoured reply option.

\textbf{1997-8}

Opposition to the implementation of the National Competition Policy grew strongly in this period. One Nation became a strong force arguing against many elements of competition policy in various arenas. Similar political debates raged around the country, but again especially in Queensland and Western Australia. The review of the Victorian \textit{Audit Act} 1994 caused enormous controversy in that State.\textsuperscript{26} Debates in Commonwealth Parliament over the establishment of the Productivity Commission had thrown doubt on the processes of economic analysis and the narrowness of its subject matter.\textsuperscript{27} A number of Parliamentary Committees were set up to investigate elements of competition policy, most importantly the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy. A number of matters were referred to the Productivity Commission.

\textsuperscript{25} Ibid 14.

\textsuperscript{26} See below 264-6.

\textsuperscript{27} See above, Chapter 3.
During the year the defences against opposition to the National Competition Policy were bedded down, which, when they are examined in the next chapter of this thesis, will be called the ‘duck’, the ‘weave’ and the ‘falling man’. These were supported by an articulation of the rationality adopted by the National Competition Council in its Annual Reports of this year and the following years. This process was consciously adopted in order to combat what the National Competition Council saw was a ‘failure of governments to adequately address related issues such as equity and adjustment assistance, and limited community understanding and acceptance of the nature, need for and place of competition policy itself.’ Indeed, the National Competition Council claimed that groups were misrepresenting National Competition Policy processes:

However, the level and nature of public debate about NCP [the National Competition Policy] has changed significantly in recent months. Awareness of the existence of competition policy has increased, although understanding of what it entails appears to have become more confused. This stems partly from the complex nature of the NCP package, and partly from the misrepresentation of NCP processes and outcomes by certain groups. Further, in the current political climate, there are limited incentives for community leaders to publicly support specific competition reforms, even if they believe that the reforms offer a substantial community benefit.

In order to combat these tendencies, the National Competition Council developed a ‘communications strategy’:

1. Correcting misunderstandings and highlighting public interest safeguards built into the National Competition Policy;
2. Relying less on the media to convey its message, rather communicating directly with affected communities;
3. Getting more money from the Government for an expanded information campaign

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28 See below 352-3.


30 Ibid 61-2
4. Building a ‘greater constituency of groups that support particular reforms and encouraging those groups to make their views public’.

Nevertheless, it spent a deal of space setting out its rationale in detail. While each subsequent year had its focus, for 1997-8, it was on explaining ‘equity’ as well as the usual distinction between competition policy and privatisation, deregulation and economic rationalism, and the ‘one plank in a platform’ rhetoric, including some consideration of how environmental concerns fitted in. The essence of the argument was that first, competition policy should result in improved sharing across society as it takes away entrenched advantages and substitutes competition for it, and utility price reduction should reduce the gap between rich and poor. Second, deploying the ‘one plank in a platform’ argument, equity was a matter for other planks if it was a concern. Third, to the extent that equity was reduced by competition policy, adjustment assistance should compensate (although great care is taken to limit it: it had to be rigorously justified, transitional and targeted at equipping people to adjust).31 Finally, as a last resort, Community Service Obligations could be required of firms, although the National Competition Council preferred direct subsidy.

Despite the concern with political pressures to resist competition policy and some indications that governments felt reluctant to press on with certain reforms, the National Competition Council felt able to assert that progress was still generally on track. It trumpeted in particular reductions in energy prices to consumers and resistance to the Asian Financial Crisis. Nevertheless there was concern with legislation reviews, perhaps as they were the most visible changes and thus the most susceptible to pressure. Governments appeared to be willing to review restrictive legislation but did not seem to be implementing recommendations. The Commonwealth in particular seemed recalcitrant, although it had undertaken to ‘address the matter’.32

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31 Ibid 35-45.
32 Ibid 23.
The Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy released an interim report in 1999. While the report was generally favourable, as were, as one would expect, various other Reports from the Productivity Commission, submissions to the Senate Committee had crystallised many concerns with the National Competition Policy. One Nation was still hugely influential and concerns continued to be raised in many Parliaments.

Despite the prevalence of critical commentary, the Annual Report of the National Competition Council for the year resonates with renewed confidence. It quotes strong economic results in a number of sectors to support its contention that the National Competition Policy was serving Australia well. Thus the opening paragraph of its 1998-9 Annual Report stated:

The recent economic crises in East Asia revealed how global economic forces can affect the well-being of individual nations. But while globalisation brings risks, it is also a major source of wealth generation for nations with the appropriate blend of policies to minimise the risks and harness the benefits of change. National Competition Policy (NCP) is part of a suite of policies – both macroeconomic and microeconomic – that is placing Australia in a better position to benefit from global forces for change.

While it had started in 1997, the Asian Financial Crisis had gripped the region to Australia’s north during much of 1998. However, Australia escaped the worst effects. Citing Reserve Bank, Commonwealth Treasury, Productivity Commission, OECD and IMF reports, the National Competition Council claimed that Australia’s strong economic performance, if not a direct result of the National Competition Policy in particular, was the result of sound macroeconomic underpinnings coupled with structural reforms.

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Persuasive language in general is much more apparent throughout the Report; for example,

Since the early 1980s, Australian governments have deliberately chosen to develop Australia as a dynamic, outward-looking economy. The benefits are significant …

Although NCP is a relatively new policy area, many of the reforms are already yielding benefits to Australian consumers through lower prices and/or improved service provision. …

NCP is also lowering a range of input costs for producers. Some examples are provided …

On a broader plane, NCP and related reforms have been helping to forge a stronger, more resilient economy.

Thus also in the Second Tranche Assessment where it said in a surprisingly strong denunciation of opposition to the National Competition Policy:

NCP implementation has often been contentious. By subjecting all restrictions on competition to public interest tests, NCP has generated opposition from small, vocal (and often well resourced) groups who currently benefit from those protections. This narrow opposition has sometimes combined with a general lack of understanding of the scope and objectives of NCP, and widespread concerns about the pace of economic and social change generally in Australia, to help create a political environment not always conducive to any economic reform. The role of political leadership on economic reform and NCP has been a critical component of this environment.

But attitudes to economic and social change in Australia are gradually becoming more sophisticated and this has helped NCP implementation to progress. There have been four factors in this development.

First, the recent economic upheavals in the region have underlined the fact that Australia has little control of its economic environment: we
cannot stop change; we can only ensure that we are as well placed as possible to adapt to it.

Second, economic reforms to date have helped Australia to adapt to the changing international environment. Recent international developments have made the importance of these reforms more evident.

Third, there have been increasing efforts to explain the need for further economic reform to the community; from the political leadership in some jurisdictions down to the National Competition Council’s (the Council) expanding communications program.

Fourth, there is greater recognition of the need to help people adjust to a changing world. This is important not just in terms of the direct economic consequences of NCP, but more broadly, in terms of the social and economic changes associated with technological developments and globalisation.35

It is clear that this stronger rhetoric was the result of a decision, foreshadowed in previous years, to take persuasion of the populace of Australia as its primary role, apart from simple assessment of progress. This also is apparent in the quotation immediately above. In the Guidelines for National Competition Policy Legislation Reviews,36 a report commissioned, adopted and disseminated by the National Competition Council, there is a blatant call for propaganda:

Where the political sensitivities to implementation are strong, a comprehensive process of public debate may be crucial to educate the electorate of the need for change and to counter the resistance from vested interests.

To fuel the debate it may be necessary to:

- ensure the release of either or both the draft or final report receive adequate publicity;


• produce a pithy, well edited summary concentrating on the key findings and pieces of evidence;
• invite independent agencies such as the Productivity Commission, academics, other state NCP units or overseas agencies to comment on the report;
• encourage independent editorials;
• encourage groups, with an interest in the outcome of the review, to engage in the debate; and
• stage an open public forum to allow both sides of the debate to be presented.

Where warranted a publicity campaign (like that prepared for the GST) may be advantageous to educate the electorate. This may be especially important where the practicalities of a new system are highly complicated.

Despite this attention to persuasion, legislation reviews remained problematic. The review of the Victorian Audit Act 1994\(^37\) had brought the processes into sharp focus in a State inured to structural reform. Reform of the professions had proved to be sensitive and the Council of Australian Governments prevaricated on the subject. Nevertheless, reviews were being followed by reforms and the National Competition Council approved most of them.

Structural reform and competitive neutrality were facing difficulties in relation to minimum service levels. Community Service Obligations were not favoured by the National Competition Council\(^38\) yet seemed to be favoured by all Governments.\(^39\) The National Competition Council conceded that well designed Community Service obligations might assure the provision of certain minimum levels of service to disadvantaged people provided and also enable government enterprises to operate on a competitively neutral basis. Moreover, there seemed to be some hesitancy among the


States and Territories to distribute competition payments to local governments even though they had borne the brunt of opprobrium resulting from many reforms.40

Much of this is summarised in the Second Tranche Assessment. The National Competition Council is forthright in its claims of failure to perform, although it allows for redress in accordance with the graduated approach outline the year before. With one exception, it recommended full payment of the first part of the second tranche of Competition Payments. The exception was Queensland, which, understandably given the strong showing (22.7% of the vote for 11 seats in the Legislative Assembly) for One Nation in the Queensland state election in June 1998, was somewhat dilatory in a number of areas.41 The recommendation was for a suspension of 25% of the first part due to be paid in 1999-2000, subject to a supplementary assessment in December. The reason was a perceived failure to implement competitive neutrality principles in relation to public transport between Brisbane and the Gold Coast. As it happened, the supplementary assessment was deferred pending the resolution of an application for judicial review relating to those principles.42 Nevertheless it raised the issue of who

40 Ibid 27.

41 National Competition Policy was a matter of considerable controversy in Queensland; it was debated on motion frequently, for example Queensland, Parliamentary Debates, Assembly, 11 November 1998, 3025-3034. The motion debated was, ‘That, given the fact that the National Competition Policy is the domestic extension of the economic rationalism, and the international history of the economic chaos produced by the adoption of the so-called level playing field which I will outline whilst so moving, this House determines to severely dilute the NCP before it costs Queensland more economic growth, more jobs, more welfare recipients, the total collapse of our rural communities, the loss of more industries, an ever-widening gap between the privileged and the rest, the loss of the Australian way of life and, eventually, depression. The indicators of economic malaise are already evident to all Queenslanders.’ (moved by Dr Kingston, 3025). Despite the ferocity of the motion, nothing in particular resulted.

42 The case is unnamed in the Supplementary Assessment. The only 1999 Queensland Supreme Court case to mention competitive neutrality principles is Hume Doors and Timber (Qld) Pty Ltd v Logan City Council [1999] QSC 350, although that case was decided in November and not September as stated by the National Competition Council. It went on appeal ([2000] QCA 389) on different grounds. A more apposite case, Sita Qld Pty Ltd v Queensland [1999] FCA 793, was about public transport between Brisbane and the Gold Coast, was heard in the Federal Court and decided on 15 June 1999 by Dowsett J. It decided the case on many issues, including those summarized by the National Competition Council. A further action for damages for breach of contract in the same matter was decided on 13 November 2000 again by Dowsett J: Sita Qld Pty Ltd v Queensland [2000] FCA 1616. Presumably the case to which the National Competition Council refers is the second of these: Sita Qld Pty Ltd v Queensland [1999] FCA
decides whether a Community Service Obligation is justified under the *Competition Principles Agreement*. The Queensland Government gave way, but only reluctantly, it appears. The National Competition Council conceded some of the deduction, nevertheless suspended 10% of competition payments for 2000-1 until an approvable framework for public transport in South East Queensland was finalised. If it was not finalised by 31 December 2000, the National Competition Council proposed to recommend that the suspension become a permanent reduction.

Payment of the second part of the Second Tranche was subject to supplementary assessments for every subject State and Territory. These covered a range of items, including re-reviewing certain legislation because earlier reviews were not up to standard, incomplete reforms especially as to road transport, produce marketing arrangements, third party motor vehicle and professional indemnity insurance, gas access and retail shop trading hours, and water trading legislation not being enacted. At least 13 Supplementary Assessments were issued before the end of the financial year. Ultimately, however, all payments were recommended.

For the first time Second Tranche Assessments dealt with the Commonwealth Government’s progress in implementing the *Agreements*. The First Tranche Assessment had considered progress in relation to telecommunications and a few other industries but only in those terms and not in terms of the Commonwealth as a separate jurisdiction. There is little comment in relation to the progress of the Commonwealth. Clearly there were no consequences in terms of competition payment from adverse assessments of Commonwealth progress, except as a matter of hypocrisy. No charge of that ilk is on the record.

Matters of focus by the National Competition Council for this year were the distribution of wealth\textsuperscript{43} and the nature of community service obligations\textsuperscript{44}. Both had proved

\textsuperscript{793} The mistaken date reference may be accounted for by the Austlii report having been ‘Last Updated’ on 10 September 1999 but little can account for the mistaken court.


\textsuperscript{44} Ibid 27.
controversial during the year but the former receives more sophisticated articulation in later years, and is dealt with in Chapter 7 under the appropriate heading.

Another matter that started to receive some attention was the future of the National Competition Policy. The Agreements, the National Competition Council and third party access under Part IIIA of the Trade Practices Act 1974 (Cth.) had been scheduled for review in 2000. While much had been done, much remained to be done, according to the National Competition Council. Notable in areas identified as needing further reform effort were government business enterprises, competitive neutrality, structural reform, legislation reviews and the associated reforms.

The National Competition Council set out a program for the future:

1. The National Competition Council and Governments were to reach agreement on reform priorities, including those which would raise compliance issues;
2. The National Competition Council and Governments would work cooperatively to develop practical approaches to implement reform in those priority areas;
3. A nation-wide coordinated program to consult, inform and assist key reform stakeholders; and
4. The National Competition Council would conduct community information programs.

In all of this the National Competition Council identified a key role for itself.

1999-2001

Much happened in the two-year period 1999-2001. Implementation continued apace, although it, subject to what follows in respect of the public interest test, was carried out in much the same way as it had previously. The real changes came as a result of growing discontent manifested politically. What happened as a result over the two years is best taken together, rather than in annual blocks as previously.

The Senate Select Committee inquiry into the Socio-Economic Consequences of the National Competition Policy published its report, Riding the Waves of Change, in
February 2000. It found that the community on the whole accepted the theory that the National Competition Policy was beneficial to society, but that when individual costs were severe people rejected particular changes. It set out what it saw as the major concerns of the community:

- the inconsistent application and interpretation of the public interest test with its domination by economic assessment ahead of the harder-to-measure intangible attributes in the social and environmental areas;
- the lack of understanding of the policy overall, which indicates the need for a strong education program, particularly at local government and community levels;
- the way legislation reviews are being undertaken within individual jurisdictions and the lack of a national approach;
- the lack of oversight by CoAG [Council of Australian Governments] of the NCC [National Competition Council] and the NCP [National Competition Policy] agenda;
- the impact on employment and the lack of structural adjustment and transitional arrangements; and
- the interface of short term economic development policies and proposals with longer term ecologically sustainable development and environmental issues. The evidence presented to the Committee on water resource policies clearly marks this issue as an emerging one to which Governments will have to give due attention to resolve potential conflict within the community.

Responding in his own way to the same political pressures as instigated the Senate to refer the socio-economic impacts of competition policy to a select committee, the then Treasurer, Mr Peter Costello, referred ‘the impact of competition policy reforms on

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46 Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, Riding the Waves of Change, 2000, xiii.

rural and regional Australia for inquiry and report’ by the Productivity Commission. This reference was very similar to that of the Senate albeit in language deriving much more from prevailing governmental discourse.48 ‘Socio-economic’ was to be determined by reference to ‘established economic, social, environmental, and regional development objectives of Australian governments.’ Moreover, in every respect analysis was to take into account the operation, structure and competitiveness of markets.

The Productivity Commission released *The Impact of Competition Policy on Rural and Regional Australia*49 in September 1999. This concentrated on disentangling the effects of the National Competition Policy from other influences on communities in rural and regional Australia, and on the diversity of impacts. It concluded that most changes were due to other factors, mostly long-term and beyond government control. It cited


In undertaking the inquiry the Commission should have regard to the established economic, social, environmental, and regional development objectives of Australian governments. Consideration should be given to other influences on the evolution of markets in regional and rural Australia, including the role of international trade, foreign investment and globalisation generally.

The Commission should specifically report on:

(a) the impact of competition policy reforms on the structure, competitiveness and regulation of major industries and markets supplying to and supplied by regional and rural Australia;

(b) the economic and social impacts on regional and rural Australia (including on small businesses and local governments) of the changes to market structure, competitiveness and regulation flowing from the reforms and the effect of these impacts and changes on the wider Australian economy;

(c) possible differences between regional and metropolitan Australia in the nature and operation of major markets and in the economic and social impacts of the reforms promoted by national competition policy; and

(d) any 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 regional and rural Australia.

declining terms of trade for agriculture, changes in technology and in consumer tastes as examples. It claimed the National Competition Policy had become a scapegoat for such effects, although it acknowledged that metropolitan areas were receiving more of the early benefits and there was more variation in the incidence of benefits and costs in rural and regional areas. Its recommendations were directed at ‘improving community understanding of NCP [the National Competition Policy] including clarification of how matters of wider public interest, and social considerations in particular, are to be taken into account in its implementation, and to consider ‘specific forms of adjustment assistance … for some people in adversely affected regions’.

For now, the task is to talk about the effect of these reports on the implementation of the National Competition Policy. Given that it had the carriage of the National Competition Policy, albeit without sufficient multi-government supervision according to the Senate Select Committee, the reading of the reports provided by the National Competition Council is seminal.

The National Competition Council read down the Terms of Reference of the Senate Select Committee to be an investigation of ‘community attitudes to National Competition Policy [National Competition Policy], general micro-economic reform and globalisation’. They were in fact,

To inquire into and report on the National Competition Policy, including:

(a) its socio-economic consequences, including benefits and costs, on:
   (i) unemployment,
   (ii) changed working conditions,
   (iii) social welfare,
   (iv) equity,
   (v) social dislocation, and
   (vi) environmental impacts;

(b) the impact on urban and rural and regional communities;

(c) its relationship with other micro-economic reform policies; and

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50 Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, Riding the Waves of Change, 2000, xvii.
In other words, the National Competition Council read the Terms of Reference of the Senate Select Committee to be asking it to find out what the community thought, rather than what was happening. It left the latter to the Productivity Commission. Thus by definition dealing with the Senate Select Committee’s findings became a matter of dealing with the community’s perceptions rather than ascertainable effects on the community.

The National Competition Council went on to read the reports as together making three main points. First, it asserted that both reports concluded that the National Competition Policy led to net community benefits. The Senate Select Committee did not in fact come to that conclusion. All it concluded was that ‘the policy has not been in operation long enough for the full effect and impact to become apparent’. On the other hand, the Productivity Commission concluded that

The selected NCP reforms modelled are cumulatively estimated to provide a sustained increase in output from the economy, as measured by real gross domestic product (GDP), of 2.5 per cent above what would otherwise occur in the absence of the reforms

Second, the National Competition Council read the Senate Select Committee as supporting the proposition that ‘many people, although not all, accept that NCP [National Competition Policy] provides a net benefit.’ This is not what the Senate Select Committee said. It was talking about people’s perceptions of the disjunction between theory and practice:

The community is clearly expressing concern at the social consequences of the changes that are resulting from NCP [National Competition Policy], general micro-economic reform and globalisation. There is a

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51 Ibid vii.

concern that policies labelled as ‘economic rationalisation policies’ are eroding the social cohesion of some communities and devaluing social objectives at the expense of economic objectives such as productivity and efficiency. The nexus extolled by economists between the achievement of economic objectives and the flow-on to the achievement of social benefits is not always evident to the community at large. This scepticism of the nexus arises particularly in the many small communities being disproportionately affected by the impact of economic reform policies, social changes, globalisation and technology.\(^\text{53}\)

This is saying that experience makes people doubt the theory – a very different point from that the National Competition Council attributed to the Committee. In the National Competition Council version ‘people also reject individual changes where direct costs (such as increased unemployment or reduced social infrastructure) are severe.’ Later it casts this point as a veritable tautology: ‘The Council well recognises that National Competition Policy [National Competition Policy], while benefiting Australia overall, can have significant impacts on those directly affected by change.’ In any case it is axiomatic to the Productivity Commission report that the question is simply whether real benefits to all outweigh detriments to individuals and particular communities. It does not pursue the extensive economic theory on this point.

Third, the National Competition Council stated, correctly this time, that both inquiries found ‘continuing misunderstandings about the scope and requirements of the NCP [National Competition Policy]’\(^\text{54}\).

These points appear to have little substantial influence of the course of the implementation of the National Competition Policy by Governments. This is not surprising as the inquiries were a reaction to pre-existing political pressures. However, there were influences on the manner in which the National Competition Policy was

\(^{53}\) Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, *Riding the Waves of Change*, 2000, xiii.

implemented; in particular, on the way the National Competition Council carried on its business.

First, the National Competition Council changed the manner in which it represented the achievements of the National Competition Policy. While every Annual Report paints a rosy picture of progress, as would be expected given that the National Competition Council had taken on the function of ensuring all commitments were met as a ‘key performance indicator’, from 1999-2000 there is renewed emphasis on external evidence of the benefits to be accrued from competition policy. Thus the 1999-2000 Annual Report quotes the Productivity Commission Report that the National Competition Policy ‘can potentially add 2.5 per cent to Australia’s economic growth’. It also quotes reports by the OECD and academic authors. It provides more facts and figures, although continued resort is still made to anecdote and simple assertion.

Second, the Council of Australian Governments insisted on the clarification of the public interest test in legislation reviews and also on procedures for transparency of review procedures. This was implemented through amendments to the Implementation Agreement in the form of a letter from the Prime Minister to all Premiers and Chief Ministers on 27 October 2000. Meanwhile, the National Competition Council had commissioned an external consultant to prepare a document as to how reviews should be carried out. The upshot of these was that the review procedure was regulated more heavily and the criteria for the public interest test spelled out in more detail. There had been a call by the Productivity Commission in its Report to quantify any public interest issues so that a balancing exercise could be carried out, although changes did not go that far.

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56 Council of Australian Governments Communique, 3 November 2000. The letter itself is only available in the Western Australia, Parliamentary Debates, Legislative Council 11 September 2003, 2105, as a tabled copy in response to a question by Hon Dee Margetts.

Third, considerable disquiet had been expressed about the interface between competition-based water reform and the associated environmental and social issues. Moreover, the then current drought brought tensions of a different order into the processes of reform. Water reform received more attention. That there was a conflict was not conceded by either the National Competition Council or the Productivity Commission, both asserting that the reform procedures took the latter into account. However, from 2000 on, there was a marked change in the representation of change. Thereafter the environmental and social concerns were far more to the fore and that reform was not entirely efficiency based reiterated on many occasions.

Fourth, the principles on which adjustment assistance should be provided were spelled out. These were that assistance should be focussed on helping people adjust to change, should be of limited duration and tailored to the particular dislocation. These principles were based on the idea that change was a fact of life and that there was a generally available social welfare net. People hurt by the National Competition Policy were not to be privileged over those affected by other changes going on in society.58 Interestingly, as discussed in Chapter 9, the theoretical foundations of this approach in the Kaldor-Hicks measure of efficient public policy is not set out, although they are clearly at its core. The most important aspect of the approach to adjustment assistance was to be that the public interest test be transparent, rigorous and independent in order that there be community confidence in its application. That compensation was problematic had been foreshadowed from the first evaluations of what the Hilmer Report might imply.59 That the theoretical foundations for efficiency-enhancing policies were not spelled out at any time is a notable absence, especially as they do not preclude compensation. It is surprising that little commentary was inspired by the polemic of the National Competition Council.

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58 National Competition Council, *Annual Report 1999-2000*, 2000, 25. On 13 September 2001 it held a workshop to consider processes that could be used to help those directly affected by implementation of the National Competition Policy adapt to change; see National Competition Council, *Annual Report 2001-2*, 2002, Box A12

59 See Chapter 1.
Fifth, framework of the National Competition Policy was clarified by making it very clear that the obligations of Governments arose from the Agreements and Governments were simply implementing what was agreed. From this arose the defences to criticism, here nominated the ‘duck’ and the ‘weave’, repeatedly deployed from this point on by all Governments. This was that if the policy was criticised, implementation by the States or Territories was blamed (the ‘duck’); and if the implementation was criticised, it was claimed that what was being done was as required by the National Competition Policy and that if it was not done competition payments would not be paid (the ‘weave’).

Finally, the National Competition Council was subjected to greater accountability requirements, most notably to the Council of Australian Governments through its ‘senior officials’. These were the product of a secretive review by those same ‘senior officials’. The measures included:

- the National Competition Council was to formulate its work program not on its own initiative, rather in consultation with senior Council of Australian Governments officials;
- the commitments to reform and the assessment of progress in meeting them were to be subjected to control by Council of Australian Governments Senior Officials and the Agreements were amended to ‘further guide’ the National Competition Council in its assessments; and
- the deadline for completion of the legislation review program was to be extended to 30 June 2002 (it was later further extended).

Although this is to comment outside the strict limits of descriptive purity adopted in this Chapter, in its Annual Report for 2001-2, the National Competition Council is remarkably impatient and defensive, no doubt as a result of the implicit criticism of its role in the preceding 5 years. Even the business community appears to have seized the opportunity to criticise. In a passage remarkable for its anti-libertarian flavour the National Competition Council sets out what it perceives the role of business is and is

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60 It is mentioned in the Council of Australian Governments (COAG) Meeting 3 November 2000 Communique and in the Prime Minister’s letter of 11 September 2000.

61 Ibid.
not. It says the role of business does not extend to advocating government policies, being hypocritical, avoiding the question and avoiding accountability. It says that the role of business is in fact ‘acceptance of, and practical support for, the social and economic objectives behind the rules’. Business, it said, should implement sensible socially responsible change management accounting for socioeconomic impacts.

Meanwhile Governments fell further behind the timetable for legislation reviews and competitive neutrality structures still, according to the National Competition Council, needed to be extended into a greater range of government businesses through clarification of what ‘significant’ meant. Energy reform also was behind schedule, especially the establishment of the retail electricity market with choice of supplier and sufficient geographical coverage, and because of game playing by participants.62 Water reform had a long way to go.

In summary, 1999-2001 marked a turning point in the implementation of the National Competition Policy. Controversy had focussed on its remaining elements of legislative reviews and certain structural reform. The public interest test was the storm centre. Further, some areas of structural reform lagged. However, little changed in the nuts and bolts of implementation. Attention began to be paid to what was to happen once the Agreements expired: whether the ambit of the National Competition Policy should be broadened and what the role of the National Competition Council was to be. Rail and upstream gas were of particular concern to the National Competition Council. It also thought there should be a process to ensure continued implementation of the emphasis on competition in legislation.

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62 See Ann Wardrop, ‘Competition, Regulation and the California Electricity Market’, in Christopher Arup and David Wishart (eds), Competition Policy with Legal Form (Federation, 2002), 141. The National Competition Council (National Competition Council, Annual Report 1999-2000, 2000, 30) puts it this way:

- the ongoing use of vesting contracts to manage financial risk;
- the lack of a consistent response to supply imbalances, in some cases resulting in electricity prices being inflated; and
- concerns among some parties that government owned businesses in the electricity sector may enjoy competitive advantages by virtue of their public ownership.
This period marked the end of the National Competition Policy. One Nation faded away and critique ran out of steam, although, as we shall see in Chapter 8, the ‘Civil Society’ movement gained intellectual rigour in the form of the ‘Third Way’ and had a brief period of political acceptance. National Competition Policy processes were refined and strengthened, particularly those related to competitive neutrality and legislation reviews, and the final assessments for the purposes of Competition Payments were made.

Over the final three years, the National Competition Council emphasised the National Competition Policy as a social enterprise aimed at improving Australian society in many differing respects. Water reform was highlighted as a matter where the economic viability and ecological sustainability of Australia’s water resources had both been improved despite the commonly held idea that these were incommensurable goals. It stated that water rights trading was crucial to these successes.\textsuperscript{63} Evidence of the benefits conferred by the National Competition Policy was also touted, especially in the 2001-2 and 2003-4 Annual Reports; again the evidence was as to falls in utility prices, especially electricity, modelling by the Productivity Commission, for what that was worth, and anecdote. That evidence was not conclusive is acknowledged,\textsuperscript{64} in particular the comment by the Productivity Commission in its 2002 Report that Australia’s economic performance over the period of the National Competition Policy could have been due to education and skills development, take-up of information and communication technologies as much as of competition reform initiatives.

Areas of rhetorical focus were, again consistently with the approach adopted after the 1999-2001 Reports and Reviews, adjustment assistance, the application of the public interest test and competition policy as not just about economics and the economy, but also about it as a social matter. Little changed in the substance of what the National Competition Council said, what is worth noting is the concentration on these matters.

\textsuperscript{63} National Competition Council, \textit{Annual Report 2001-2}, 2002, 1.

\textsuperscript{64} National Competition Council, \textit{Annual Report 2000-3}, 2003, 3.
Adjustment assistance was comprehensively discussed in the 2002-3 Annual Report, under the heading ‘Managing the Change Process’. The National Competition Council first places the National Competition Policy in the context of a history of continual structural change arising from a number of causes. This is followed by a discussion of what costs are caused by change and the determinants of the ability to adjust to change. It says, citing a paper on water reform prepared for it,

> The ability of businesses and individuals to adjust to change depends on the availability of alternative employment and business opportunities. It also depends on whether businesses and individuals have the skills, financial resources and flexibility to take advantage of alternative opportunities.

It then describes what it thought the most effective packages of adjustment assistance:

> The most effective packages balance the competing objectives of maximising the ability of people and communities to cope with change, and maximising the speed of achieving the benefits of reform, while minimising the cost to taxpayers. Adjustment assistance does not necessarily involve direct financial assistance to those affected by reform.

Elsewhere it insists that direct financial assistance is a last resort to be used sparingly. It mounts an argument based on fairness: that most structural changes in the economy do not attract direct compensation therefore National Competition Policy induced changes should not do so either. It also asserts that general social support mechanisms should deal with adverse impacts where people have not been able to adapt.

Finally it points out that the National Competition Policy Agreements place no obligations on Governments in respect of the change process. While change management might be a matter of implementation strategy, who bears the cost is a

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65 Ibid 18-20.

matter for the particular implementing government. This rather begs the question of why the National Competition Council deals with it at all. After all, the function of the National Competition Council was to assess compliance with the Agreements for the purposes of determining whether the tranche payments should be made. Whether unrest within any jurisdiction occurred as a result of implementation was not its concern.

The National Competition Council also focussed on what was to happen when the National Competition Policy wound down. Given its functions, this was somewhat beyond its jurisdiction; nevertheless it appears to consider that as the expert in the area its thoughts were cogent. It was in fact generally ignored. As one would expect, the National Competition Council took the attitude that to continue pro-competition reform after the conclusion of the National Competition Policy, an independent supra-governmental body just like the National Competition Council was essential. This is most evident in its 2004-5 Annual Report, tabled after the formal end of the National Competition Policy. Most interesting here is an acknowledgement that the federal state fiscal imbalance was the driver of policy. Earlier it had nominated labour market reform as an important target of competition policy for the future. In its 2005-6 Annual Report, the National Competition Council reviewed the future of competition reform, noting that on 10 February 2006 the Council of Australian Governments had agreed to a ‘National Reform Agenda’ and supporting institutional arrangements. There was no place in that for the National Competition Council. Its role as assessor was supplanted by case-by-case consideration by the federal Government of implementation plans.

In 2000 the Council of Australian Governments had required annual assessments of progress for the remainder of the National Competition Policy and also better reporting of the basis for deductions from competition payments. Before 2002, the National Competition Council took a soft line, suspending payments pending further discussions. From 2002 on, a more stringent process appears. The language of ‘penalties’ appears. Penalties are categorised into, permanent deductions, specific suspensions and pool suspensions. Permanent deductions were to be irrevocable for specific failures, although their application might be suspended pending the introduction of complying

67 National Competition Council, Annual Report 2005-6, 2006, 68-74
68 Council of Australian Governments (COAG) Meeting 3 November 2000 Communique.
reform. Suspensions were where payment was to be made, but only when certain conditions were met. If the conditions were not met, the suspensions would be converted into a permanent deduction. Specific suspensions were for particular matters and pool suspensions were for a category of reforms, mostly legislation reviews.

Naturally, the Assessments include a huge amount of detail as to what was done and what was not. For present purposes, the following table appears best to summarize the National Competition Council’s assessments:

![Table 1: Summary of outcomes, by jurisdiction](image)

| Source: | National Competition Council, *Assessment of governments’ progress in implementing the National Competition Policy and related reform*, 2000, xviii |

The final result was that the Victoria, the Australian Capital Territory, and Tasmania all received payment in full; permanent deductions were made for New South Wales Queensland, Western Australia, South Australia and the Northern Territory. The following table sets it out:
Table 2: Council’s recommendations on 2005-06 competition payments and suspended 2004-05 competition payments.

| Recommendation | 2005-06 payments | Suspected 2004-05 payments | Council’s recommendations for
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Source: National Competition Council, Assessment of governments’ progress in implementing the National Competition Policy and related reform, 2000, xxxviii.
It is notable that the Commonwealth Government was the worst performer, yet was excluded from any penalties.

**Final Assessments of the National Competition Policy**

The Council of Australian Governments, the Productivity Commission and the National Competition Council all provided assessments of the National Competition Policy at the conclusion of its period of formal operation. However, as one would suspect from reading this thesis thus far, each took a particular approach to the task. The dimensions of difference between them are the concept of what the National Competition Policy was thought to be, the idea of its purposes, what was measured, and the interests of the institution concerned.

**The National Competition Council**

The National Competition Council might have provided an assessment of the National Competition Policy as a whole in its Final Tranche assessment submitted in October 2005. However, it did not do so, limiting itself to assessments of progress in each of the elements of the National Competition Policy. It was more forthcoming in its *Annual Report* for 2005-6, although again resiled from extensively assessing the National Competition Policy as such. Of course, it should be remembered that, given that the National Competition Council set for itself the task of ensuring the success of the National Competition Policy as measured by completion of the again self-set tasks of the governments concerned, any assessment of it as a whole by the National Competition Council would have been an assessment of its own success and hence not to be trusted, except where it detailed its failures. It did state, as illustrated in the Table provided above, the areas where the ‘objectives of the National Competition Policy’ had not in its opinion been met. Overall its assessment was ‘[m]any reform objectives under the NCP and program of related reforms have substantially been met’ but that there was still much more to do.69 It cited the Council of Australian Governments *Communique* of 10 February 2006 and the Productivity Commission *Report* of 2005 in support. That

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there was still much to do is clearly self-serving, even were it to be true: it saw itself as having a role in that task. Nevertheless, no such role was given to it.

**The Council of Australian Governments**

The Council of Australian Governments also provided a very brief formal assessment of the National Competition Policy in June, 2005. It simply said: that the National Competition Policy ‘measures were pivotal in boosting the competitiveness and growth of the Australian economy and the living standards of all Australians and drew together the reform priorities of the Commonwealth, States and Territories, to improve Australia’s overall competitiveness and raise living standards – with Australian income per head rising from 16th in the OECD in 1990 to 8th in 2004.’ The Council of Australian Governments moved on in February 2006 to set out ‘A New National Reform Agenda’.\(^70\) This was somewhat broader than the National Competition Policy, covering in addition ‘Human Capital’ in addition to continuing competition and regulation reforms:

> A healthy, skilled and motivated population is critical to workforce participation and productivity, and hence Australia’s future living standards. By focusing on the outcomes needed to enhance participation and productivity, the human capital stream of reform aims to provide Australians with the opportunities and choices they need to lead active and productive lives.

The Council of Australian Governments saw ‘this new wave of collaborative reforms’ as building ‘on the success of a quarter of a century of national economic and social policy reform, which has fundamentally reshaped the Australian economy and increased living standards’. It went on to say that its

> [The] National Reform Agenda aims to deliver significant economic and social rewards. Heads of Treasuries have advised that it has the potential to deliver over the next decade benefits of the same size, if not even

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\(^{70}\) Council of Australian Governments (COAG) Meeting 10 February 2006 *Communique* 1
larger, than those achieved in the last decade from the implementation of national competition policy and associated reforms. The Productivity Commission has estimated that national competition reforms have permanently increased the level of Australia’s GDP by 2.5 per cent, or $20 billion.

The competition and regulation reforms to be undertaken under the National Reform Agenda were stated to be ‘a substantial addition to, and continuation of, the highly successful National Competition Policy reforms’ focusing further reform in the areas of transport, energy, infrastructure regulation and planning, and climate change technological innovation and adaptation. The reforms are set out in greater detail than was provided in the Principles Agreement from 1995, but little else changed beyond bringing areas which were once in the ‘additional reforms’ category into the general family of competition reforms and adding climate change into the mix.

By way of contrast, implementation was to be very different from previously. The National Competition Council was stripped of responsibility for implementation and was replaced by a body called the ‘COAG Reform Council’. This body was to have the role of ‘report[ing] to COAG annually on progress towards the achievement of agreed reform milestones and progress measures across the broad National Reform Agenda’.

It was also to take over the National Competition Council’s role in relation to third-party access to infrastructure although the Council of Australian Governments decided otherwise in April of 2007. The COAG Reform Council, like the National Competition Council before it, was to make recommendations as to funding of reform. But it was to be on a case-by-case basis, not generic, additional to Commonwealth funding and was to be decided upon by the Commonwealth.

The implications of the Council of Australian Governments’ 2006 Communique is that the reforms associated with the National Competition Policy were accepted to have been of substantial benefit, but that the institutional arrangements were no longer needed, if

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71 Ibid.

72 Council of Australian Governments (COAG) Meeting 13 April 2007 Communique.
they had ever been necessary. The Productivity Commission’s 2005 assessment was apparently taken to be accurate.

**The Productivity Commission**

Assessment of the National Competition Policy was referred to the Productivity Commission by the then Treasurer, Peter Costello, by letter dated 24 April 2004. In that letter it was stated that the referral was pursuant to Council of Australian Governments agreement in November 2000, although it was in fact pursuant to an attachment to a letter from the then Prime Minister, John Howard to Premiers and Chief Ministers dated 27 October 2000.73 It is notable that the Treasurer’s letter informed the Productivity Commission that ‘[The National Competition Policy] has delivered significant benefits to Australia’ and ‘[I]t is therefore timely to undertake an independent review of these arrangements to consider the extent of the benefits the reform program has delivered to date’. The commissioned scope of the enquiry was less didactic, including as its first item:

- the impact of NCP and related reforms undertaken to date by Australian, State and Territory Governments on the Australian economy and the Australian community more broadly. To the extent possible, such assessment is to include:
  - i. impacts on significant economic indicators such as growth and productivity, and to include significant distributional impacts, including on rural and regional Australia; and
  - ii. its contribution to achieving other policy goals.

The second reporting item returned to a discourse of assumed benefit:

[A]t the Australian, State and Territory level, areas offering opportunities for significant gains to the Australian economy from removing impediments to efficiency and enhancing competition, including through

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73 As discussed in Chapter 2.
a possible further legislation review and reform programme, together with the scope and expected impact of these competition related reforms.

One can only assumed that the question was begged. Even if that assumption is not made, a critical eye is warranted when looking at the Productivity Commission’s findings.

The conclusions of the Productivity Commission and their tenor are best presented by simply quoting the boxed set of ‘Key points’ at the outset of the Report:74

<table>
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<th>Key points</th>
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<td>• National Competition Policy (NCP) has delivered substantial benefits to the Australian community which, overall, have greatly outweighed the costs. It has:</td>
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<td>• contributed to the productivity surge that has underpinned 13 years of continuous economic growth, and associated strong growth in household incomes;</td>
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<td>• directly reduced the prices of goods and services such as electricity and milk;</td>
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<tr>
<td>• stimulated business innovation, customer responsiveness and choice; and</td>
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<td>• helped meet some environmental goals, including the more efficient use of water.</td>
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<tr>
<td>• Benefits from NCP have flowed to both low and high income earners, and to country as well as city Australia — though some households have been adversely affected by higher prices for particular services and some smaller regional communities have experienced employment reductions.</td>
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<tr>
<td>• Though Australia’s economic performance has improved, there is both the scope and the need to do better. Population ageing and other challenges will constrain our capacity to improve living standards in the future. Further reform on a broad front is needed to secure a more productive and sustainable Australia.</td>
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<tr>
<td>• In a number of key reform areas, national coordination will be critical to good outcomes. These areas — many of which have been encompassed by NCP — should be brought together in a new reform program with common governance and monitoring arrangements. Priorities for the program include:</td>
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– strengthening the operation of the national electricity market;
– building on the National Water Initiative to enhance water allocation and trading regimes and to better address negative environmental impacts;
– developing coordinated strategies to deliver an efficient and integrated freight transport system;
– addressing uncertainty and policy fragmentation in relation to greenhouse gas abatement policies;
– improving the effectiveness and efficiency of consumer protection policies; and
– introducing a more targeted legislation review mechanism, while strengthening arrangements to screen any new legislative restrictions on competition.

• An ‘overarching’ policy review of the entire health system should be the first step in developing a nationally coordinated reform program to address problems that are inflating costs, reducing service quality and limiting access to services.
• National action is also needed to re-energise reform in the vocational education and training area.
• Reform is important in other key policy areas, including industrial relations and taxation, but there would be little pay-off from new nationally coordinated initiatives.
• The Australian Government should seek agreement with the States and Territories on the role and design of financial incentives under new national reform programs.

The Productivity Commission famously quantified the growth in the economy attributable to the National Competition Policy as 2.5% with few differential regional impacts. However, closer examination of the Report reveals a great deal of uncertainty, many qualifications and shifting conceptual frameworks. There is little challenge to the discourse of competition, despite challenges provided by submissions to the Productivity Commission in relation to the Report.

The uncertainty in the Report stems from the evidentiary problem of separating effects of the National Competition Policy from the results of other policies, trends and events. For example, to what extent were falling prices in a number of areas due to technological change (this was the era of extraordinary progress in computing and the
invention and expansion of the Internet) rather than market restructuring? 75 Indeed, the difficulty of disentangling National Competition Policy reform from other things is a theme running through the whole report. 76 Some of those things are obvious, like technological change, but others such as microeconomic reforms not part of the National Competition Policy are quite subtle and difficult to disentangle; 77 as discussed later, the Productivity Commission tends to merge the two.

The Report discusses alternative explanations of ‘Australia’s productivity revival’ at quite some length. 78 Productivity is claimed to have increased at the second highest rate of the nineteen OECD countries and at a historically high rate for Australia. The upshot was that Australia’s productivity per worker grew from 16th to 8th in the OECD. 79 This, claimed the Productivity Commission, was despite major domestic and international constraints, such as declines in terms of trade, economic stagnation in Japan, the impact of the SARS epidemic, drought and global economic weakness in 2001-2 after the September 2001 terrorist attacks. The alternative (to competition reforms) causes of the productivity revival considered by the Productivity Commission were a cyclical recovery from recession, an unsustainable increase in work intensity and more rapid accumulation of workplace skills. The Productivity Commission argues against those explanations by citing OECD analyses and International Monetary Fund reports, both of which in this respect should not be considered to be independent, 80 and an article by Salgado which, like the others, did not single out competition reforms as the sole determinant; rather trade liberalisation, and labour market reforms were considered as also important. Looking at selected sectoral productivity, the Productivity Commission again argues by assertion and selective citation. Its evidence in each case is simply a statement of reforms and a statement of productivity improvement. This does not establish causality. It simply establishes contemporaneity.

75 Discussed in particular at ibid 62.
76 See ibid 3, 52, 85, 87.
77 Ibid 89
78 Ibid 42-47
79 Ibid 40-42
80 See above Ch 1, n 4.
In general, the Productivity Commission dealt, in its 2005 Report, with uncertainty by acknowledging it, then simply asserting a positive result for National Competition Policy reforms. A similar approach was adopted in relation to the use of economic modelling.

Distrust of economic modelling had been at the heart of criticism of the then Government’s plans when setting up the Productivity Commission in 1996-8 (although the erstwhile Industry Commission had been acting as the Productivity Commission between 1994 and 1998). As Mark Latham put it in the House of Representatives:

> I am also concerned by the limits of their [the Productivity Commission’s] economic modelling. Anyone who has been through the study of the dismal science of economics knows that outputs from a model are directly related to the assumptions and inputs that fashion the model—that is that anything, virtually, can be proved in economic modelling according to the types of inputs and assumptions that are applied from first principles.⁸¹

The upshot of the debates was s 8(3) of the Productivity Commission Act 1998 (Cth.) which requires that the Productivity Commission

> … in all reports on matters referred to it, must provide a variety of viewpoints and options representing alternative means of addressing the issues in the report. If the report relies on formal mathematical economic modelling, the Commission must either:

(a) if practicable—utilise at least 2 different economic models, with the assumptions and results of those models made explicit in the report; or

(b) if it is not practicable to utilise at least 2 different economic models, appoint, and report on the views of, an independent reference panel on the modelling.

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⁸¹ Commonwealth, Parliamentary Debates, House of Representatives, 11 February 1996, 641. See, generally, the discussion in Chapter 4 pp 161-7 under the Heading ‘The Productivity Commission’.
The response of the Productivity Commission was to hold conferences on the economic models it used as well as to comply with the requirements of the Act. Thus

A workshop was held in Canberra in July 2004 to make the Commission’s preliminary modelling results available for scrutiny and comment. This was attended by academics, consultants and representatives of the Australian, State and Territory governments. A second modelling workshop was held in Canberra in February 2005 to further discuss the distributional component of the modelling. It was attended by academics, consultants and the ABS.82

Little is said in the Report about the proceedings of those workshops, although it says that ‘[f]eedback from those workshops has been taken into account in the version of the modelling results presented in this report’. However, the Productivity Commission’s modelling, plus that of the Victorian Government, and a summary of the workshop proceedings were published in a supplement to the report.83 The following is the Productivity Commission’s summary of the referees’ comments:

The referees supported the modelling approach adopted to quantify national and regional impacts of infrastructure industry change over the 1990s, and recognised the ambitious nature of the undertaking. The referees and workshop participants noted that the changes observed were influenced by both NCP and other factors and that the results would need to be interpreted with care in that light.

As to the second workshop:

The workshop was supportive of the work. In particular, the workshop noted the absence of information on the distributional implications of infrastructure industry reform and the importance of this study in filling


this gap. It also confirmed the appropriateness of the key measure of household purchasing power adopted in the study. Nevertheless, some concerns were expressed about the rudimentary treatment of investment income in current MMRF-style models. The reconciliation of benchmark MMRF-CR and HES data and the possible implications this may have for the distributional analysis was also discussed. In response, a range of alternative modelling and data assumptions were examined. The results were not found to be sensitive to the alternatives considered.

While economic modelling is a specialist skill it is clear from the Productivity Commission’s own admission that the following factors were important in the process adopted by the Productivity Commission.

1. It was aimed at finding what happened, not, as had been the case for the previous two studies,\(^84\) at an assessment of prospective effects of the National Competition Policy reform program.\(^85\)
2. It looked only at ‘the impact of labour productivity and service-price changes’. The Productivity Commission argued that falls in prices were greater than as shown by falls labour costs, possibly due to other National Competition Policy elements. However, causation was not identifiable and could have been due to other non-National Competition Policy factors.
3. It looked only at ‘six key infrastructure activities encompassed by NCP — electricity, gas, urban water and sewerage, urban transport, ports and rail freight and telecommunications’, although changes had already commenced in many of these prior to the Agreements.
4. It only took in the first 5 years of the National Competition Policy – that is, until 1999-2000.
5. It was based on the assumption of ‘full adjustment to the effects of labour productivity and service-price changes in infrastructure industries.’ Of course,

\(^{84}\) In 1995 and 1999. These were, as the Productivity Commission belatedly stated ‘outer envelope’ studies: the best possible outcome based on ‘the full implementation of reforms, prospective productivity and price changes and complete adjustment to their effects.’ Ibid 2.

\(^{85}\) Ibid.
experience in the second half of the 2000s somewhat puts the lie to electricity price falls, about which see below.

6. It did not model what would have happened in the absence of the National Competition Policy: ‘To create a counterfactual, judgments would be needed about the effect of NCP compared to other influences. Such judgements themselves would determine the outcome of the analysis and would be contentious.’ This meant that the model did not distinguish between changed not due to the National Competition Policy. Thus the model assumed the cause/effect relation.

The modelling thus ignored most legislation reviews and competitive neutrality procedures, although they had been the chief raison d’etre for criticism of the National Competition Policy, and did not isolate the National Competition Policy from other influences on the economy.

The following diagram\textsuperscript{86} encapsulates the findings of the modelling. It shows the GDP growth attributed to each of the infrastructure industries examined.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{estimated_impacts_on_gdp.png}
\caption{Estimated impacts on GDP of productivity and price changes in key infrastructure industries, 1989.90 to 1999.00}
\end{figure}

Perhaps that should be compared to a later diagram\textsuperscript{87}.


\textsuperscript{87} Department of Resources, Energy and Tourism, \textit{Enhancing Australia’s Economic Prosperity Fact Sheet Electricity Prices}, 2012, 2.
This diagram shows household gas and household electricity prices experiencing remarkable increases since 2000. Price falls persisted for business electricity and business gas until about 2007, whereupon they resumed the real prices as at 1991. The main factor for price rises is attributed to network costs: remedying the rundown of the previous twenty years. Yet those years are the years of price reductions the Productivity Commission claims are due to simple competition reform. This renders the Productivity Commission’s claim

‘[m]oreover, the full gains from reform are yet to be realised. In particular, the more responsive and innovative business culture engendered by NCP and other reforms should be a source of dynamic efficiency gains for the community over time’\(^\text{88}\)

somewhat specious.

Regional and distributional impacts were also modelled. Again, detailed critique is a specialist matter, but it should be noted that the long run was assumed to be discernible even within just a few years of changes having been made, and that labour is mobile. Of course, this is at the core of critique: that disruption is in itself a cost and it is a human cost not apparent in employment or income data. In a particularly insensitive couple of paragraphs the Productivity Commission puts it this way:

The model’s estimates are also made on the presumption that workers in eight occupational groups are mobile between regions in the longer run.

In reality, while job mobility may pose few problems for some, it could pose significant adjustment problems for others. For example, in regions with declining employment, mobility may be inhibited by depressed regional real estate markets relative to those in expanding areas.

Estimated employment changes made in this framework provide one indication of adjustment problems. In particular, instances are identified where employment is projected to be lower than otherwise as a result of infrastructure industry change in regions that have experienced actual employment declines over the 1990s. The estimated changes may be contributing to or aggravating those observed changes in regional employment. However, it needs to be stressed that adjustment problems are transitory while income gains are permanent.\footnote{Productivity Commission ‘Modelling Impacts of Infrastructure Industry Change over the 1990s’, Supplement to \textit{Review of National Competition Policy Reforms}, Productivity Commission Inquiry Report No. 33, Canberra February 2005, 9.}

Dislocation is accordingly assumed to be a ‘transitory’ ‘adjustment problem’. More generally, human or psychological cost is simply not measured. And given that the effects of legislation reviews were not a part of the assessment, there is no indication of how costs are incorporated. There is no sense of ‘public benefit’ as a matter not commensurable against economic welfare.

The assessment of regional and distributional impact by the Productivity Commission was relatively crude. There was no attempt to provide detailed micro-level assessment by industry and region while the critique was of the impact on small communities and individual persons. Aggregation can smooth away much.

Most of the evidentiary and incommensurability problems with modelling were acknowledged by the Productivity Commission.\footnote{Productivity Commission, above n 88, 47-52.} Indeed it quotes from various submissions talking of the increase of inequality that might have flowed from the
National Competition Policy. At this point, however, the burden of proof seems to switch:

However, the more pertinent question is whether the contribution of NCP has been significant, relative to the many other factors that would have influenced income distribution over the 1990s. …

As outlined in earlier chapters, the Commission’s modelling does not differentiate between changes induced by NCP and other factors. Nonetheless, it suggests that the impacts on income distribution of productivity improvements and price rebalancing in the infrastructure sectors — and by implication the effects of National Competition Policy and related reforms — have been small.

The Productivity Commission concluded that many regional areas benefitted from the reforms but that some mainly smaller communities were adversely affected. It is somewhat difficult to reconcile with the figures one page later that

[T]he Commission’s modelling projects that the productivity and price changes in the infrastructure sectors will have led to higher employment than would otherwise have prevailed in 16 of the 57 regions, and lower employment levels than otherwise in the remaining 41 regions.

Overall, then, the Productivity Commission’s 2005 assessment was a highly qualified statement based on flimsy evidence. It did not test propositions, rather it set out to support them. It made theory contingent assumptions as to what counts as ‘cost’ and the nature of ‘public benefit’. Where it conceded evidentiary or methodological problems, it proceeded to ignore their impact: its conclusions frankly ignored the concessions it had made. Costs were narrowly defined, if at all (including the very costs of implementation as such). Causation was not established and it conflated non-National Competition Policy measures with microeconomic reform while at the same


\[92\] Ibid 104.
time concluding that it was measuring the effect of the National Competition Policy. Claims to increased economic resilience were not borne out nor were those as to continued cost benefits. Finally, the Report did not convincingly settle on what it was measuring: was it productivity, increases in gross domestic product or infrastructure price reduction? The conclusion must be that there was no real assessment of the National Competition Policy; certainly that provided was not convincing. It can be said, then, to have satisfied the requirements of the terms of reference: to provide a panegyric for the National Competition Policy.

**Conclusion: the story over time**

When the course of implementation of the National Competition Policy is viewed as a series of events, it is revealed as somewhat different from the normal picture of smooth government-directed change. It translates into a picture of initial progress but growing resistance, followed by turmoil provoking the Senate Select Committee’s inquiry as the impact of reform on certain industries, regions and government activities became apparent. (That turmoil will be further explored in Chapter 8.) Resistance was overcome, with very little alteration to the National Competition Policy, by a combination of clever political defence, careful misrepresentation of findings, reference of matters to friendly inquiries (especially the Productivity Commission) and superficial change in the Agreements and processes. While the place of the National Competition Policy in the platform of Government policy initiatives shifted from being a major support to being a single plank amongst many, efforts were made to broaden its reach. These included muted references to industrial relations reform coming under its aegis (a subplot of a fascinating story, but not one within the purview of this thesis) and a more concrete assumption of responsibility for water reform (which was equally futile). The latter was in part to address concerns that competition policy was regardless of environmental concerns.

The events chronicled here add to the story sketched in Chapter 5 about the National Competition Council’s overreach. The National Competition Council took on the task of proselytizing the National Competition Policy within a year of its establishment and moved to what can only be called propaganda after 2000. It failed to concede the legitimacy of the political processes of implementing governments although its early
claim that the *Agreements* bound Parliaments was not repeated. It mounted a series of arguments about equity, compensation, and community service obligations, none of which were taken up by critical commentators but all of which are theoretically problematic.

Ultimately very little was deducted from competition payments, which the National Competition Council took as a marker of success. Assessments, particularly that by the Productivity Commission, tended to hagiography. While the possibility of 5.9% growth was repeatedly deployed as justification of the National Competition Policy, the estimate of 2.5% growth was greeted with equal joy, with little mention of the failure to meet expectations. No assessment was made of the overall costs of the program.
Chapter 6
Implementation Diced: The Elements

The elements of the National Competition Policy as set out in the Agreements\(^1\) were reform of competition law, prices oversight of government businesses, access, competitive neutrality, legislation reviews and structural reform. While previous chapters set out the implementation of these elements in terms of an institutional and a historical account respectively, what follows here is how each one of the elements were implemented in terms of government action. This chapter drills into specifics, although only where necessary for descriptive completeness. More might been provided were it not for space limitations; moreover, a large proportion of the extant literature dealing with competition policy measures or elements describes the impact of implementation on certain industries, businesses and geographical areas. There is no need to repeat it, even were it epistemologically appropriate to do so.

**Competition Law**

Extending the reach of the then *Trade Practices Act 1974* (Cth.) to non-corporate businesses throughout Australia was the subject of the *Conduct Code Agreement*. Given that the Heads of the State and Territory Governments had signed the *Agreement*, it was relatively unproblematic for the legal processes of legislative reform to take place. This involved the insertion of a new Part XIA into the Act by virtue of the *Competition Policy Reform Act 1996* (Cth.). That part provided for a version of Part IV known as the ‘Schedule Version of Part IV’ the ‘Conduct Code’ or the ‘Competition Code’ (the last was nominated in sections 10-12 of the application legislation as the correct citation), and various legislative accommodations to the scheme. That version is altered every time the Commonwealth Parliament varied the main text (which it does quite frequently, with consultation with the States and Territories\(^2\)). By September

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\(^1\) See Chapter 1, n 12.

\(^2\) For example, changes made in response to the difficulties with cross vesting legislation resulting from *re Wakim; ex parte McNally* (1999) 198 CLR 511.
1996 every State and Territory had enacted its own application act *sub nom* Competition Policy Reform (Name of State) Act. Those Acts applied the ‘Competition Code’ within the States or Territories, and provided for future alterations of that Code.

Section 51 of the Competition Code provided for legislative exception to the operation of the Code. The operation of this was constrained by the *Conduct Code Agreement*, which set up a system to ensure that such exceptions did not undermine the project of coverage of businesses throughout Australia. It applied only to the application of the Commonwealth legislation, although in its Annual Reports the National Competition Council seemed to be of the opinion that the system applied to non-corporate businesses covered only by the State Competition Codes. A Government enacting such legislation was required to notify the National Competition Council within 30 days of the legislation. That would normally trigger the Treasurer to apply the exemption to all business covered by the Commonwealth Act by regulation under sec 51(1C)(f). However, the Treasurer was required to also table a notice that the benefit to the community outweighed the costs and that those benefits could only be achieved by restricting competition. These are the familiar legislation review criteria. The requirements triggered no deductions from competition payments.

**Prices Oversight of Government Businesses**

Clause 2 of the *Competition Principles Agreement* set out detailed provisions as to prices oversight of Government Businesses. Yet the requirement was limited: subclause (1) made it clear that prices oversight was the responsibility of the State or Territory that owned the business and the commitment in subclause (2) was to ‘work cooperatively to examine issues associated with prices oversight’ and in subclause (3) to ‘consider establishing independent sources of prices oversight advice’. The rest of clause 2 stated what characteristics an independent source of prices oversight advice should have and provided for jurisdictions to subject its businesses to prices oversight advice by the National Competition Council or another jurisdiction. While, as discussed earlier,

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3 National Competition Council, *Annual Report 1995-6*, 1996, 96-7. The Commonwealth Parliament would not have had the power to override the State Parliaments in this respect, although it could override State Parliaments.

4 In the *Competition Principles Agreement* it is nominated as s 51(1B)
'government business enterprise’ was not defined, the commitment was in respect only of ‘all significant Government business enterprises that are monopoly, or near monopoly, suppliers of goods or services (or both’).\(^5\) Moreover, all that was suggested should be the function of the ‘independent source of prices oversight advice’ was that it should take submissions from interested persons and that its pricing recommendations, with reasons, should be published. Recommendations suggested to be made on the basis of the ‘efficient allocation of resources’ while having regard to any community service obligations that may be imposed on the enterprise.\(^6\)

By the second assessment of implementation of the National Competition Policy by the National Competition Council all States and Territories, apart from Western Australia and the Northern Territory, had prices oversight arrangements in place. Generally the function is given to a statutory body.\(^7\) In New South Wales and Victoria, the particular monopolies were specified (for the former, electricity, gas, water, waste and urban passenger transport, and, for the latter, electricity, gas, water, ports and grain handling). In the other jurisdictions the body was tasked with prices oversight of enterprises declared to be subject to it, usually by a nominated Minister. Quite frequently other functions, such as access determinations, are also exercised by the same body. Western Australia established its body in 2004,\(^8\) although gas pipelines and rail transport had been subject to specific oversight earlier. The Northern Territory established its body in 2000.\(^9\)

\(^5\) Ibid cl 2(4)(c).

\(^6\) Ibid cl 2(5)

\(^7\) The bodies are: Australian Competition and Consumer Commission (Australian Government), the Independent Pricing and Regulatory Tribunal (New South Wales), the Essential Services Commission (Victoria), the Queensland Competition Authority, the Essential Services Commission of South Australia, the Government Prices Oversight Commission (Tasmania), and the Independent Competition and Regulatory Commission (Australian Capital Territory).

\(^8\) Economic Regulation Authority Act 2003 (WA) establishing the Economic Regulation Authority of Western Australia,

\(^9\) Utilities Commission Act 2000 (NT) establishing the Utilities Commission of the Northern Territory.
Access

The National Competition Policy required only that the Commonwealth ‘put forward’ legislation providing for access to significant infrastructure facilities. Accordingly, the National Competition Policy Reform Act 1995 (Cth.) inserted Part IIIA into the then Trade Practices Act 1974 (Cth.). This satisfied the terms of the Competition Principles Agreement. Part IIIA was amended in 2006 and 2010.10

The Hilmer Committee had recommended11 against reliance on s 46 of the Trade Practices Act 1974 (Cth.)12 to deal with the problem of natural monopoly and access to essential services. The reason was that the High Court of Australia had ‘not embraced’ such a doctrine and the Federal Court had ‘specifically rejected it’.13 Section 46 would have had to have been amended. Moreover, Courts do not like setting prices or determining the terms of a bargain that should exist between parties, which is what it

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10 Trade Practices Amendment (National Access Regime) Act 2006 (Cth.). This was pursuant to a Productivity Commission report: Productivity Commission, Review of the National Access Regime, Report no. 17, 2001. The amendments:
- Inserted a new objects clause (s 44AA)
- Modified the criteria in s 44G(2) for declaration from ‘promote competition’ to ‘material increase in competition’.
- Provided pricing principles for access disputes, undertakings or codes in s 44ZZCA.
- Altered some process matters, including as to arbitration, lodgement of undertakings and codes, appeal rights, time limits and publication of decisions and reasons.
- Provided for pro-competitive supervision of tender processes for Government infrastructure facilities in Division 2B.

2010 amendments were by virtue of the Trade Practices Amendment (Infrastructure Access) Act 2010 (Cth.). They were designed to simplify and speed up the processes of Part IIIA.

11 Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, National Competition Policy 1993, 239-268

12 This section proscribes the abuse of market power by a corporation possessing a substantial degree of market power. An owner of a facility that is necessary for the operation of an upstream or downstream market possesses market power.

13 Ibid 243.
must do if granting access to an essential facility.\textsuperscript{14} Nevertheless, s 46 remains operable in cases of essential facilities: it has not been excluded from operation.\textsuperscript{15}

The regime recommended by the Hilmer Committee was a matter of the creation of a right of access through declaration by a designated Commonwealth Minister.\textsuperscript{16} The debates in the Council of Australian Governments, the bureaucrats involved and the drafters of Part IIIA of the then \textit{Trade Practices Act 1974} (Cth) teased apart the elements of the Hilmer Committee’s recommendations into two processes while keeping its national and general facets:\textsuperscript{17} first, a declaration that a facility was subject to the regime and, second the development through negotiation or arbitration, adoption or recognition of a regime for access. This was implemented by the \textit{National Competition Policy Reform Act 1995} (Cth.).

The declaration process is unnecessary under Part IIIA in two circumstances. The first is where there is already an ‘effective access regime’; indeed, in these circumstances the

\begin{itemize}
\item The facility or facilities subject to the regime.
\item Those who were to benefit from the right.
\item The pricing principles governing access to the facility.
\item Other terms and condition to protect the legitimate interests of the owner of the facility.
\item Any safeguards necessary to protect the competitive process.
\item Who was to arbitrate disputes.
\item The penalties for non-compliance with an access right.
\end{itemize}

The right would be created if the owner agreed or by \textit{fiat} on the advice of the National Competition Council, subject to recommended or agreed terms and conditions. There were recommendations as to publicity and review. The system, therefore, was an amalgam of consent, arbitration and National Competition Council recommendation. The bureaucratic processes involved were not particularly well articulated. Importantly, however, it was to be national and general (rather than industry specific).

\textsuperscript{14} Ibid 243-4.


\textsuperscript{16} The declaration was to set out the applicable access regime, including:
\begin{itemize}
\item The facility or facilities subject to the regime.
\item Those who were to benefit from the right.
\item The pricing principles governing access to the facility.
\item Other terms and condition to protect the legitimate interests of the owner of the facility.
\item Any safeguards necessary to protect the competitive process.
\item Who was to arbitrate disputes.
\item The penalties for non-compliance with an access right.
\end{itemize}

\textsuperscript{17} In \textit{re Fortescue Metals Group Ltd} (2010) 271 ALR 256; [2010] ACompT 2 at [1348], the majority (Finkelstein J, Mr Grant Latta and Professor David Round), in observing the complexity of the process, stated that there were 9 steps in the process: (1) NCC recommendation; (2) Ministerial declaration; (3) Tribunal review; (4) Appeals to the court; (5) Possible remitter; (6) Negotiations for access; (7) Arbitration; (8) Further Tribunal review; (9) Possibly more appeals to court.
service cannot be declared.\textsuperscript{18} An ‘effective access regime’ is one which complies with clause 6 of the \textit{Competition Principles Agreement}.\textsuperscript{19} Clause 6 sets out the characteristics of an access regime put in place by a State or Territory government. In other words, it is a regime under the jurisdiction of the State or Territory and the National Competition Council considers that it complies with competition policy as set out in the \textit{Agreements}. This is the accommodation of the national character of the access regime to State and Territory sovereignty made by the Council of Australian Governments. During the currency of the National Competition Policy it was deployed for gas pipelines, electricity, and ports.\textsuperscript{20}

A service subject to an ‘access undertaking’ also cannot be declared. An access undertaking is a regime set out in the form of an undertaking to the National Competition Council setting out the details ‘under which the provider undertakes to provide access to the service.’\textsuperscript{21} Thus it is for those who own or are prospective owners of facilities which might be subject to declaration and who seek to pre-empt the declaration process. The criteria are not those for a declaration because it is a voluntary subjection of a proposed regime which may or may not be approved. A number of sections then followed setting out the procedures for the acceptance of access undertakings.\textsuperscript{22}

Under Part IIIA as implemented, and as in almost all respects still obtaining, applications for declarations could be made by any person, including the designated Minister.\textsuperscript{23} They were to be made to the National Competition Council, which would recommend to the Minister whether a declaration should be made. The Minister would then decide whether or not to declare it. The criteria for the advice and the decision were and mostly are:

\begin{itemize}
\item \textit{Trade Practices Act 1974} (Cth) s 44G(4).
\item \textit{Trade Practices Act 1974} (Cth) s44N.
\item \textit{Trade Practices Act 1974} (Cth) s4ZZA.
\item \textit{Trade Practices Act 1974} (Cth) s 44F.
\end{itemize}
(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
(b) that it would be uneconomical for anyone to develop another facility to provide the service;
(c) that the facility is of national significance, having regard to:
   (i) the size of the facility; or
   (ii) the importance of the facility to constitutional trade or commerce; or
   (iii) the importance of the facility to the national economy;
(d) that access to the service can be provided without undue risk to human health or safety;\footnote{This was removed in 2010: \textit{Trade Practices Amendment (Infrastructure Access) Act 2010}.}
(e) that access to the service is not already the subject of an effective access regime;
(f) that access (or increased access) to the service would not be contrary to the public interest.\footnote{\textit{Trade Practices Act 1974 (Cth) ss 44G and 44H.}}

There has been a deal of litigation defining the precise ambit of these criteria:\footnote{As might be expected, most of these were over transport facilities. The major cases were \textit{BHP Billiton Iron ore Pty Ltd v National Competition Council} (2008) 236 CLR 145; [2008] HCA 45; re Review of Freight Handling Services at Sydney International Airport (2000) ATPR 41-754; [2000] ACompT 1.} clearly much hangs on the decision of the Minister. (Such judicial casuisms as resulted do not concern the argument of this thesis.) Appeal lies to the Australian Competition Tribunal and thence to the Federal Court.\footnote{\textit{Trade Practices Act 1974 (Cth) s 44K.}}

The second part of the process is as to the access regime. Declaration is simply that the facility is an essential facility. If those seeking access are happy with access as provided at the given price, no more procedures apply other than registration of agreements with the National Competition Council and enforcement procedures: there
is no need. 28 This is considered to be access by agreement. Usually, of course, there will be substantial negotiation and sophisticated contracting.

The balance of the legislation operates only where there is a dispute. It sets out a procedure 29 for notification of disputes and, failing agreement, for arbitration of the dispute by the Australian Competition and Consumer Commission with appeal to the Australian Competition Tribunal for review 30 and further appeal to the Federal Court. 31 Approval of contracts by the National Competition Council and arbitration decisions are made using criteria that are required to be taken into account. For registration of agreement, these are that that the public interest, including the public interest in having competition in markets (whether or not in Australia) and the interests of all persons who have rights to use the service. 32 For arbitrations the list is somewhat more expansive, reflecting the imposed nature of the result of arbitration, although it is much the same sort of thing:

(a) the legitimate business interests of the provider, and the provider's investment in the facility;
(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(c) the interests of all persons who have rights to use the service;
(d) the direct costs of providing access to the service;
(e) the value to the provider of extensions whose cost is borne by someone else;
(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
(g) the economically efficient operation of the facility. 33

28 Trade Practices Act 1974 (Cth) ss 44ZU-ZW.
29 Trade Practices Act 1974 (Cth) ss 44R-ZO.
30 Trade Practices Act 1974 (Cth) ss 44ZP-ZQ.
31 Trade Practices Act 1974 (Cth) ss 44ZQ-ZT.
32 Trade Practices Act 1974 (Cth) s 44ZW. From 2006 the objects of Part IIIA also had to be taken into account: Trade Practices Amendment (National Access Regime) Act 2006 (Cth).
33 Trade Practices Act 1974 (Cth) s 44X; again, the objects of Part IIIA were added in 2006 as para (aa).
Overall, then, by the end of 1996 the requirements of the Agreements in respect of an access regime had been put in place. It did not perceptibly change during the currency of the National Competition Policy. During that time the access regime was well used and a number of declarations were made. Agreement were registered and arbitrations held.

Competitive Neutrality

Clause 3 of the Competition Principles Agreement dealt with ‘competitive neutrality’ – a policy, maybe not named as such, which had been implemented by Australian governments for some years prior to the National Competition Policy. The Hilmer Committee had argued that ‘by far the most systematic distortions [to competition] appear to arise when government businesses participate in competitive markets.’ These were, in particular, competitive advantages by virtue of ownership by the government, including exemptions from taxation. The Hilmer Committee proposed that a systematic, nationally consistent mechanism be established as part of national competition policy to address these distortions. There would be a set of principles, supported by appropriate institutional arrangements and agreed upon by Australian Governments. The Hilmer Committee’s recommendations based on these arguments were the foundation of the competitive neutrality provisions in the Competition Principles Agreement, although there were substantial departures.

Clause 3 (1) of the Competition Principles Agreement sets out the objective of competition policy thus:

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34 These are recorded on the National Competition Council website: <www.ncc.gov.au> (last accessed 20 June 2013).

35 There are public registers in respect of ss 44Q, 44ZW, 44ZZC and 44ZZL on the Australian Competition and Consumer Commission website: <www.accc.gov.au> (at last access the website was in transition but as these are public registers, it is highly unlikely they will disappear).

36 Hilmer Report above n 11, 293.

37 These were in that complaints mechanisms were not national, reflecting the Hilmer Committee’s naïveté in relation to federalism, in the suggested presumption in favour of corporatisation and in its simplistic notion of government business; see Hilmer Report, above n 11, 308-309.
... the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.

‘These principles’ referred, albeit apparently ungrammatically, to the propositions set out paragraphs (4) and (5) and the qualifications in paragraphs (6) and (7).

The principles applied to enterprises classified as ‘Public Trading enterprises’ or ‘Public Financial Enterprises’ in the Government Financial Statistics Classification (clause 4). They also applied in situations where an agency of a government which did other things as well also undertook ‘significant business activities’ (clause 4(5)). Finally, the principles applied, as did legislation reviews and structural reform, to local government, even though they were not parties to the Agreements. This was particularly cogent for competitive neutrality as local government carried out many activities directly. While not parties, local government is a creature of State and Territory Parliaments and hence State and Territory governments were made responsible for applying the principles to it. Consultation with local government was required by clause 7 (2)(a). These provisions reflect the trend in the Council of Australian Governments for greater recognition of local government as constitutional partners, although it is far from equality of status with Territories, let alone States.

The competitive neutrality propositions\(^\text{38}\) were:

1. Somewhat less forcefully than the presumptive approach recommended by the Hilmer Committee, the Governments would ‘where appropriate’ corporatise

\(^{38}\) In its 2005 assessment (Productivity Commission, Review of National Competition Policy Reforms, Report No 33, 2005) the Productivity Commission was somewhat more robust in its articulation of the requirements: ‘competitive neutrality requirements involving the adoption of corporatized governance structures for significant government enterprises; the imposition of similar commercial and regulatory obligations to those faced by competing private businesses; and the establishment of independent mechanisms for handling complaints that these requirements have been breached’: xv.
Government business enterprises. A particular approach developed for the November Special Premiers’ Conference was recommended.  

2. Government business enterprises should pay Commonwealth State and Territory taxes or their equivalents, and fees for any debt guarantees resulting from their status as government business enterprises. Where the business was not fully severed from other activities, sums equivalent to those taxes and fees should be reflected in prices for their goods and services.

3. Government business enterprises should be subject to the same regulations as private sector competitors. If a government business enterprise was subject to regulation but the private sector competitor was not, the relevant government was free to retain the regulation if it thought to do so was appropriate.

Clause 4(6) watered down these propositions by only requiring Governments to implement them ‘to the extent the benefits to be realised outweighed the costs’. A requirement for a complaints mechanism under which competitors could seek to have government businesses be placed under the same costs and constraints as they were was not included in the principles of competitive neutrality. Complaints mechanisms are, however, mentioned in clause 4(8) as something to be included in Governments’ policy statements. That is their only mention; nevertheless complaints mechanisms became one of the major issues in the implementation of competitive neutrality principles.

The *Competition Principles Agreement* set out the procedures for implementation. These were similar for the other elements of competition policy. By June 1996 the Governments were to publish a ‘policy statement on competitive neutrality’. This was to include an implementation timetable and a complaints mechanism. It was also to publish an annual report on implementation of the principles, including allegations of non-compliance. The National Competition Council was specifically enjoined by the

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40 *Competition Principles Agreement* cl 3 (8). While the National Competition Policy website maintained by the National Competition Council claims these statements are available (<http://ncp.ncc.gov.au/pages/competitive_neutrality> (accessed 26 June 2013)), a publication search does not reveal them.

41 *Competition Principles Agreement* cl 3 (10).
Implementation Agreement not to recommend payment of tranches of the Competition Payments unless Governments had complied with competitive neutrality principles and publication timetables for statements.

These principles and processes proved problematic. In its assessment of the National Competition Policy, the Productivity Commission, while acknowledging competitive neutrality as a key element, virtually ignored it as such. Most of the mentions are in respect of road and rail transport. It is only in Chapter 10, where it discusses its ideas for the future competition framework that there is discussion of any depth of competitive neutrality. There it says:

For the most part, the CN [competitive neutrality] elements of NCP [the National Competition Policy] have been implemented and appear to be working relatively smoothly. There is general agreement that the broad principles underlying the CN regime remain appropriate and that the regime – including complaints’ handling mechanisms – should continue into the future.  

In this context it thought suggested changes for the future could be characterised as ‘fine-tuning’ and not of high priority.

The main evidence for the Productivity Commission’s satisfaction with the competitive neutrality regime is its assessment of Government Business Enterprise financial performance. Indeed, the National Competition Council also cites the Productivity Commission’s assessment of this as an indicator of the competitive neutrality regime doing well. This is illogical. The aim of competitive neutrality is not performance of the government business enterprise, it is resource allocation in the economy. It is not

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43 Ibid XLIX.

44 Ibid 293.


46 National Competition Council, Assessment of governments’ progress in implementing the National Competition Policy and related reform’, 2005, 2.1.
even performance in the industry, although the state of competition in an industry is, according to economic theory, a predictor of performance. The equivocal assessment by the Productivity Commission, apart from in summaries, of overall and industry specific economic performance has been discussed above. The performance of government business enterprises would be expected to reduce once advantages are removed. It is management change that might improve performance and competition is alleged to help in that respect, given that enterprise structure permits it. In its assessment of the performance the Productivity Commission said this:

There has been a pronounced improvement in the financial performance of GBEs since the early 1980s, attributable to NCP and related governance reforms. Nevertheless, around half of Australia’s GBEs continue to record rates of return below the risk-free government bond rate.\footnote{Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33, 2005, 53.}

This statement, used as evidence of the effectiveness of competitive neutrality reforms, is not only contradictory but also irrelevant to assessment of the National Competition Policy. If the policy is good, why is financial performance bad? How can improved performance ‘since the early 1980s’ be attributable to a policy that commenced implementation sometime after 1995?

The National Competition Council was a little more equivocal in 2005. It again referred to the financial performance of government business enterprises as the touchstone of assessment,\footnote{National Competition Council, above n 46, 2.7-2.10.} noting that ‘most are not achieving fully commercial levels of financial performance’. Mind you, it also said, ‘The performance of government businesses has improved as CN [competitive neutrality] has promoted a more dynamic culture through greater transparency and accountability.’ Its summary assessment was that ‘Governments generally met the explicitly stated obligations of CN several years ago, but realising the objective of CN still appears some way off, bringing into focus the CN obligations that are only implied.’\footnote{Ibid 2.12.} For the National Competition Council, then,
Competitive neutrality appears then to be one of the less successful aspects of competition policy, even if, in terms of the interpretation in this thesis of the National Competition Policy as the Agreements, the obligations of governments were acknowledged to have been met.

But what was actually done? Disentangling the strands of competitive neutrality policy from other aspects of competition policy generally is somewhat problematic. In the various reports they are confused with structural reform and legislation reviews, especially in relation to corporatisation. However, the strands most commonly distinguished are:

- Coverage,
- Requirements,
- Community Service obligations,
- Complaints mechanisms,
- Corporatisation,
- Application to local government.

**Coverage**

The *Competition Principles Agreement* had defined the enterprises covered as significant business activities of entities under public ownership and classified as ‘Public Trading Enterprises’ or ‘Public Financial Enterprises’ in the Government Financial Statistics Classification (clause 4). Yet even with such external reference there was early debate. As discussed in Chapter 4, the idea of ‘government business enterprise’ has not been articulated with certitude. The *Competition Principles Agreement* seemed to be precise by reference to classification, yet this was illusory. The classification begged its own question: What is the difference between ‘business’ and ‘government’? An example of the doubt that could creep in is in the potential application of the principles to Universities. In 2005, the National Competition Council noted the reluctance of governments to apply competitive neutrality principles to even the commercial activities of universities, although Western Australia did so in 2003 and also implemented a complaints process. The issue was that Universities were not thought of as businesses, at least at that time, and even the severance of ‘commercial
activities’ was problematic. Moreover, as noted above, as early as 1996 the National Competition Council lamented the coverage of the competitive neutrality principles and the tendency of States and Territories to identify ‘significant’ businesses subject to competitive neutrality strictures by size alone, rather than influence of in the relevant market. It conceded only that size alone might be a useful determinant as to priorities.

The lamentations of the National Competition Council were to some extent addressed by its assessment powers. Nevertheless, clause 3 of the *Competition Principles Agreement* is strong in preserving for governments discretion in relation to the application of competitive neutrality principles. Only ‘significant’ business activities were covered, business activities of agencies which undertook a broader range functions need only apply the principles ‘where appropriate’ (clause 3 (5)), corporatisation was subject to the same qualification (clause 3 (4)(a)) and all applications of the principles and corporatisations need only be undertakes ‘to the extent that the benefits to be realised from implementation outweigh the costs’ (clause 3 (6)). All jurisdictions reserved to themselves the right of determination of what was ‘significant’ although the National Competition Council assessed only Western Australia as not having met its clause 3 obligations. Western Australia had subjected only significant business activities that it, after review, considered should be covered in the public interest, to competitive neutrality principles. However, this is as permitted in the *Competition Principles Agreement*, thus the main reason is somewhat unclear; it appears to be more a matter of the timeliness of review rather than the fact of review.

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50 National Competition Council, *Annual Report 1995-6*, 1996, 14-15. In its November 2000 meeting, the Council of Australian Governments softened the requirements of clause 3 by only requiring governments to use their ‘best endeavours’ where a ‘government business is not subject to executive control of a party’. (This is not in the Council of Australian Governments *Communique*, rather it is as stated in an attachment to a letter from the Prime Minister to Governments dated 27 October 2000, which the Council of Australian Governments adopted in November 2000: *Communique*, 2000. 4-5.) Of course, legislation could have been passed requiring compliance. In this can be seen the equivocal nature of Universities and other such institutions and the inability of the competition discourse to capture any institution other than government or business. It is an issue deserving of further articulation beyond the space available here.


52 National Competition Council, *Assessment of governments’ progress in implementing the National Competition Policy and related reform’,* 2005, 2.2
Ultimately governments adopted similar agency self-assessment processes which followed the following steps:53

1. Is the activity a ‘significant’ activity in a market in terms of both size and significance?
2. Do the expected benefits of application of competitive neutrality policy outweigh the costs of so doing?
3. Is it in the public interest to apply the competitive neutrality policies, using the criteria expressed in clause 1(3) of the Competition Principles Agreement?54
4. If all answers are ‘yes’, then competitive neutrality measures should be undertaken.

The decisions about applicability of the principles were then subject to review under the complaints mechanism.

**Requirements**

The requirements as to competitive neutrality (other than as to corporatisation) as set out in the Competition Principles Agreement appear relatively simple: to impose taxes or equivalent, to charge fees for debt guarantees and to apply all regulations. Mandating that government businesses comply was relatively easily accomplished for most jurisdictions. It was simply a matter of requiring it within the terms of public service arrangements.

The legal structure of government activity is not always of departmental activity under enabling legislation. There are a number of statutory forms of organisation some of which are susceptible to Ministerial or other order and others that are more autonomous. It depends whether they have separate enabling legislation and the terms of ministerial or other direction in it. It is for this reason that ordering Universities to apply competitive neutrality principles was problematic, as noted above. It also meant that the processes of corporatisation were not separable notionally from application of pricing

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53 This is taken from Victoria, Department of Treasury and Finance, *Competitive Neutrality Policy*, 2012.

54 It is notable here that the preference for competition evinced in legislation reviews under clause 5 is not required.
and subjection to regulation. Public critique of competition policy tended to confuse and conflate these processes, throwing contracting out and competitive tendering into the mix as well. The National Competition Council and governments generally valiantly tried to disentangle these aspects, with only limited success.\textsuperscript{55} These complexities are dealt with below. For now the focus is on what such orders, if empowered, might contain.

Very early in the National Competition Policy the National Competition Council had broadened the matters it considered necessary to take into account in determining what was a competitively neutral position for a government business enterprise. In its 1997 Assessment it took the brief and probably careless reference in clause 3(5)(b) to ‘full cost attribution’ of the matters to be included (taxes, debt guarantee fees and regulation) to apply generally as a competitive neutrality principle.\textsuperscript{56} There appeared to be no objection on the basis of what the Agreement said, hence the Prime Minister’s letter of 27 October 2000, adopted at the November 2000 Council of Australian Governments meeting stated that ‘the term “full cost attribution” accommodating a range of costing methodologies, including fully distributed cost, marginal cost, avoidable cost etc., as appropriate in each case’. While there expressed to be a mere redefinition of the term, by 2002 the National Competition Council had broadened the principles themselves to include targeted rates of return, costs of noncurrent assets, depreciation, and other costs such as local government charges and rates.\textsuperscript{57}

The types of advantages that government business enterprises might have include exemptions from payroll tax, land tax, stamp duty, insurance premiums, local rates and charges, cost of capital, corporate overhead costs, and government guarantee charges. On the other hand, employment remuneration and awards, accountability measures, structural rigidity and compliance costs might all be greater. Competitive neutrality principles required that these all be quantified and appropriate adjustments to agency goods and services charges be made.

\textsuperscript{55} National Competition Council, Second Tranche Assessment of Governments’ Progress in Implementing the National Competition Policy and Related Reforms, 1999, 7

\textsuperscript{56} Ibid 57; see also National Competition Council, Annual Report 1997-8, 1998, 150-151

\textsuperscript{57} National Competition Council, 2002 Assessment of Governments’ Progress in Implementing the National Competition Policy and Related Reforms, Volume 1: Assessment 2002, 2.17-8.
Community Service Obligation.

Competitive neutrality implies a distinction between ‘business’ and other governmental activity. ‘Business activities’, the policy asserts, should be priced according to the full cost attribution so that both private and public suppliers compete. However, in some situations governments do not want to charge the full price. This is allowed for under the rubric of ‘community service obligation’. The National Competition Council put it this way:

Ensuring that prices reflect a full cost attribution does not preclude government businesses from charging prices below cost, that is, subsidising the good or service, where there is a strong public interest justification. This can be done through what is known as a CSO.58

Examples include the obligation on Australia Post to deliver letters to every address in Australia59 or, as became contentious in Queensland, obligations to run bus services even when uneconomical.60

As early as 1994 the Steering Committee on National Performance Monitoring of Government Trading Enterprises had proposed a definition of community service obligations as:

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


59 *Australian Postal Act 1989*, s 27.

60 See Chapter 6, n 37.
sectors to generally undertake, or which it would only do commercially at higher prices.\textsuperscript{61}

Within a couple of years this definition was accepted by most Australian Governments, with a few minor alterations.\textsuperscript{62}

There was a strong impetus to confine the ambit of community service obligations. According to the National Competition Council, they should only:

- ‘be used to achieve a specific community outcome for a well-defined target group’; and
- be funded directly from general revenue or, at least, costed as if it were so funded and the business’s rate of return transparently adjusted accordingly.\textsuperscript{63}

Moreover, if they could be clearly defined and separately funded, competition could be introduced into their provision, asserted the National Competition Council, by making them contestable. This suggestion was slapped down by the Council of Australian Governments, which adopted the principles of:

- there being no requirement for parties to undertake a competitive process for the delivery of Community Service Obligations (CSO); and
- parties being free to determine who should receive a CSO payment or subsidy, which should be transparent, appropriately costed and directly funded by government.\textsuperscript{64}

Perhaps the National Competition Council saw that it had overreached itself as early as 1999, when in its Annual Report it moderated its language to say:

\footnotesize{
\begin{itemize}
\item \textsuperscript{61} Steering Committee on National Performance Monitoring of Government Trading Enterprises, Community Service Obligations: Some Definitional, Costing and Funding Issues, Industry Commission, 1994, xi.
\item \textsuperscript{63} National Competition Council, Annual Report 1997-8, 1998, 152.
\item \textsuperscript{64} The letter from the Prime Minister to Governments dated 27 October 2000, which the Council of Australian Governments adopted in November 2000: Council of Australian Governments (COAG) Meeting 3 November 2000 Communiqué 4-5.
\end{itemize}
}
Emerging issues are the relationship between, and reconciliation of, competitive neutrality reforms (including actions by governments to address competitive neutrality complaints) with the treatment of community service obligations (CSOs). Properly designed CSOs allow:

- governments to assure the provision of certain minimum levels of service to disadvantaged people; and
- government businesses to operate efficiently and on a competitively neutral basis.

The Council has an ongoing interest in these issues, and looks to governments to develop CSO frameworks which meet the social needs of the community as well as the community interest in competition policy reform.\textsuperscript{65}

Community service obligations thus was one of the early sites of resistance to competition policy. This resistance led to a rewriting of the relation between competition policy and other policies. By the end of the National Competition Policy, competition policy was conceived of as a social policy on a par with other social policies, not as metaregulatory of all social policies.\textsuperscript{66} A claim that the spirit of competition policy reform should imbue all aspects of government was defeated and retreat was made to the terms of the \textit{Competition Principles Agreement}. The situation was different, however, for legislation reviews, where the \textit{Agreement} provided for the supremacy of competition over other policies.

Were making community service obligations contestable to have been accepted, it would have been an example of contracting out. This is the process of taking a particular activity away from a government agency and contracting for its delivery by a body distinct from that responsible for its delivery. It is frequently known as an implementation of the provider/supplier split. The National Competition Council from its first \textit{Annual Report} claimed that contracting out was not required under the National Competition Policy.\textsuperscript{67} This was true of competitive neutrality. However, contracting

\textsuperscript{65} National Competition Council, \textit{Annual Report 1998-9}, 1999, 27.


\textsuperscript{67} National Competition Council, \textit{Annual Report 1995-6}, 1996, 15.
for the supply of services was taken into account in assessing legislation reviews for compliance with competition principles.

Complaints Mechanism

By 2005, the *Competition Principles Agreement* was assumed to require a mechanism to investigate complaints that a government business has breached competitive neutrality policies. It is not explicitly mentioned, but appears to be implied. The National Competition Council signalled a complaints mechanism as a requirement in its First Tranche Assessment, stating that Governments were to have set out what they intended to do in their Statements due by June 1996. All Governments did in fact set one (or more: New South Wales had two) in place.

The mechanisms varied. A unit within the Productivity Commission (the Australian Government Competitive Neutrality Complaints Office) investigates complaints by any individual or organisation in relation to Commonwealth Government business activities, making recommendations to the Treasurer. In New South Wales the Premier refers matters to the State Contracts Control Board in relation to tenders, bids and all other complaints to the Independent Pricing and Regulatory Tribunal, although the usual process is to refer it the relevant authority first. Complaints in Victoria are made to the Victorian Competition and Efficiency Commission. South Australia appoints competition commissioners to deal with assigned complaints. The other States and Territories have variants.68

Each Government reported to the National Competition Council on complaints every year. The only real issue arose over bus lines on the Gold Coast in 1997, which cost Queensland some part of its second tranche payment.69

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68 See National Competition Council, *Assessment of governments’ progress in implementing the National Competition Policy and related reform*, 2005, 2.4-2.7

69 See Chapter 6, n 37.
Corporatisation

Corporatisation is a technique deployed extensively in competition policy. It is also repeatedly criticised and even railed against. However, except in so far as it is mentioned in Clause 3, it was not a separate element of the National Competition Policy. It was considered merely as a tool to be deployed in competitive neutrality, structural reform and legislation reviews. As such, corporatisation rests on some misconceptions as to the nature of companies, let alone corporations, and that the process demands that the concept of the company be reconstructed to fit competition policy especially in terms of shareholder primacy and the nature of the corporate constitution.70 This suggests that corporatisation represents a gross simplification of the idea of governance; it harks back to the argument made in Chapter 2 that the critical assumption is the idea of ‘business’ and illustrates that this idea has been imposed without rational consideration.

Parties agreed under clause 3 of the Competition Principles Agreement that they would ‘where appropriate adopt a corporatisation model for these [the defined] Government business enterprises’. Competitive neutrality is thus explicitly constructed as the principal mechanism for governing the difference between government functions and business functions. Matters in the public interest are government-controlled but those deemed ‘businesses’ are to be competition controlled, either by launching them into the private sphere as corporations or by mimicking corporations. To the extent that a company incorporated under a companies statute (for Australia, the Corporations Act 2001 (Cth.)) is separate, decisions must be made in that corporation’s best interest, rather than that of the Government, consumers, the public or anyone else.71 To the


71 Corporations Act 2001 (Cth.) ss 181. The seminal case is Re Smith & Fawcett [1942] Ch 402 In that case the duty was expressed to be merely to act in what the directors consider are the best interests of the company, but the subjective element is almost universally disregarded. There is a huge jurisprudence on exactly what ‘the company’ means in this context. A sampling of the issues includes: is ‘the company’ synonymous with ‘the members’(Darvall v North Sydney Brick and Tile Co Ltd (1987) 16 NSWLR 212, Ngurli Ltd v McCann (1953) 90 CLR 425) and always so (as to creditors, Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722; Spies v R (2000) 201 CLR 603; as to other members of a group of companies, Charterbridge Corp Ltd v Lloyds Bank Ltd [1970] Ch 62; Walker v Wimborne (1976) 137 CLR 1); what
extent that the corporation is incorporated under its own enabling statute, decisions are to be made in accordance with that statute and also under the regulations applicable to appointees to the positions provided for in that legislation – both of these normally provide for duties.\textsuperscript{72}

The process of corporatisation is essentially twofold. The first part is legal. A legal entity is formed either by registration under a general registration act, such as the \textit{Corporations Act 2001} (Cth) or by individual act of Parliament. Second, the government business is transferred to it by the relevant government. A half-way measure is to set up the governance structure for the business as if it were an independent entity. Within this there are many variations. If a company is formed, it need not be for profit; it can be a charitable company or even a company limited by guarantee – a point which seems to have escaped much of the corporatisation literature. Statutory corporations are similarly variable, although more visibly in that instance.

Both the \textit{Hilmer Report}\textsuperscript{73} and the \textit{Competition Principles Agreement} make it clear that National Competition Policy was not to be a matter of who owns the corporation or government business enterprise. The \textit{Agreement} puts it this way:

\begin{quote}
This Agreement is neutral with respect to the nature and form of ownership of business enterprises. It is not intended to promote public or private ownership.\textsuperscript{74}
\end{quote}

All National Competition Council \textit{Reports} and \textit{Assessments} rigorously exclude any favouring of privatisation of government ownership, although the \textit{Hilmer Report’s}
mention that sometimes government ownership provides a temptation for governments to favour the businesses they own is repeated. Less frequently mentioned is the Hilmer Report’s assertion that private ownership of monopoly elements in disaggregated industries can lead to a loss of control in situations where incentive structures are inadequate. Overall, one gets the feeling, and it is just that, that the assessments smiled on privatisations.

As important as the legal structure of the corporatised government business is the subsequent process of fitting the decision-making structure into the legal form. The Competition Principles Agreement specifically mentioned ‘the model developed by the intergovernmental committee responsible for GTE National Performance Monitoring’ as a ‘possible approach to corporatisation’. That particular model is somewhat elusive, although the summary provided by the National Competition Council in its First Tranche Assessment seems to be abstracted from a set of background papers developed for the 1991 Special Premiers Conference. In any event, there was no objection to the summary, although the Communiqué of the Special Premiers’ Conference does not specifically adopt any model. There appears to have been a Steering Committee on National Performance Monitoring of Government Trading Enterprises, possibly organised through the Council of Australian Governments, but it was abolished in 1997.

The summary of the model referred to in the Competition Principles Agreement as set out by the National Competition Council in its first tranche assessment is as follows:

- a clear statement of objectives, with a clear commercial focus aimed at maximising the value of the owner government’s investment in the enterprise;

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75 National Competition Council, Assessment of Governments’ Progress in Implementing the National Competition Policy and Related Reforms, 1997, 22


- full responsibility and accountability for decisions affecting enterprise performance vested in a management board at arms’ length from the owner government;
- independent and objective performance monitoring focussing primarily on commercial performance against clearly specified performance targets;
- effective rewards and sanctions pre-defined against agreed performance targets;
- competitive neutrality in input markets such that government enterprises do not face advantages or disadvantages in the cost of inputs relative to the private sector because of their public ownership;
- competitive neutrality in output markets, including the removal of any protective barriers which reduce the degree of competition faced by government enterprises and the application of the same legislative regulations facing equivalent private sector enterprises; and
- effective regulation of government enterprises such that natural monopoly powers cannot be abused.

This is clearly a set of characteristics or outcomes rather than a process. The actual processes were thus a matter of internal bureaucratic actions. Each government had procedures as to how each step was to be carried out. However, all jurisdictions were well experienced in these mechanics even before the Hilmer Committee’s inquiries. The National Competition Policy hardly changed the process; it merely provided a mechanism for ensuring the processes adopted were good enough to meet the standards set by the National Competition Council. Thus, in its 1997 Report, *Performance of Government Trading Enterprises*, the Productivity Commission stated that the process of corporatising had been bedded down and that was the reason why the Intergovernmental Steering Committee had itself decided that it should be disbanded.78

On the disbanding of the Steering Committee, the Productivity Commission was given the task of assessing the performance of Government Trading Enterprises. The National Competition Council extensively used these reports in its own assessments. The Productivity Commission assessments were issued on a rolling four year basis almost

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78 Ibid.
every year, starting with 1991-2 to 1996-7 and ending at the end of the currency of the National Competition Policy with a Report considering performance in the two years of 2004-5 to 2005-6. In this last report the stern message, taken up by the National Competition Council was issued:

Although the return on assets improved on average, about half of the monitored GTEs earned less than the long-term bond rate in 2005-06. This implies that an even greater proportion did not earn a commercial rate of return (which would include a margin for risk). The poor financial performance of many GTEs underscores a longer-term failure to operate these businesses on a fully commercial basis in accordance with competition policy agreement undertakings.\footnote{Productivity Commission, \textit{Financial Performance of Government Trading Enterprises 2004-05 to 2005-06}, 2006, 2}

In summary then, the exhortation to corporatise in the \textit{Competition Principles Agreement} cannot be said to have done very much at all. The work on process had already been done, the National Competition Policy did not alter the procedures, and the corporatisations that took place cannot be said to have performed well.

\textbf{Application of Competitive Neutrality Principles to Local Government}

Local government was in somewhat of an equivocal position in relation to the National Competition Policy. Local government provides many services such as garbage, roads, parks and reserves, cleaning, childcare, recreation, sport and leisure, libraries, heritage protection, arts promotion and promotion of the locality generally. Accordingly competitive neutrality impacted heavily on the way in which local governments were to provide the services. On the other hand, local governments are creatures of State and Territory governments, existing only as a result of State and Territory legislation and subject to State and Territory directives to the extent that legislation allows. Moreover, local government has few resources for and little expertise in engaging in the development of policy implementation processes. Finally, the services provided by local government impact directly on people with immediacy and universality; hence reforms are at their most sensitive at this level. This equivocal position played out
through the whole currency of the National Competition Policy: in its formulation, in the Agreements, in the events and controversies, and in the assessments, even in the funding arrangements and the membership of the Council of Australian Governments itself.

The trace of the equivocal position of local government in the National Competition Policy starts early. The President of the Local Government Association had attended meetings of the Council of Australian Governments since its inception in 1992. The Communiqué setting out the outcomes from the very first Council of Australian Governments meeting in which a National Competition Policy (1994) was discussed states:

The Council agreed that the Australian Local Government Association would participate in the further consultations on competition policy that are now to occur and in the preparation of the advice to the Council flowing from these consultations.80

However, by the time of the signing of the Agreements this had been moderated to:

… under the Competition Principles Agreement, Governments agreed to publish policy statements on competitive neutrality and the application of the Competition Principles Agreement to local government (in consultation with local government) by June 1996.81

By the time of the signing of the Agreements themselves, matters had settled down. Local government did not become a Party to the Agreements. Clause 7 (1) the Competition Principles Agreement articulated the equivocal position of local government well:

7(1) The principles set out in this Agreement will apply to local government, even though local governments are not Parties to

80 Council of Australian Governments (COAG) Meeting 19 August 1994, Communiqué.

81 Council of Australian Governments (COAG) Meeting 11 April 1995, Communiqué.
this Agreement. Each State and Territory Party is responsible for applying those principles to local government.

Subclause (2) extended the applicability of the competition principles to include legislation reviews and structural reform in relation to local government, although it was a little far-fetched and somewhat illusory given the lack of legislative power and utility ownership. It also confirmed the consultation requirement while preserving the sovereignty of the States and Territories by placing responsibility squarely with the States and Territories. Nevertheless, any accountability was diminished by adoption of the technique of States and Territories setting their own agendas by statement to which they would be held:

(2) Subject to subclause (3) [as to later accession by States or Territories], where clause 3, 4 and 5 permit each Party to determine its own agenda for the implementation of the principles set out in those clauses, each State and Territory will publics a statement by June 1996:

(a) which is prepared in consultation with local government; and

(b) which specifies the application of the principles to particular local government activities and functions.

Governments satisfied the requirement to lodge statements with the National Competition Council and by the time of the first tranche assessment the National Competition Council was satisfied ‘that all governments have made some progress towards implementing reform proposals in cooperation with local government, particularly in informing local government about processes for the application of NCP [National Competition Policy] reforms’. However having set the standard for the first tranche to be:

Governments should have published a policy statement outlining their proposals for applying the competition principles to local government.

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The competition principles with most relevance for local government are the application of competitive neutrality principles and the review of restrictive local government legislation. In assessing first tranche reform performance, the Council has focused on the adequacy of the local government reform agendas proposed by State and Territory governments in these two areas, and evidence of progress against these agendas.\(^{83}\)

The National Competition Council felt it did not have enough evidence to be satisfied that it had been met. It issued an implicit threat that it needed more evidence of substantive progress. Clearly the question was of progress. All governments were subjected to supplementary assessment. However, the National Competition Council expressed much greater satisfaction in its Second Tranche Assessment, saying:

> From that difficult start, local government reform has gathered acceptance and support, helped by positive measures to assist local government reform by State governments. Increasingly, local governments are adopting NCP and complementary reform measures to provide better value services to ratepayers and the community. The shift in the attitudes to, and performance of, local government competitive neutrality reform is exemplified by the fact that no jurisdiction is the subject of a qualified second tranche assessment in this area.\(^{84}\)

The sort of thing the National Competition Council identified was an initial survey by State and Territory governments of what business activities were being carried out, and to categorise them according to size, and to apply taxation equivalents and debt guarantee fees, and charge commercial rates of return, including full cost attribution. At about this time, the National Competition Council started noting the extent to which governments were passing competition payments through to local governments.\(^{85}\) As

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\(^{83}\) Ibid 6.


\(^{85}\) For example, in relation to Queensland, ibid 61.
the National Competition Policy wore on, the National Competition Council was generally satisfied with the application of competitive neutrality principles (and structural reform) to local government businesses although the relatively minor benefits relative to implementation costs was noted (and hence the importance of the categorisation by size).86

Debate over the pass-through of competition payments is not apparent in the National Competition Council Assessments. It is apparent, however, in the Productivity Commission Final Assessment, especially in the submissions to the Productivity Commission from local governments.87 The problem was that it cost money to implement the changes (although this was never factored into an assessment of the overall worth of the National Competition Policy) yet local government was not provided with the benefits. This was the reason for competition payment in the first place: that the States and Territories were not receiving the benefits while wearing the costs. On the other hand, as the States and Territories put it:

… competition payments under NCP [National Competition Policy] were not intended to compensate jurisdictions for the costs of implementing reform. Rather, their role was to provide State and Territory governments with a share of the higher tax revenues generated by the NCP reforms that would not otherwise have accrued to them because of vertical fiscal imbalance.88

The difference is not obvious. In any event, Queensland, Victoria and Western Australia shared some of their competition payments with local government. The Productivity Commission refused to draw any general conclusions, except to suggest sharing where ‘local governments [to] incur disproportionate costs relative to the benefits of reform.89

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87 Ibid 153-4.

88 Ibid 154.

89 Ibid.
Competitive Neutrality in Summary

Despite the rhetoric of the National Competition Council and the Productivity Commission, competitive neutrality was one of the less successful elements of the National Competition Policy in the form of the Agreements. The Productivity Commission had to resort to fudging the figures to maintain the appearance of success. That this was so should not be surprising as many of the key strands in competitive neutrality do not withstand rigorous scrutiny. They prove theoretically suspect.

The distinction between government business and simple government was not articulated with clarity. This issue plagues many of the elements of competition policy. More practically, working out when an activity was important enough to be a candidate for application of the principles was unclear, particularly as States and Territories were reluctant to put themselves to the bother and political opprobrium of doing so.

Community service obligations as the interpretation of the ‘public interest’ – other of competition requirements – inevitably produced difficulties. To assert that they should be contracted out was a clear case of the National Competition Council overreach. Indeed the reaction of governments to the subjection of public interest to competition policy was sufficient to relegate competition policy from its putative position as a metaregulatory ideal.

On the other hand, despite the gross simplification of the idea of institutional governance represented by the preference for the corporate form, corporatisation was relatively uncritically adopted. The Hilmer Report and the Agreements both carefully distinguish between the corporate form and ownership. This could well be because corporatisation was already a well-accepted and established process and hence the process of competitive neutrality could concentrate on the problematics of technical calculation of the pricing principles reflecting full cost of production, taxation or taxation equivalent, fees for government guarantees, and equal subjections to regulation such as that as to the environment, and planning and approval processes.

The final strand of competitive neutrality which produced less than satisfactory results was its impact on local government. The problem here was its subordinate position and the tendency of State and Territory governments to take the competition payments for
themselves while expecting local government to wear the burden of implementation. There was not much the National Competition Council could do about it – it was a matter of federalism that was untouched by the Agreements. The National Competition Policy can be considered to have failed to reform federalism to that extent.

**Legislation Reviews**

Under the National Competition Policy, the States, Territories and the Commonwealth implemented a process of review of the larger portion of their current statutes. This process checked legislation for compliance with competition principles. All legislative restrictions on competition were to be removed unless justified – meaning that the benefits of a restriction outweigh the costs to the community. Of 1,800 pieces of legislation identified by the Governments in 1996 as containing restrictions on competition and which they committed to review, by the end of 2005 around 85% had been reviewed and, where appropriate, reformed.90

Legislative reviews are supposed to continue to this day. At the meeting of the Council of Australian Governments on 10 February 2006 and as a result of the assessment of the National Competition Policy, all governments recommitted themselves to legislation review principles, to completing their outstanding priority legislation reviews under the National Competition Policy and to prevent the introduction of unwarranted competition restrictions in new and amended legislation and regulations.91

The legislation review process was an invention of the Hilmer Committee, as described in Chapter 3. While many instances of legislation review proved to be enormously controversial92 and even if, as recounted in Chapter 1, the process, with the rest of the National Competition Policy, has been little examined other than from within the National Competition Policy process itself, personalities in Australian competition

90 National Competition Council, *Annual Report 2006-2007*, 2007, 22. Interestingly, in 1996 around 800 pieces of legislation were slated for priority review; of these only 78% have been reviewed and, if appropriate, reformed.

91 COAG Meeting 10 February 2006, *Communique*.

92 See for example, the reform of the Office of the Victorian Auditor-General, which occasioned protests in the streets of Melbourne. This is considered below.
circles – particularly ex-heads (chairmen) of the Australian Competition and Consumer Commission – are particularly proud of legislative reviews. Legislation reviews, regardless of the extensive critical scholarship on legal transplantation, are held up as a model to the world of good economic management.

The ‘guiding principle’ of legislation reviews was that

- legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
  - (a) the benefits of the restriction to the community as a whole outweigh the costs; and
  - (b) the objectives of the legislation can only be achieved by restricting competition.

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93 I have not been able to dig up references for this, but I have personally heard Alan Fels and Graeme Samuels, both ex-chairmen of the Australian Competition and Consumer Commission, eulogise the legislative review process as a model for the world. See also the interview evidence in Bronwen Morgan, Social Citizenship in the Shadow of Competition (Ashgate, 2003), 11.


96 National Competition Council, Annual Report 2006-2007, 2007, 22. Interestingly, in 1996 around 800 pieces of legislation were slated for priority review; of these only 78% have been reviewed and, if appropriate, reformed.

96 Competition Principles Agreement, cl 5(1).
In other words, competition was always to be preferred: if a market can do it, then the state should not. This represents a boundary for state action, one at the functional level rather than at the structural level as in competitive neutrality. It was new, adopted from the recommendations of the Hilmer Committee, and, as stated in Chapter 4, founded in an economic understanding of ‘competition’ and its societal benefits, and a theoretically contingent and unreflective approach to government.

The process required under the National Competition Policy, specifically clause 5 of the *Competition Principles Agreement*, was similar to the one adopted for competitive neutrality: the Governments were required to provide, by June 1996, a timetable for reviews, and reform (if appropriate) of all the legislation within their jurisdiction restricting competition. They had freedom to determine their own agenda within that list. Any proposal for legislation to be made after the commencement of the *Agreements* was to be accompanied with evidence that the legislation would be consistent with competition principles as set out in the ‘guiding principles’.

The process of a review was set out in clause 5(9) of the *Competition Principles Agreement*:

Without limiting the terms of reference of a review, a review should:
(a) clarify the objectives of the legislation;
(b) identify the nature of the restriction on competition;
(c) analyse the likely effect of the restriction on competition and on the economy generally;
(d) assess and balance the costs and benefits of the restriction; and
(e) consider alternative means for achieving the same result including non-legislative approaches.

The factors to be taken into account in assessing the public interest were stated to be:

(d) government legislation and policies relating to ecologically sustainable development;
(e) social welfare and equity considerations, including community service obligations;
(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
(g) economic and regional development, including employment and investment growth;
(h) the interests of consumers generally or of a class of consumers;
(i) the competitiveness of Australian businesses; and
(j) the efficient allocation of resources.97

In 1998, about half way through the program and probably as a result of political pressure,98 the National Competition Council asked the Centre for International Economics, a private economic research agency, ‘to set out as clearly as possible a framework covering the National Competition Policy legislation review and reform process, including implementation of recommendations’.99 This resulting framework sets out the procedures Governments might undertake in undertaking reviews; procedures recommended by the Organisation for Economic Co-operation and Development and the World Trade Organisation are extraordinarily similar to it.100 Moreover, there are a number of other, mainly government publications dealing with the processes of legislative review.101

While the Hilmer Committee had emphasised that the issue in reviews was what a reviewing body did, rather than the legal or institutional form, it did seem to envisage

97 Ibid cl 1(3)
98 Morgan, above n 93, chs 3 and 4 provide detailed description. See also Robyn Hollander, ‘National Competition Policy, Regulatory reform and Australian Federalism’, (2006) 65 Australian Journal of Public Administration 33, 33-6. Western Australia was particularly restive. The politics of Pauline Hanson were also whipping up a degree of resistance in relation to the social impact of the National Competition Policy in rural areas: see Chapter 8.
100 See n 95 above.
that the reviews would be more national in character co-ordinated strongly through the National Competition Council. This fell before State chauvinism, and given the assessment process it was probably unnecessary. Each state set up a variety of processes and bodies, although essential to most was the independence of the reviewing body. Space does not permit a thorough analysis, but they varied from ad hoc committees to specialist bodies to undertake such reviews as have to be made.

Morgan provides detailed analyses of the impact of the legislative review process in four sectors: the Commonwealth Department of Immigration, utility reform, a statutory marketing board and the Victorian Auditor General.

Remembering that somewhat more than 1,500 pieces of legislation have been reviewed, a comprehensive review of every legislative review is somewhat far-fetched. Nevertheless, a study of the practicalities is instructive. The following example is chosen precisely because it is the ‘edge experience’, as de Certeau would put it: that by reason of its outrageousness it reveals the nature of the normal.

The example is the review of the *Audit Act 1994* (Vic.). Conveniently, but not altogether by chance, most of the relevant material is gathered together in a book, *In the Public Interest*. The book was prompted by the review and the extraordinary public

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102 Clause 5(8) of the *Competition Principles Agreement* preserved the right of a government to request the National Competition Council to undertake a review of legislation if the government thought it should be a national review. As to the politics in which State chauvinism was embedded, see also Martin Painter, *Collaborative Federalism* (Cambridge University Press, 1998).


104 The best way to survey the variety of processes is to peruse the National Competition Commission’s Competition Policy website: <ncp.ncc.gov.au>.

105 See, for example, the Victorian Competition and Efficiency Commission, set up by order in Council under the *State Owned Enterprises Act 1992* (Vic.); see <http://www.vcec.vic.gov.au> or the Queensland Competition Authority, set up by the *Queensland Competition Authority Act 1997* (Qld.)

106 Morgan, above n.94, ch 5.


108 Peter Yule, *In the Public Interest*, (Victorian Auditor-General’s Office, 2002). See also Morgan, above n 94,190-200; Victorian Auditor-General’s Office *Response to the Review Team Report by the Auditor-General of Victoria*.
outcry that followed. It was written at the behest of the members of the Auditor-
General’s Office and in many ways is a defence against the review, even though the
review had proved abortive. The story is linked into the political history of Victoria –
which raises, of course, a major critical in itself: can it be stripped out of its context?

The Auditor-General of Victoria is an office which since 1857 had carried out the task
of public sector auditing, like many such offices in governments around the world.
Since 1981 it had been carried out as ‘risk-based auditing’ and included analysis of the
efficiency and effectiveness of the delivery of government services. The Auditor-
General was an appointment for seven years by the Governor in Council, without clear
responsibility but reporting to the Department commissioning an audit, the Department
of Premier and Cabinet and for special audits to both Houses of Parliament. It was
funded by the Department of Premier and Cabinet.

A new Liberal/National party coalition came to power in 1992, although for present
purposes whether it or its predecessors or successors were left, right or brindled does
not matter in the slightest. That Government had been helped in its accession to power
by some devastating reports on the previous Labor party government by the then
Auditor-General. Initially relations were good, but after a series of critical audit reports
relations deteriorated. Although the Audit Act (Vic) had been slated as low priority by
Victoria in its 1996 National Competition Policy Statement and its equivalent had not
been even contemplated for review by other Governments, in November 1996 the
Victorian Premier, as responsible Minister for the Audit Act 1994 (Vic), issued the terms
of reference for a review of the Audit Act under the National Competition Policy. An
independent Committee was appointed in December 1997 and it reported on 18 April
1997. It recommended that the Auditor-General or their office no longer carry out
audits, that all be contracted out by the Auditor-general who would organise the tenders.
A separate government business enterprise to actually do the audits was recommended,
but they would have to compete with the private sector.109

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The essential change recommended was to move to contracting out rather than in-house audits. The idea was that competition for audit work would improve the quality of audit work, and that the purchaser/provider split would sharpen the definition of what was required for audits. These are relatively conventional economic recommendations. The Committee admitted that the cost of audit services would probably rise, although it said that it was its judgment that ‘benefits to Victoria will exceed any rise in costs and that the reforms proposed are in the public interest’.

Although the Committee had made strenuous efforts to enhance responsibility and accountability and independence, the main critique was that independence had not been preserved and that competition would not work.

Public outcry followed the Review. There were demonstrations and public meetings. Public debate was vigorous. Both the Chairman of the Review Committee and the then Auditor General issued pamphlets attacking each other. Nevertheless the Audit (Amendment) Act passed through Parliament and became effective on 1 July 1998. However, the Labor party had seen that political capital was to be made. In the 1999 elections it campaigned heavily on the issue and won. Most of the changes were reversed in December 2000.

As the case of the Victorian Auditor-general exemplifies, over the period of the National Competition Policy legislation reviews were the most controversial element. Throughout the National Competition Council tranche payment assessments there is a continuing complaint about the standard of reviews undertaken by the States, Territories and Commonwealth and the lack of implementation of those that were carried out. As recounted in the previous chapter in relation to the National Competition Policy in 2000, the Governments agreed in Council of Australian Governments to a series of measures formulated by ‘senor officers’ to try and address some of these issues. This was cotemporaneous with high levels of somewhat unfocussed agitation in the community about the effects of the National Competition Policy and the suspected politicisation of reviews revealed by the case study above. In any event, the upshot of the new measures was taken by the National Competition Council to imply:

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110 Ibid 53.
... the need for a rigorous analytical approach whereby reviews consider all relevant evidence and logically draw conclusions and recommendations from that evidence. Policy actions in line with review findings and recommendations based on flawed analysis or incomplete evidence may not satisfy the CPA guiding principle.\textsuperscript{111}

The deadline for completion of the reviews had been set at year 2000 in the original \textit{Competition Principles Agreement}, although this was extended in the Council of Australian Governments meeting that year to 30 June 2002. The National Competition Council itself gave one year extensions in 2002. Its 2003 \textit{Assessment} recommended payment reductions and suspensions for failure to complete reviews and reforms. However, Governments did carry out many reforms to the National Competition Council’s satisfaction. It issued the following table:\textsuperscript{112}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|c|c|}
\hline
\hline
\textbf{Australian Government} & 60 & 64 & 77 & 89 & 70 & 78 \\
\textbf{New South Wales} & 83 & 88 & 84 & 94 & 83 & 91 \\
\textbf{Victoria} & 84 & 84 & 86 & 91 & 85 & 88 \\
\textbf{Queensland} & 83 & 85 & 92 & 92 & 86 & 87 \\
\textbf{Western Australia} & 46 & 55 & 73 & 77 & 62 & 68 \\
\textbf{South Australia} & 60 & 69 & 90 & 94 & 77 & 83 \\
\textbf{Tasmania} & 82 & 84 & 95 & 96 & 89 & 91 \\
\textbf{ACT} & 81 & 82 & 98 & 98 & 93 & 93 \\
\textbf{Northern Territory} & 79 & 82 & 90 & 90 & 83 & 85 \\
\hline
\textbf{Total} & 74 & 78 & 87 & 91 & 81 & 85 \\
\hline
\end{tabular}
\caption{Overall outcomes with the review and reform of legislation\textsuperscript{a}}
\end{table}

\textsuperscript{a} Includes the stock of legislation identified by jurisdictions in their original legislation review schedules, jurisdictions’ periodic additions, and legislation containing restrictions on competition identified by the Council. Excludes water related legislation, apart from three pieces of such legislation that include matters relevant to non-water legislation areas. Excludes legislation specific to electricity, gas and road transport (except where, for example, it relates to professions such as electricians and gasfitters), which are treated separately in chapters 6, 7 and 8 respectively.

\textsuperscript{111} National Competition Council, \textit{Assessment of governments’ progress in implementing the National Competition Policy and related reform’}, 2005, 9.2.

\textsuperscript{112} Ibid xviii.
The clear recalcitrant was Western Australia with South Australia and the Commonwealth not far ahead. Accordingly, deductions were made for the former two. The Commonwealth Government, not being a recipient of competition payments and thus under no real compulsion, was merely told that it was ‘still to appropriately address some significant legislative restrictions’. New South Wales was given a chance to redeem itself from a deduction with regard to rice marketing. The Northern Territory and Queensland were non-compliant with respect to liquor sales.

**Structural Reform**

The concept of structural reform overlaps competitive neutrality and legislation reviews. In the National Competition Policy, competitive neutrality was aimed at ensuring that government businesses were not in a favourable position relative to private sector counterparts; legislation reviews were aimed at ensuring that competition was deployed as much as possible as a tool for getting things done as cheaply and efficiently as possible, and structural reform was about changing the structure of markets where goods or services were supplied by a public monopoly. Putting it another way, under structural reform as much competition as possible was to be introduced – a legislation

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113 Ibid xxxvii

114 The Hilmer Committee analysed the introduction of competition into two parts: the separation of natural monopoly and potentially competitive activities (vertical separation), and the horizontal separation of potentially competitive activities: Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, *National Competition Policy* 1993, 217-220.

115 As noted earlier, the National Competition Policy was directed at public monopolies. The Hilmer Committee explicitly rejected a general divestiture power for public monopolies (Ibid 233-4) let alone a power to disaggregate private monopolies such as under called the *Enterprise Act 2002*. In Chapter 1 of Part 4 it provides for ‘market investigations’. The Fair Trading Commission can make a reference to the Competition Commission if it thinks there are monopoly problems in a market. The Minister can intervene if he or she thinks there are public interest concerns. If there are such problems or concerns, the Competition Commission can make a variety of remedial orders, including disaggregation of the business. Appeal is limited. This echoes the powers available to the US Supreme Court under the Sherman Act – deployed notoriously to disaggregate AT&T (‘Ma Bell’) into the Regional Bell Operating Companies (the ‘Baby Bells’), although the break-up was infact a consent decree resulting from the antitrust case *United States v AT&T* 552 F.Supp. 131 (DDC 1982).
review – and industry regulation was to be isolated from the exercise of the monopoly power, which was explicitly conceived of as a matter of competitive neutrality. 116

While structural reform was a separate and explicit part of the National Competition Policy by virtue of being required by clause 4 of the Competition Principle Agreement, the Implementation Agreement made Competition Payments conditional not only on the States and Territories giving effect to the ‘Competition Policy Intergovernmental Agreements’ but also effective implementation of intergovernmental agreements as to electricity, gas, water and road transport. 117 This is the fuzzy edge of the definition of National Competition Policy as adopted in this thesis: electricity, gas, water and road transport are notionally only half in the National Competition Policy. However, the assessments at the end of the National Competition Policy tell a different story.

The Productivity Commission’s 2005 Assessment distinguishes between general and sector-specific reforms, both being aspects of the National Competition Policy. Yet the chief illustrations of benefit are electricity charges, rail freight rates, port charges, telecommunications charges and milk prices. Its quantitative modelling, from which the much-vaunted figure of a 2.5% increase in Australia’s Gross Domestic Product due to the National Competition Policy was derived, was based on just six industries: electricity, gas, urban water, urban transport, ports and rail freight and telecommunications. 118 All but urban transport and ports were the subject of the additional intergovernmental agreements. It could thus be argued that the ancillary matters came to dominate perceptions of what the National Competition Policy was

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116 Competition Principles Agreement, clause 4 (2): ‘Before a Party introduces competition to a sector traditionally supplied by a public monopoly, it will remove from the public monopoly any responsibilities for industry regulation. The Party will re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its (existing and potential) rivals.’

117 Road transport: the 1992 between Australian Transport Ministers to improve efficiency and safety, and reduce the costs of regulation; Electricity: the 1993 agreement between the Australian, New South Wales, Victorian, Queensland, South Australian and ACT Governments to form a competitive interstate electricity market; Gas: the 1994 Council of Australian Governments agreement to provide for free and fair trade in gas between and within the States and Territories; and water: the 1994 Council of Australian Governments agreement to implement a framework for the efficient and sustainable reform of the Australian water industry.

about. Ironically, as described earlier, it was these very sectors where reform methodologies and proposals were already most developed in 1995. The National Competition Policy thus in this respect merely facilitated the reform and mitigated the impediments arising from Australia’s federal structure, both in terms of jurisdictional sovereignty and the federal-state vertical fiscal imbalance.

To the extent that structural reform pre-existed the National Competition Policy, it of constitutional necessity respected the jurisdiction of the States and, to a lesser extent, the Territories. In the *Competition Principles Agreement* the sovereignty of the Parties is strongly reasserted in the opening subclause, 4(1): ‘Each party is free to determine its own agenda for the reform of public monopolies’, although this was subject to the *Implementation Agreement* which set out a timetable as to electricity and gas industry reform, and in the Attachment to the Agreement referred to progress in water and road transport. Despite this, progress in structural reform was closely monitored by the National Competition Council and this was factored into Competition Payments. It is difficult to assess the extent to which States and Territories objected to this, although it is noticeable how structural reform in assessments is conflated with competitive neutrality, especially in respect of corporatisation, and with legislation reviews. Both of these had, as has been described, the requirement of a statement and this was something to which the Parties would be held. Parties were not required to lodge a statement with respect to structural reform.

The process of structural reform as set out in the *Competition Principles Agreement* was simply that Parties were to conduct a review when it proposed to introduce competition into a market traditionally supplied by a public monopoly or privatise a public monopoly. That review was to inquire into:

- its appropriate commercial objectives,
- the merits of separating any natural monopoly elements from potentially competitive elements,
- the merits of separating potentially competitive elements from each other,
- the most effective means of separating regulatory functions from its commercial functions,
- the most effective means of implementing competitive neutrality principles,
• the merits of any community service obligations and the best means of delivering any mandated ones,
• the price and service regulations to be applied to the industry, and
• the appropriate financial relationships between the owners of the public monopoly and the public monopoly itself, including the rate of return targets, dividends to be paid, and capital structure.

As mentioned above, no more than a review was required by the Competition Principles Agreement. However, there were other intergovernmental agreements in respect of each of the electricity, gas, water and road transport industries. The extent to which these were carried out was measured by the National Competition Council in assessing progress of Governments for the purpose of Competition Payments.

Thus structural reform was seen to be about corporatisation as a matter of coherent objectives and financial structure, competitive neutrality while maintaining community service, introducing or maintaining competition where structural reform made it feasible, and maintaining price and service regulation while separating them from commerce interests. It was a complex task to change from the state of the industry before structural reform to one which reflected these ideas and thus resulted in huge amounts of activity. It also has taken a great deal of regulation, in both legislation and regulations to maintain these goals.\footnote{This is a point made repeatedly in Christopher Arup and David Wishart (eds) \textit{Competition Policy with Legal Form: Reviewing Australian and Overseas Experience} (Federation, 2002). Indeed, it is the pun in the title.} The electricity industry provides a useful example. It is a story that has often been told,\footnote{A particularly useful, if early, analysis is the Australian Parliamentary Library Research paper: Mike Roarty, \textit{Electricity Industry Restructuring: The State of Play}, Research Paper No 14, Parliamentary Research Service, Department of Parliamentary Library, Parliament of the Commonwealth of Australia, Canberra, 1998.} although seldom from the point of view of governmental actions.

The structure of the electricity industry is usually taken to have always already been, before structural reform, one of a monopoly, state-owned utility providing electricity to all customers in each State or Territory. This is far from the case, as there were a number of private generators selling electricity into the grid and municipal authorities
buying or generating electricity to sell into a municipality. However, as a generalisation by the 1980s the vast proportion of electricity was generated and supplied in Australia by monopoly state-owned utilities structured under specific legislation as government instrumentalities. The structure of these instrumentalities was simple: enabling legislation and regulation.

After reports and the usual paraphernalia of policy development, structural reform of the electricity industry took the form of

- the formation of a number of companies;
- the sale of generation, transmission, wholesaling and retailing businesses to the companies;
- the onsale of those companies into the capital markets;
- the removal of anticompetitive regulation so as to permit choice of supplier;
- the review of regulation and legislation to remove discriminatory barriers to trade and to allow for new entrants into the generation industry;
- the establishment of or conferral of power on regulators of
  - supply,
  - safety,
  - emergency management,
  - fair trading,
  - pro-competitive regulation,
  - sustainability and energy efficiency, and
  - essential service maintenance;

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121 For example, there were a multitude of separate companies selling electricity with varying voltage, phase or current, and tariffs in Melbourne until after the advent of the State Electricity Commission of Victoria in 1921. There were eleven municipal authorities reselling electricity until as late as the 1990s. See Cecil Edwards, Brown Power: A Jubilee History of the State Electricity Commission of Victoria (State Electricity Commission, 1969). The advent of public ownership of a variety of common services in Victoria was controversial, being seen as a form of socialism; see F. W. Eggleston, State Socialism in Victoria (King, 1932).
• the establishment\textsuperscript{122} of a national electricity wholesale market for Queensland, New South Wales, Victoria, Tasmania, and South Australia, which involved setting up
  o the operator, together with all the necessary assets and personnel,
  o a transition institution,
  o a regulator, and
  o a rule-maker.

The result is an industry comprising many privately owned competing generators, although in Western Australia and the Northern Territory there are corporatised entities owned by the Government and many remote locations have separate vertically integrated systems. The regime of generation in most places is open access, on condition of meeting technical supply conditions. There is a national wholesale electricity market, operated by a company (National Electricity Market Management Company Limited) and an administrating company (National Electricity Code Administrator Limited). On this market the generators sell electricity into a pool. Wholesalers purchase electricity from the pool or on an associated ‘spot market’. Wholesalers may then onsell electricity to retailers or retail it themselves. All electricity is transmitted over networks owned by monopolies which are themselves regulated as to the prices they charge.

Whether this vast amount of activity resulted in decreased prices, better services or both is moot. It is this that the Productivity Commission measured and claimed did represent a change for the better, although most of the benefit was garnered by business. (It is worth noting parenthetically that economic efficiency pays no regard as to whether consumers or producers receive the benefits, all that matters is that the surplus is maximised in sum.) Certainly governments received large sums of money from the sale of generators, transmitters and retailers. This was at the expense of future payments from those businesses and, while accordingly cannot be claimed to be a benefit, did substantially reduce government debt. On the other hand, in 2005 the Productivity Commission itself noted multiple regulators, a lack of investment in transmission between established grids, insufficient competition between generators, and inflexible

\textsuperscript{122} This was through cooperative legislation adopted in the various States and Territories: National Electricity (South Australia) Act 1996 (SA).
retail contracts. Moreover assessments tend to ignore the role of transmission. This remained in the form of a monopoly. Transmission represents more than 50% of the cost to customers of electricity and thus reform under the National Competition Policy seems to have been less than comprehensive of the industry.

In contrast to the relatively smooth transition of the electricity industry to contestability, the path to competition in the telecommunications industry has been rocky, contested and inconclusive. This is, no doubt largely due to the rapid technological change that occurred during the currency of the National Competition Policy. After all, mobile phones were in their infancy in 1995 yet by 2005 were ubiquitous. Another eight years on, at the time of writing, they are connected as a matter of course to the Internet. Yet much of the problematic nature of the discussion of competition policy’s effectiveness can be seen through the lens of Telstra’s trajectory during this time. In particular, telecommunications (strictly, ‘postal, telegraphic, telephonic, and other like services’) under the s 51 (v) of the Australian Constitution is the province of the Commonwealth and hence the National Competition Council had no power to influence implementation through the competition payments system.

Prior to 1991, Telstra had been a fully vertically integrated monopoly provider of telephone services, introducing mobile services in 1981. Between 1989 and 1993, the structure of Telecom changed from a statutory authority to a public limited company, although then owned by the Commonwealth Government. It changed its business name to Telstra in 1997. Notwithstanding the determinedly non-committal approach of the National Competition Policy to ownership of businesses, the Government sold tranches of ownership of Telstra in 1997 (33%), 1999 (16.6%) and 2006 (31%), with the remaining 17% transferred to the Future Fund in 2007.

Industry restructuring occurred in 1997 with the passing of the Telecommunications Act 1997 (Cth.). No formal review pursuant to clause 4 of the Implementation Agreement

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123 Indeed prior to 1975 and since 1901, both postal and telecommunications services were provided by the Postmaster-General’s Department. In 1946 telecommunications with the rest of the world was hived off to the Overseas Telecommunications Commission, to be reunited with Telecom in 1991. In 1975 two statutory authorities were set up, the Australian Postal Commission for postal services and the Australian Communications Commission for telephone services, the latter trading as Telecom Australia.
was undertaken, although the Commonwealth maintained that a series of reviews sufficiently answered the requirement. The *Telecommunications Act 1997* (Cth.) provided for competition between providers, regulation of that competition under Part XIB of the *Trade Practices Act 1974* (Cth.), and access to the local fixed network by providers under Part XIC of the same Act. Both of these were (and are) administered by the Australian Competition and Consumer Commission. Technical regulation was placed in the hands of the Australian Communications Authority. The fixed network remained in Telstra’s hands.

Some of the National Competition Council’s strongest criticism was reserved for the Commonwealth’s approach to the structural separation of Telstra. In 1999 it reported that the partial privatisation of Telstra should not have taken place before at least examination of whether the monopoly should be structurally separated into network and retail arms. The Government’s response was that regulation through the *Trade Practices Act 1974* served the competition just as well. After privatisation structural separation would have been difficult due to shares having been sold in the unified business. However, even to simply allow access was difficult as the question of price dogged regulation. In 1999 the National Competition Council commissioned an independent report from Tasman Asia Pacific to consider just the record-keeping necessary for the Australian Competition and Consumer Commission to do its job as regulator.

That the Government was sensitive on the issue of structural separation is demonstrated by the fact that it withheld consideration of structural separation from its terms of reference for the Productivity Commission review into telecommunications regulation in 2000. Under sustained pressure from the National Competition Council the Government conceded an operational separation in 2005 yet even this was insufficient for the National Competition Council. In its 2005 Assessment the National Competition Council concluded that the Australian Government was in breach of its *Implementation Agreement* obligations. However, this was no more than embarrassing because for the Commonwealth Government there was no penalty.

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The irony in this concern as to structural separation is that technological development left the matter for reconsideration de novo. Both mobile telephony and broadband has left the copper network owned by Telstra redundant. Satellite communications further erodes the monopoly.

Reform of the water industry also commenced well before the advent of the National Competition Policy.125 Indeed it was a matter of sufficient importance to be the subject of provision in the Australian Constitution, reflecting the shortage of water in the continent and the problems of allocation and governance in a federation. In the 1980s a variety of matters made reform a pressing issue. These included excessive and inappropriate use in both urban and rural situations, difficulties in constructing new dams, aging and degrading infrastructure, and salinity and other environmental damage. In the same meeting as its adoption of the Hilmer Committee Report, the Council of Australian Governments also and separately agreed to a ‘strategic framework’ for the reform of the industry.126

The strategic framework was described in these terms:

The framework embraces pricing reform based on the principles of consumption-based pricing and full-cost recovery, the reduction or elimination of cross-subsidies and making subsidies transparent. The framework also involves the clarification of property rights, the allocation of water to the environment, the adoption of trading arrangements in water, institutional reform and public consultation and participation.127

It was envisaged to be completed within 5 to 7 years with a Working Group on Water Resource Policy reporting annually.

127 Ibid.
By 2005, some eleven years after the decision by the Council of Australian Governments, the National Competition Council praised governments for ‘making progress’ on their water reform obligations.\textsuperscript{128} It had proved much more difficult than envisaged. These difficulties were due to the complexity of what was required, the diversity of administrative and legislative environments across jurisdictions, differences in the actual river systems, particularly in their health, and the different interests of stakeholder interests.\textsuperscript{129}

The particular activities included, in respect of urban areas,

- consumption based usage charges, and
- corporatisation, and sometimes privatisation or contracting-out of urban water authorities.

For rural areas the changes included:

- the separation of water entitlements from land title, and movement towards water rights trading,
- institutional reforms to regulatory bodies,
- new economic and environmental appraisal arrangements, and
- administrative reforms in relation to irrigation water delivery.\textsuperscript{130}

Resistance grew to the implementation of many of these changes from about 1998.\textsuperscript{131} The National Competition Council responded by emphasising the importance of ecological and social concerns in the reform process, asserting that the framework of change for the water industry did not arise out of legislation reviews, where competition had primacy. Rather it arose out of a mix of social policies in which efficiency and hence competition had but a part.\textsuperscript{132} This rendered water’s place in the National

\textsuperscript{128} National Competition Commission, \textit{Second Tranche Assessment of Governments’ Progress with Implementing National Competition Policy and Related Reforms} 2005, xvi.


\textsuperscript{131} This is discussed in Chapter 8.

\textsuperscript{132} National Competition Council \textit{Annual Report 2001-2}, 2001, 1
Competition Policy somewhat equivocal as it was treated under a differing conceptual framework.

At the end of the National Competition Policy, water reform was the subject of further activity in order to achieve more. In 2004 a new National Water Initiative was initiated in the Council of Australian Governments.\textsuperscript{133} This was maintained through the change in Government: in 2009 the Council of Australian Governments agreed to ‘redouble its efforts to accelerate the pace of reform under the National Water Initiative.’\textsuperscript{134} Slightly earlier, the effects of the then drought impelled serious attention to the Murray-Darling basin and a Memorandum of Understanding was signed.

The gas and road industries were also the subject of reform attention with more and less efficacy respectively. Reform in many other industries could also be brought under the heading of structural reform, including rail, ports, airports, various produce marketing arrangements, and so forth. In all the same principles applied: separation of the monopoly into the necessarily monopolistic elements (such as transmission wires) and introducing competition into the other areas.

Overall, there is no evidence that the National Competition Policy changed any government’s approach to structural reform. What was done may have been changed as a result of pressure by the National Competition Council, particularly in relation to Western Australia’s marketing boards. The National Competition Council did not have a great degree of influence of the Commonwealth Government in relation to Telstra, which emphasises the degree to which the competition payments did provide an incentive to do as the National Competition Council interpreted government’s obligations. On the other hand, the National Competition Policy removed impediments to structural reform resulting from Australia’s federal structure, allowing for recompense for loss of revenue streams and the negotiation under a mutually acceptable discursive framework of difficult issues over interstate trade, especially in electricity, gas and water.


\textsuperscript{134} Council of Australian Governments (COAG) Meeting 7 December 2009, \textit{Communique}.  

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Conclusion: Adding complexity to the story

When the details of what was done to actually implement the elements of the National Competition Policy, the story does not markedly change, although emphases within it alter. The story becomes more focused on what the States and Territories (and the Commonwealth as an implementing government) did. The Productivity Commission 2005 Assessment becomes even more unrealistic than is revealed in its own terms. The national agenda is subordinated to State and Territory interests. The only evidence of achievement that can be provided in the end is in respect of structural reforms which were not envisaged as part of the process in the first place. Whether or not competition was enhanced any more than would have otherwise happened is to be doubted.

These conclusions, considered element by element, are perhaps overstated with respect to competition law, prices oversight and access. However, these were the immediate matters for implementation once the Agreements had been signed and overall did not require much more than the States would have done anyway. The coverage of the Trade Practices Act 1974 (Cth) was an obvious issue and the solution carefully preserved State sovereignty. Prices oversight was in some ways simply a retreat from price control and moreover the design of the relevant provisions in the Competition Principles Agreement ensured that restraint on what States and Territories might otherwise do was minimal. The access regime preserved State and Territory regimes and only applied to facilities of national significance.

The provisions in the Competition Principles Agreement as to competitive neutrality, legislation and structural reform demanded more, yet careful examination reveals that the judgement of implementing governments’ actions was measured only by what they agreed to do in the first place. Thus the National Competition Policy’s characteristic as a solution to some federal finance issues in permitting States to do what they wanted to do constrained competition policy, no matter the railing of the National Competition Council. Even if the Agreements are seen (cynically) as a solution to the thorny problem of voter backlash against the imposition of economic rationalism, the National Competition Council failed to persuade and, as will be seen in the next Chapter, disturbing problems within the Australian polity arose as a result.
Most of the problems that arose in implementation were predictable (and predicted – see Chapters 1 and 3) and arose from a necessary lack of full articulation of what was required by the Agreements. Were they to have been fully articulated, there would not have been agreement; the rhetorical appeal of the Hilmer Report would have been lost. These issues included the lack of distinction between business and government, a failure to agree on the form of community service obligations (which is much the same thing), overreach by institutions set up in accordance with the Agreements to do certain particular things, a failure to apply the same mentality of institutional self-interest as underlay the federal arrangements set up in the Agreements to the place of local government, and the impossibility of measuring public interest against net benefits of competition. Given these conceptual and practical problems, competition did not take the metaregulatory place envisaged for it (at least by the Productivity Commission and the National Competition Council): it was relegated to merely another policy amongst many. Even so, when it came up against a more complex issue in the form of water reform, it can only be said to have failed.
Chapter 7
Responses and Defences

This Chapter deals with reactions to the National Competition Policy and the responses those reactions elicited. Much of this has been referred to already, sometimes inferentially and at other times substantially, especially in the stories already set out in Chapters 3-6. There, however, the responses are part of the context for a description of the implementation of the National Competition Policy. Here they are the focus, broadening out the thick description to a more complete and, as it turns out, even more complex picture.

In an open society, there are many traces of discussion and critique. In the absence of the resources of a National Security Agency or the algorithms of Google, proxies have been chosen. These are the reports of and submissions to a selection of inquiries into the National Competition Policy,\(^1\) the *Hansards* of the select Parliaments between 1 July 1993 and 31 December 2006,\(^2\) and articles in major Australian newspapers between the same dates and accessed through *Factiva*.\(^3\)


2 Commonwealth Parliamentary debates were searched between 1 January 1995 and 31 December 2005 using the terms ‘competition policy’ although the search was somewhat broadened by serendipity and next-to-observation (i.e., accident). The numbers of hits was not able to be recorded due to the nature of the databases and the informal textual approach, although impressionistically there seemed to be the same sort of distribution as revealed by the *Factiva* search (see below n. 3) apart from in relation to the 1995 debate over the Competition Policy Reform Bill. State and Territory Parliamentary debates were not rigorously searched, mainly because little there added to the Commonwealth debates. However, recourse was frequently made to confirm the representation in Commonwealth Parliament (particularly the Senate) of debates occurring within the States and Territories.

3 *Factiva*, owned by Dow Jones & Company, provides a free text search service of various information sources (‘free’ here refers to the text, not cost). In the instant research the text ‘competition policy’ was searched for in major Australian newspapers with a total of 7453 hits in December 2013. The figures for each year are as follows: 1993 (six months only), 109; 1994, 304; 1995, 319; 1996, 501; 1997, 529; 1998,
Parliamentary and other government inquiries are obvious possible sites of critical examination, because they are normally set up as a result of aired concerns. Those who made submissions to them had a clear purpose to intervene in the conversation about the competition policy. Most of this material has, as stated above, already been considered in previous Chapters and is merely summarised here. The second resource, *Hansard*, is useful and representative because not only do politicians represent the people and have an incentive to state what concerns them but also because it is the official channel for institutional reply to critique. This is, of course, subject to politics: the need for party discipline and sometime bi-partisanship, both of which obtain in this context. Finally, articles in newspapers record societal concerns because it is their expressed duty and in their financial interest to do so. To the extent that it has not already been discussed, each of these sources will now be considered, followed by an attempt at a chronological account of the winds of critique and their effect on the trajectory of the National Competition Policy.

Two theoretical concerns arise at this point. First, to say there is a response to something clearly involves a cause/effect relation. That A causes B is possible, but that it does so should not be assumed. Simple coincidence is always possible. Without descending to scientism, the discussion here is sensitive to this possibility.

Second, the speeches, articles, essays and so forth commonly have surprisingly obvious themes. Individual matters and issues receive concentrated treatment. It may well be that the distinguishability of these themes in, say, newspapers is simply due to the nature of journalism in that just one point is made per article, although that would not apply to submissions and speeches. Moreover, the distinguishable issues are not unrelated. As is evident in preceding chapters, actions undertaken under competition policy can be talked of under more than one label. However, the articles found in the print media are usually explicit in terms of which of the categories they each fall and politicians tended to run from a party-based agreed script. Given the consequent thematic structuration observable in the data, the following sections consider themes

793; 1999, 769; 2000, 526; 2001, 1071; 2002, 491; 2003, 480; 2004, 607; 2005, 515; 2006, 439. Thus there is a rise to a peak in 2001 (with a break in 2000) and then a plateau at about half the 2001 figure.
separately (with some elision when appropriate), first explaining them, then detailing where and when their expression can be found.4

Reports from Inquiries and Government responses

Elements of the National Competition Policy were the subject of numerous inquiries, both Parliamentary and otherwise, by reference and as an aspect of an inquiry otherwise directed. They and their consequences are considered where appropriate in the Chapter 6.

Three inquiries deserve detailed consideration here because they responded to the National Competition Policy itself. For each, the important issues for this chapter’s story are what it said about the National Competition Policy, and what the response was.

Senate Economics Committee, 1995

The first report dealing with the National Competition Policy as a package was that of the Senate Economics Legislation Committee. Technically, the matter referred to the Economics Legislation Committee was the Competition Policy Reform Bill 1995, it being referred on 11 May 1995,5 rather than either the Agreements or competition policy generally. Nevertheless, many of the issues raised before the Committee were about competition policy generally and were taken to be relevant to the Bill. The Government response, included in the Report,6 pointed this out, even deployed it as a defence, although it did not confine itself to commenting only in relation to the Bill.

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4 To the student of Karl Popper or even of Hume, this smacks of theory contingency. Yet the apple falls where it may or, to change the metaphor to a more direct anti-post-modernistic stance, how else would we stumble across lost cities? See Michel de Certeau, The Practice of Everyday Life (tr. Steven F. Randall), University of California Press, 1984, 61.


Just twenty-eight submissions were received, although the Committee referred to 130 submissions to the Hilmer inquiry and 60 substantive submissions received in respect of the draft exposure Bill, and two days of public consultation. This constituted ‘extensive public consultation’. The majority Report noted that the 60 ‘substantive’ submissions in respect of the draft exposure Bill ‘for the most part expressed broad community agreement’.7

The form of the (mercifully short) Report is to summarise the Bill’s history and proposed effect. It then summarises the issues raised in relation to it and provides a ‘government response to the issues raised at the hearing’. The majority of the Committee concluded that the Bill be supported but that ‘the respective governments involved take note of the specific issues raised in evidence to the Committee’.8 It highlighted in particular concerns as to the impact on small business of the competition code (implicitly referring mostly to s 46 of Trade Practices Act 1974 (Cth.), now Competition and Consumer Act 2010 (Cth.)).9 There were two minority reports, from Senators Dee Margetts and Sid Spindler from the Green and Democrats respectively. The Report, then, provides a useful snapshot of debate at the inception of the National Competition Policy.

Tolstoy starts Anna Karenina with, ‘All happy families are alike; each unhappy family is unhappy in its own way.’ Thus, in describing this inquiry, support for the Bill (and that of the others to follow) – or for the National Competition Policy or competition policy generally – is a given: it is simply a restatement of its rationale which varies little and is dealt with elsewhere in this thesis; rather, the point here is what the ‘issues’, or critiques or disagreements were and what the response of the government was.

There were three general issues noted by the Committee. The first was about what was to be subject to competition policy: that it was, in the quoted words of Dr Richard Copp of the Queensland University of Technology, ‘being extended to a whole range of bodies and organisations which have never in the past been thought of as being subject

7 Ibid 1.
8 Ibid 6.
9 Ibid 6.
to competitive legislation’. This was a matter of the definition of ‘business’ in the Trade Practices Act 1974 (Cth.) as it was to be after amendment. The concern was that the Act would be too vague in its distinction between what the proper role of government was and what not. This in turn would leave the matter to courts and, when the Act was found to cover bodies and organisations dealing with vulnerable sectors of the community excessive and burdensome regulation would result. This was put in concrete terms by Senator Sid Spindler in his dissent:

This section [Clause 75 of the Bill inserting the proposed section 2C of the Act] may need to be amended to further clarify what is and what is not ‘business’ to ensure that core services such as health, education, welfare, employment and environmental protection programs are clearly excluded.

The same issue was raised before the Committee by the Australian Conservation Foundation. It considered that private companies should not make management and policy decisions, such as those made by utilities, that impact on the natural environment.

The Government replied in the first place by saying that to define what is the government’s role and what is that of business was simply too difficult. Instead it had decided to exclude certain defined activities but not education or health because there were circumstances where they should be covered. Authorisation or legislative exemption procedures were available. Besides, said the Government, it is not as if it is difficult to comply. This expression of the issue conflates competition law and competition policy. The concern was about there being a core of something which governments did and which should be outside the purview of competition. The government reply addressed only the Bill and hence only the operation of competition law.

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The second issue raised before the Committee was about competition policy. It was about ‘the impact of competition policy, and associated moves towards corporatisation, privatisation, outsourcing, and breakup of government business enterprises, on the overall process of technological development in Australia and the education of future generations of professional people.’\(^{12}\) It was raised by the Institute of Engineers. It was also raised by the concern of the Australian Conservation Foundation, as set out above. The Government reply did not directly address it in either form. It responded as if the issue were a critique of privatisation. In that response it averred that the Agreements established processes of change and provision had been made for all relevant public interest matters to be taken into account.\(^ {13}\) This is the ‘weave’ defence, under which responsibility for what happens is evaded by reference to process. Indeed, the reply suggests that the process imposes on governments a requirement to consider all relevant public interest criteria when before they had no such discipline.\(^ {14}\) In other words Parliamentary democracy represented by responsibility for protection of particular interests of the public was to be subordinate to the procedure as set out in the Agreements. Accordingly the Government, according to itself, could not be criticised for failure to protect any nominated public interest.

The last general issue noted by the Committee was put by the Communications Law Centre. This was, as the Committee summarised it, ‘that current discussion on competition policy reform concentrated too much on the supply side of the economic equation (that is, that efficiency and economic gains are the primary goals) and that insufficient attention was being paid to the demand side of the equation (issues such as access, equity, pricing, quality, standards and privacy).’\(^ {15}\) The government responded by referring to the insertion of ‘enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection’ as an object of the Trade Practices Act 1974 (Cth.) as acknowledging that competition ‘is not

\(^{12}\) Ibid 3.

\(^{13}\) Ibid 19.

\(^{14}\) Ibid 19.

\(^{15}\) Ibid 4.
an end in itself, but rather a means of delivering benefits to society’. This is somewhat specious as the critique was clearly directed at more than the competitive conduct rules.

Other issues noted were deemed ‘specific’ and most were: as to access to a rail system for coal haulage and to the gas industry facilities, the application of the Trade Practices Act 1974 (Cth.) to employer associations compared to an exemption for professional associations, the application of competitive neutrality rules as compared to the applications of competitive conduct rules to not for profit businesses, and the drafting of s 47 of the Trade Practices Act 1974 (Cth.). Deemed ‘specific’ but which later became controversial and which indeed were responded to by the government were representation on the National Competition Council and the Australian Competition and Consumer Commission of certain groups, and also the inclusion of local government in the processes of the National Competition Policy. The latter was also a concern of Senators Dee Margetts and Sid Spindler. Senator Spindler was also concerned about the representative nature of the National Competition Council and the operation of the access regime. The Government did not alter its stance or the Bill in relation to any of these. The Government did accept some suggestions made during consultation, including the abolition of s 49 as to price discrimination. Further, it responded to discussion of the applicability of the Trade Practices Act 1974 (Cth) to statutory marketing authorities by stating that where there is legislative backing for their activities, the competitive conduct rules will not apply but that legislation reviews may curtail them.

Overall, the there was little impact of critique on the proposals of the government. Some matters which were to become controversial became apparent, but equally the government began to establish its defences to critique especially in the form of the ‘weave’. Most cogently, critique based on social theory of the rationale for the Bill and for competition policy generally was blocked, in this case by narrowing the frame of the discussion to the Bill.

The second report responding to the National Competition Policy itself is the report of an inquiry by the House of Representatives Standing Committee on Banking, Finance and Public Administration. The tenor of the Report can be taken from the following three quotes from the Chairman’s (David Hawker) Foreword:

The significant potential benefits arising from competition reform have been recognised by all levels of government and all major political parties. Implementing competition policy will impact across the whole economy and right across the community.

…

Lack of competition in the delivery of services in the public sector has been shown to add a significant cost for those services. National competition policy seeks to improve this by opening appropriate areas of the public sector to a competitive environment.

…

… the Committee was able to reach unanimous conclusions and recommendations in this report. These reflect the view of all major parties on the need to emphasise and promote competition as a strategy for making our public sector more efficient and effective.

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17 The House of Representatives Standing Committee on Banking, Finance and Administration into National Competition Policy was provided with a reference to inquire into National Competition Policy in June 1995. The report of the inquiry was issued by its successor, the Commonwealth House of Representatives Standing Committee on Financial Institutions and Public Administration in Cultivating Competition 1997. The election in 1996 and the consequent change in Government resulted in a change in the committee structure of the House and also meant that the terms of reference had to be reissued. They remained the same to all intents and purposes, which is strong evidence of the bipartisanship of the National Competition Policy.

Clearly this was not a critical inquiry; that can also be taken from both sets of Terms of Reference which enjoined the investigation of the means of application of the public interest test as provided in the *Competition Principles Agreement*, ‘the impact of competition policy on the efficient delivery of services, including an assessment of (a) existing government policies relating to community service obligations; and (b) options for the delivery and funding of these services; and, finally, ‘the implications of competition policy for the efficient delivery of services by local government’.*19* Thus the question that the inquiry faced was not whether the National Competition Policy was Good or Bad, or even that any element, including structural change or legislation review was so, rather it was how to effect these changes.

Nevertheless, the matters examined were the keys to the distribution of power between the implementing governments and the National Competition Council as assessor of compliance with the *Agreements*. The public interest test, the nature of community service obligations and the degree to which State and Territory governments imposed competition policy on local government defined the latitude of freedom from competition principles whilst still having a claim on competition payments. The question that the inquiry provokes, then, is whether there was an examination of the ambit of these matters or whether it was simply about making them work within their existing terms – a further articulation of the requirements of the *Agreements*.

*Cultivating Competition* commences with a conventional recital of the rationale for the National Competition Policy, that ‘communities expect their governments to continually become more efficient and effective and enhanced competition is one way in which this can be achieved’*20* and that ‘expected benefits from competition reform for ordinary Australians are price reductions, lower inflation, more growth and more jobs.’*21* However, it conceded that ‘[t]here has been no major analysis of the broader socio-economic costs of the reforms particularly the impact on unemployment, changed working conditions, social welfare, equity, social dislocation, environmental impacts as

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19 Ibid xiv.
20 Ibid 1.
21 Ibid.
well as the spatial variations in these.’\textsuperscript{22} No more is said about this. It also set out the National Competition Policy in terms of ‘a cooperative approach’ in which ‘individual governments are responsible for setting their own agendas and timetables for implementing the reforms in line with the inter-governmental agreements’.\textsuperscript{23} Put together, these two factors are seen to imply that there might be substantial variation in the impact of competition policy across various jurisdictions and locations. From that point the report moves to the position that

Given the scope of the reforms, their potential to substantially impact on the lives of all Australians and the relative newness of the policy, it is critically important that there is adequate public education and consultation about the reforms and their progress. Without this there is little guarantee that the reforms are not misrepresented nor misunderstood. The reforms will stimulate discussion about the proper role of government.\textsuperscript{24}

The rationale for the inquiry was that although ‘there generally has been widespread support for the policy … there is dissension’ and some States or Territories were experiencing ‘more difficulties than others in implementing some of the reforms particularly because of the political downside especially regarding employment issues’.\textsuperscript{25} Dissension leading to political difficulty is seen as needing redress through public education.

The Committee thus took upon itself the role of determining what was causing this dissension and how it could be reduced in the fields nominated in its terms of reference. It also assessed the performance of the National Competition Council and the arrangements for National Competition Policy payments, and the National Competition

\textsuperscript{22} Ibid 2.
\textsuperscript{23} Ibid 5.
\textsuperscript{24} Ibid 6.
\textsuperscript{25} Ibid.
Policy as a whole. It considered the impact of the policy in regional areas to be of critical concern.\(^{26}\)

In each of the three areas of concern, the Committee did little more than articulate procedures and processes. It sets out the position as at 1997 clearly and in detail. It notes differences between the jurisdictions and advocates uniform approaches in the definition of terms, such as ‘community service obligation’. However, it represents another good example of the ‘weave’ defence deployed subsequently by governments. The ‘weave’ defence allows for all such matters to be political decisions of implementing jurisdictions at the same time as asserting the legitimacy and utility of competition policy itself. Thus, for example, after considerable discussion of the various methodologies for funding community service obligations and the issues with the various methodologies deployed within the different jurisdiction, it simply recommends ‘that the funding arrangements for both existing and new community service obligations be transparent and assessed on a case-by-case basis.’\(^{27}\) Or, in relation to the definition of ‘significant business activity’ for competitive neutrality purposes, it says:

‘Given the diversity of local government in terms of size, location, budget, regional employment, etc in different states, variation in the definition of significant business activities between jurisdictions is inevitable. The Committee supports the inclusion of a broad range of matters to define significant business activity rather than relying just on monetary thresholds.’\(^{28}\)

On the critical issue of the impact of the National Competition Policy in rural and regional areas, the Committee is similarly anodyne:

Rural communities need to build on some innovative thinking already appearing on how to approach opening their businesses to competitive

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\(^{26}\) Ibid 8.

\(^{27}\) Ibid 37.

\(^{28}\) Ibid 50-1.
neutrality while still allowing the council to retain skills and expertise, ownership of infrastructure equipment, etc. For example options for doing this include phasing in of tendering over time; councils in a region specialising and sharing services; etc. This would apply in some metropolitan areas as well.\textsuperscript{29}

Given that the Committee stated that it considered the impact of competition policy in regional areas to be ‘of critical concern’,\textsuperscript{30} surprisingly little about it appears later in the report.

Bronwen Morgan conducted an intensive study of submissions to the Inquiry into Aspect of the National Competition Policy Reform Package.\textsuperscript{31} Unfortunately for a thick study of the social field represented by the National Competition Policy (but, of course, not unfortunately for her purposes), Morgan approaches the matter structurally, by setting up an analytical model to categorise the submissions in order that her question, about the discursive survival of notions of social citizenship in a time of enhanced competition policy, might be answered. Her question determines how the submissions are observed. As is later demonstrated, this question is an aspect of the instant study, but is just a part of it. For that part it is immensely useful, but awareness of the possibility of other questions should nevertheless subsist.

Morgan’s analysis consists of formulations of the legitimate role of the state and the appearance and categorisation of submissions accordingly. Between market infrastructural regulation (represented by public choice economics and a reliance on

\textsuperscript{29} Ibid 55.

\textsuperscript{30} Ibid 5.

\textsuperscript{31} Bronwen Morgan, \textit{Social Citizenship in the Shadow of Competition} (Ashgate, 2003), 92-111. There is some degree of difficulty in replicating this study as the 8 volume set of 103 submissions referred to by Morgan is not available at any public library. A 5 volume set of 58 submissions is available and was obtained for the instant study. The Report of the Committee, (Standing Committee on Financial Institutions and Public Administration, Commonwealth House of Representatives, \textit{Cultivating Competition. Report of the Inquiry into Aspects of the National Competition Policy Reform Package,} 1997) itself refers to 107 submissions. The 5 volume set contains submissions up to no. 58 as numbered by the Committee (at p 73).
market theory for rationality in regulation) and social citizenship as the determinant of the form of regulation (represented by the rule of law as a constitutional principle), Morgan finds ‘variations on tempered forms of market liberalism’. These allow for non-economic forms of social welfare. The two positions Morgan finds are a ‘community morality perspective’ and a ‘differentiated consumer sovereignty perspective’.

The community morality perspective is one where ‘key functions such as the promotion of community and cohesiveness’ are to be maintained at the same time as ‘forcing and supporting market-mimicking strategies’. The second, or ‘differentiated consumer sovereignty perspective’, ‘reframed the goals of social justice, access and equity typical of the welfare state discourses in terms of the new language of competition and economic analysis’. This reflects strongly a distinction which was taken to be the theme of a special edition of Law in Context: Contractualism and Citizenship:

neoliberalism may provide opportunities to self-actualise or it may have an insufficient concept of the individual to achieve the ends of government. In the latter lies critique of competition policy, but as a critique of the National Competition Policy the deferral of implementation to other parties renders the critique into mere description. Morgan’s categories thus are useful to indicate the proportion of submissions which find that the goals of the welfare state may be met within the state as framed by competition policy – those with a ‘differentiated consumer sovereignty perspective’, and those where there is a least incipient critique.

32 Ibid 92.
33 Ibid 93.
34 Ibid.
35 Ibid.
36 Terry Carney, Gaby Ramia and Anna Yeatman, Contractualism and Citizenship. (Federation 2001). See also See Anna Yeatman, ‘Contract, Status and Personhood’ and Judy Cashmore, ‘Children: Contractual Non-persons?’ in Glyn Davis, Barbara Sullivan and Anna Yeatman (eds), The New Contractualism (1997) 39 and 57 respectively. Yeatman and Cashmore accept that the contract state assumes the capacity to choose, but argue that the state, in so doing, empowers persons to act within the state, and that a task of the state is to enhance this.
Morgan’s analysis leaves untouched the question of whether there was amongst the submissions a challenge to or critique of the National Competition Policy and what the impact of such a challenge or critique was. There was at least one such critique amongst the published submissions and possibly more amongst those presently unavailable. This was a submission by the National Anglican Caring Organisation\(^{37}\) – no doubt counted by Morgan as amongst the seven ‘[s]ocial policy lobby groups (aged care, aboriginal, education, environmental, consumer, education)’.\(^{38}\) Mostly these, according to Morgan, ‘called for the maintenance of key functions such as the promotion of community and social cohesion \textit{in tandem with} supporting and facilitating competitiveness’.\(^{39}\) This is to depreciate the claim that was made in the submission. This was that ‘unfettered competition is shifting the way in which we relate to each other within our community’ and that ‘this shift is a matter for examination – perhaps even for our concern, unless community values are reassessed and guidelines put in place to express these’.\(^{40}\) Religion-based values were set out, including dignity and equality and that exploitation is wrong, responsibility and caring, and special concern for those in need. The submission stated ‘[t]hese values do not portray a society which is “survival of the fittest” based on competition. Then followed a rarely made connection between this critique and the National Competition Policy itself:

\begin{quote}
Our concern with the National Competition Policy rests around this point. It has changed the language of evaluating our national goals. Economic achievement alone is measured, and the means of achieving that – even though these means may exploit, ignore members of our society who are not the achievers, remove the most basic resources if a human being cannot pay for them – these means are tacitly approved, even seen as necessary.\(^{41}\)
\end{quote}


\(^{38}\) Morgan, above n 31, 94

\(^{39}\) Ibid, 99.

\(^{40}\) National Anglican Caring Organisation, above n 37, 1.

\(^{41}\) Ibid, 2
It is only after this general opposition that the submission moves to addressing the terms of reference of the inquiry by accommodating those principles as best they might within the structures of the public interest and community service obligations, with a special emphasis on social welfare provision. That structure illustrates two matters: first, that there was a strong critique of competition as such and that it was expressed to the various bodies; and, second, that the processes and structure of the National Competition Policy, and the terms of inquiries into it channelled such critique into a discourse of accommodation within competition policy. The promotion of community and social cohesion was not necessarily, or even in a majority of cases ‘in tandem with’ supporting and facilitating competitiveness. Rather, if anything was to be saved in the inevitability of the reforms, this tactic was necessarily expressed.

Hence the perspectives distilled by Morgan accommodate the structure of the National Competition Policy as setting out a process for the implementation of competition policy. The community morality perspective in its narrow formulation recognised the public interest as a matter to be considered as offsetting the advantages of competition. But if the goals of justice, access and equity were accommodated within competition, as accepted by the ‘differentiated consumer sovereignty perspective’ then the public interest had no offsetting advantage and would be ineffective as an inhibiting effect. In either case, the matter was for the implementing government and therefore was outside the National Competition Policy.

The submissions in general did recommend in relation to the details of how particular visions of public benefit, whether within the competitive ideal or not, impacted on the agreed procedures for implementation. Thus the more community morality was thought to be encompassed within competition, the less the need to consider separately the public interest and the greater the need to restrict, confine and tame community service obligations. Morgan found that the adoption of such opinions was not a function of whether the contributor came from state, market or civil society actors. There was a surprisingly fragmented picture, according to Morgan.42 Such fragmentation is, however, predictable if the contributors are taken to have understood that the National Competition Policy was a means to the implementation of certain principles of

42 Morgan, above n. 31, 97 and 108-9.
competition policy, thus any resistance or incentive effects demanded a strategy in relation to the complexities of procedure. Such strategies will vary considerably as the precise formulations of ‘public interest’ and ‘community service obligation’ satisfy or fail to satisfy the object of the contributor. The main areas where they did not vary was in relation to the trade-off between competition and the public interest: was the competition to be preferred unless the alternative public interest grounds outweighed its benefits, as the Hilmer Committee had recommended, or was the weighting to be different? Given that the matter had been agreed by all governments, there seemed little doubt. Nevertheless, the Australian Council of Trade Unions argued otherwise, just as it had its submission to the Hilmer Committee and no doubt elsewhere too. Church and producer groups (mainly rural industries) also argued in favour of a community morality perspective. Church groups in particular were able to articulate a rationale for community morality and thus to challenge the economic analysis. However, as Morgan points out, they could provide few ‘institutional avenues for implementing [their] vision’. The point here is that this was the consequence of the submissions being about the National Competition Policy, which set out procedures which had already formulated the manner in which and degree to which those moralities could be heard.

Morgan’s analysis provides a masterful dissection of the particular forms in which goals such as justice, access and equity could be thought of as operating within neoliberalism, and this is her aim, but it is of marginal help here. This is because neither of the possibilities framed a challenge to the National Competition Policy and neither produced a response. By framing the ‘weave’ defence, Cultivating Competition, the report of the inquiry, simply absorbed such critique as existed. As the Committee concluded, such dissent as existed could only be irrational and was therefore to be dealt with by an injunction, in its final recommendation, ‘that all agencies involved in the implementation of national competition policy devote resources to ensure community understanding and debate about the contents of the policy and its outcomes.’

43 Ibid.
44 Ibid 110.
What Price Competition?

Contracting out of government services had been a practice for some time prior to the Hilmer Committee’s adumbrations; indeed, it has always been a part of the way the state conducts itself. The earliest forms of corporation were those set up by private individuals to gather taxes on behalf of the state – clearly evidence of contracting out as the norm. Or, as quoted in the Report from evidence given on behalf of the Department of Finance and Administration, the existence of mercenary armies is proof of the extreme of contracting out armed force.

There were, even during the currency of the National Competition Policy, a number of reports into aspects of contracting out. Mostly these were about managerial accountability and Parliamentary scrutiny, quality assurance, performance monitoring, risk allocation and management. While relevant to competition policy, they did not specifically address it, except in passing.

However, by the early 1990s, as the National Competition Policy was being developed, contracting out was seen to be being ‘extended’ into ‘core’ government services (although there could hardly be anything more ‘core’ than tax collection or the

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46 Two of the forms of commercial association recognised in the Corpus Juris Civilis, or Institutiones Justinian, were formed for the purpose of public activities: the universitas and the publicani. In the middle ages manoe were organisations set up for the gathering of taxes.


provision of armed force) and was being subject to review as to whether social responsibilities, later to be known as ‘community service obligations’, were being neglected, and accountability was being preserved, objectives defined and business conducted efficiently and effectively. After the National Competition Policy was established, contracting out was expanded even further into the delivery of welfare services, although it would be a mistake to attribute this simply to the Hilmer Report: it was a national and international trend. In any event, while the reports considered above illustrate that, by 1997, internal government questioning of National Competition Policy as such was abating, the application of competition policy to welfare services had become controversial. Hence the Commonwealth Health Minister referred competitive tendering of welfare service delivery to the House of Representatives Standing Committee on Family and Community Affairs in April 1997. This led to one of the most critical assessments of competition policy, although it was, in tune with other assessments, expressed as a study in implementation rather than a critique of the policy as such. The report is What Price Competition? A Report on the Competitive Tendering of Welfare Service Delivery. This report was briefly considered in Chapter 1 as an assessment of the National Competition Policy; here it is considered as a response.

The material presented by this Report provides a devastating critique of competition policy. The anger is at times palpable. Yet the Committee appears resigned to the inevitability of the National Competition Policy: without contradicting the thrust of competition policy, it develops a series of recommendations calculated to restrain implementation.

The anger can be seen in these paragraphs from the Executive Summary:


51 Ibid generally.

The expansion of contracting into ‘core’ government services has led to a redefining of responsibilities and relationships between key stakeholders and raised important questions of accountability and quality, equity and distributional impacts of contracting, and the suitability of pro-competitive models for particular services. While some of these questions have been raised in the context of government welfare services, there has been no detailed examination of the desirability and feasibility of increased contracting out and competitive tendering of welfare service delivery. The present inquiry is the first to specifically examine this question and the core issues surrounding it, including the current levels of service provision by the non-government welfare sector; the adequacy of current monitoring of performance standards for the sector; the role of government in standards setting and monitoring of accountability standards; and the role of government in measuring the efficiency and effectiveness of new service delivery arrangements.

At the outset, the Committee wishes to emphasise that the overwhelming weight of evidence suggests that no further contracting out of welfare services should take place until a continuum of contestability framework is developed for determining the suitability of these services for contracting out. This framework should include service related and non-service related factors and be reviewed on a regular basis to take account of changes in organisational objectives and practices, technology and service markets, and that the contestability status of all welfare services be re-assessed at regular intervals.⁵³

The Report itself, as distinguished from the Executive Summary, does not conclude in such trenchant terms, although the recommendations are strong. The first was as to accountability. ⁵⁴ Competition policy introduces a split between a service’s purchaser and its provider. The government purchases a service from a provider. The service may be to provide welfare to the client/recipient. The Report comments on just the

⁵³ Ibid xi.
⁵⁴ Ibid, para 4.12.
relationship between the purchaser and the provider, not between the provider and the client – a relationship equally the subject of competition policy but in more subtle ways which are considered later. For now, the Report identified as the first issue relating to the split as ‘who is accountable, to whom and for what’. Enhanced accountability could arise from the exigency of contracting: the necessity of specifying with exactitude the various responsibilities involved in the service, leading to easier identification of service failure; easier monitoring of service delivery, enhanced capacity for clients (in the Report – ‘consumers’) to choose between providers, hence achieving redress for failure or even simple inadequacy; and separating and clarifying roles allows the public service to concentrate on policy development and accountability monitoring. On the other hand, contracting out enables risk to be shifted from the purchaser to the provider enabling government officials to evade their responsibilities; and extended lines of responsibility means that those responsible for service standards may become indeterminate. Accountability should be always with the purchaser/Government agency, according to the Committee, regardless of who the provider, who actually delivers the service, is.

A second set of recommendations supports one of the main arguments of this thesis: simply that not enough was known about contracting out. The Committee recommended that research be conducted into the impact of contracting out on the quality of welfare services, on service quality, cost, volunteerism and social and economic impact in small rural and remote communities. While it did not result in a recommendation, the Committee also noted the possibility of impacts on the structure of the welfare services industry. Possible impacts included on the size of providers, the nature of relationships within the sector – a move to competition from co-operation, and on job security, wages and conditions of employees. Competition policy begs this

55 Ibid xii.  
56 Ibid xii-xiii; 23-5.  
57 Ibid para 4.29.  
58 Ibid para 4.30. See also ibid xiii; 26-30.  
59 Ibid para 4.51. See also ibid xiii-xiv; 30-6.  
60 Ibid para 4.89. See also ibid xiv-v; 42-4.  
61 Ibid para 4.101. See also ibid xv; 44-7.
question: is a marketised industry better than one not marketised? Because the answer is assumed, stated the Committee, to answer it challenges competition policy itself and hence the Committee would not attempt it. However, it did mount a direct challenge in respect of the assessment of whether every service is susceptible of contracting out.

The Committee recommended that a ‘contestability continuum’ for welfare services be developed by the Department of Health and Family Services, in conjunction with welfare organisations and providers before new welfare services are considered for contracting out and that all welfare services be re-assessed on it at regular intervals. It also set out a stringent set of requirements for service agreements, covering the terms, the tender process, and ongoing management. This is a direct challenge to competition policy itself – a challenge already considered in Chapter 1. In summary, the Committee doubted the preference for competition in legislation reviews. It stated that whether a service should be contracted out was the first question, rather than the question of whether it is possible to contract out the service. Contestability should be assessed on a case-by-case basis on a continuum:

The Committee considers that current approaches to assessing contestability and suitability for contracting can be significantly improved by looking at contestability in terms of a continuum. Under this approach, the contestability of an activity can range on the continuum from very low (not suitable) to very high (highly suitable). The placement of an activity on the continuum depends on how it meets designated criteria. For example, an activity with no or few alternative providers, with low incentives to enter the market, low public acceptance to outsourcing and assessed as central to an agency’s objectives would be placed at the low end of the continuum. This may be the case in some isolated communities. An activity with many alternative providers, involving a large amount of money, low overheads, not central to an

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62 Ibid xiv; 36-42.

63 Ibid, para 6.30-32.
agency’s objectives, no public objections etc would be rated at the high end of the continuum.  

The Committee proceeded to set out a framework for assessing contestability covering market-specific factors, financial costs and benefits, agency-specific factors and service-specific factors. It recommended that a similar ‘contestability continuum’ be developed by the Department of Health and Human Services and that it be reviewed on a regular basis ‘to take account of changes in organisational objectives and practices, technology and service markets and that is be applied to all welfare services on a regular basis. Most importantly, it recommended that further contracting out not be undertaken until this approach was adopted.

The Government’s response was to reject outright the call for a contestability continuum. Its reason was that such a continuum did not permit assessment of the impact of contracting out on different communities and that the government had a much more rigorous approach in place. It implied that the framework approach recommended by the Committee would disallow contracting out in one community where there was a reason for not contracting it out in another. The Government wanted to contract out whenever it could. Of course, such a critique ignores the possibility of including as a variable the community to which the service is delivered in a contestability continuum. Indeed, the response erects a straw man of contestability continuums by referring solely to those developed in other jurisdictions, so ignoring both the potential for innovation and the meaning of ‘contestability’ as defined by the Committee. In respect of the latter, the Government’s existing approach as described in the response did not include anything remotely approaching an ‘appropriateness’ test; that is, asking ‘Should we?’ rather than ‘Can we?’ Commensurate with this response, the Government rejected independent assessments of the impacts of contracting out, claiming that its existing

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64 Ibid 68.

65 Commonwealth, Commonwealth Government’s Response to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Competitive Tendering of Welfare Service Delivery (‘What Price Competition’), Parliamentary Paper No 832, 1999, 2. This paper is extraordinarily difficult to find and I must here once again thank Dennis Warren, the Law Librarian at La Trobe University, for digging it out for me.
assessment structures were doing the job quite well enough,\textsuperscript{66} and generally defending its existing arrangements. In other words, it comprehensively ignored the point of the Committee’s report that things were not going as well as the Government’s assessment mechanisms appeared to demonstrate.

\textbf{Senate Socio-Economic Consequences of the National Competition Policy Select Committee 2000}

Chapter 6 considered the last\textsuperscript{67} of the significant reports contemplating the National Competition Policy as whole, the report of the Socio-Economic Consequences of the National Competition Policy Select Committee, \textit{Riding the Waves of Change}.

In this report the Committee yet again considered that competition policy was on the whole accepted by the community. Critique was adjudged to come out of the impact of the policy on individuals and that the concerns of the community were about implementation. Nevertheless many of the matters stated to be of concern in previous inquiries resurfaced. These included the application of the public interest test, inconsistencies in implementation, the lack of oversight of implementation and a disbelief that the economic rationales sufficiently took into account sustainability principles. The only issue of note that was not foreshadowed was in relation to ‘structural adjustment and transitional arrangements’. Within the structure of the National Competition Policy, this was a matter for the implementing jurisdictions, yet it there was considerable confusion as to whether this meant compensation or not.

\textsuperscript{66} Ibid 1, 5.

\textsuperscript{67} Chapter 6 also considered the Productivity Commission report, commissioned by the Government as soon as the Senate Select Committee was commissioned: Productivity Commission, \textit{Impact of Competition Policy Reforms on Rural and Regional Australia}, Report No 8, 1999. As noted in Chapter 6, it is hard to see the Productivity Commission reference as anything other than damage control, although ultimately the Senate Committee report was relatively benign. The Productivity Commission report is not considered here as it is not a site of critique.

While *Riding the Waves of Change* broke little new ground in terms of the issues noted and explored, it did capture much of the individual anger around the impact of the reforms. After all, this was its origin, as will be demonstrated in the next section of this chapter. For that reason, the reaction to the Report is of significance. That reaction can be summed up by observing that the National Competition Policy did not change in structure or direction, but that the administering body, the National Competition Council was disciplined and its ambitions curtailed to the point that, once it could be done without loss of face, it was deprived of meaningful function. Moreover, exemptions to the National Competition Policy proliferated. This story is recounted in Chapter 6.

Despite the observable consequences, the Government response to the Report was a classic ‘weave’:

> Much of the implementation of NCP is the responsibility of State and Territory governments. The Prime Minister will write to Premiers and Chief Ministers, asking them to give due consideration to the issues raised in the Report.\(^6^9\)

In respect of direct compensation for the effects of competition policy on individuals and regions, the Government response was to refuse any general idea of compensation, rather to talk in terms of adjustment assistance. This was, of course, a matter for the implementing government. Later, the National Competition Council was to directly repudiate compensation on the basis that the possibility of reform was simply another risk of which every individual, whether in business or employment, should be aware. To provide compensation would be to privilege one form of risk over another.

**Parliamentary debates: *Hansard***

Given the size and expense of the National Competition Policy, there is, with one exception, surprisingly little about it, or even competition policy generally, in the *Hansard* of any Parliament in Australia. What there is falls into three categories:

responses to implementation, which includes both debates on relevant legislation (which provides the exception) and statements in respect of various specific non-legislative implementations, responses to inquiries – these have been considered above, and the series of speeches of a limited set of politicians, in particular those of Mark Latham and Bob Katter, although others made occasional substantial critical speeches (e.g., Senators Boswell, Margetts and Kernott, and Ms De-Ann Kelly). The first and last are now considered.

**Responses to implementation**

The first identifiable matter in 1995 dealing with competition policy was the tabling in the Commonwealth House of Representatives of a petition from ‘certain residents of South Australia’ protesting the National Competition Policy.\(^{70}\) In particular they protested cuts in wages and conditions of public sector employees and user-pay price increases cutting low income people from services.

On the same day, Mr Latham, then in government, gave a strong adjournment speech in favour of the National Competition Policy, which had not then been finalised. The main thrust of his argument was that the States and Territories should sign up, and that there ‘should be no dispute about compensating the states’.\(^{71}\) In the years that followed there were many such speeches in support, so numerous that they will not be further referred to here. Nevertheless, Mr Latham’s early contribution is notable by way of contrast to his later critique of the ideology of the Productivity Commission and his support for Blairite ‘Third Way’ political philosophy.

The early commentary on the National Competition Policy continued on 9 February with another Labor Government member, Mr Griffin, asking the Assistant Treasurer without notice whether competition policy reforms ‘are encouraging’ state governments


to privatise utilities.\textsuperscript{72} Mr Gear, the Assistant Treasurer, replied that there was 'encouragement to privatise from competition policy'.\textsuperscript{73} Clearly this was designed to correct media reports. It was followed in May by the presentation of \textit{Public Business in the Public Interest}, a report of the Joint Committee on Public Accounts.\textsuperscript{74} This report set out the principles under which government businesses should be commercialized and corporatized. There was little critical debate, neither of the report nor of the principle that it is a Good Thing to commercialise and corporatise.

The sale of the government-owned Qantas had occupied Parliaments since the introduction of the original \textit{Qantas Sale Act 1992}. As an exemplar of the issues surrounding privatisation of government-owned businesses it has remained controversial even to the very day of writing these words in early 2014. In 1995, at the outset of the National Competition Policy, it was the Qantas Sale Amendment Bill 1995 which was the subject of debate.\textsuperscript{75} Nevertheless, both sides supported the Bill and the debate was over the details of the particular privatisation rather than whether Qantas should be privatised. More critical debates over Qantas took place in the Senate in June 1995.\textsuperscript{76} Even so, only the Democrats and Greens opposed it, with Senators Kernot\textsuperscript{77} and Margetts\textsuperscript{78} speaking. Moreover, their grounds of opposition were simply that it was wrongly done and that Qantas was something that should be kept in Government hands.


\textsuperscript{73} Ibid (Mr Gear).


\textsuperscript{76} As from 7 June: Commonwealth, \textit{Parliamentary Debates}, Senate, 6 February 1995, 1021, Sen. Parer commencing on behalf of the Government).

\textsuperscript{77} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 1024.

\textsuperscript{78} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 1030.
Similar debates to that over Qantas were waged over changes to the status of Australia Post, the Commonwealth Bank, Telstra, and Airports. Telstra, in particular was controversial with substantial debate occurring in 1996, 1998, 2000, and 2003. A considerable number of petitions protesting Telstra’s privatisation were tabled in the Senate in the second half of 1996 and into 1997, continuing on for many years. The debate was rendered more complex by questions as to structural separation, regulatory risk, rapid technological change and the choice to have industry-specific, rather than generic, regulation.

Meanwhile specific industries also had their grievances and fears aired. These included petrol and education. Abolition and alteration of primary industry statutory marketing boards were often the subject of speeches and questions; for example, as to rice-growers and the dairy industry. None of these contained substantial reasoned critique of the National Competition Policy. Mostly the critical voices asserted the damage to industries and regions and that there were substantial public interests involved. The response was simply that there would be economy-wide benefits, that implementing governments considered the public interest as a substantial part of their decision-making (if the Commonwealth said this in respect of State or Territory implementation, this constituted the defence of ‘the weave’), and that, substantial revenue through competition payments depended on performance of the Agreements.

79 This does not include isolated questions and petitions.

80 Commonwealth, Parliamentary Debates, House of Representatives, 2, 7, 8, and 9 May 1996; Senate, 8, 21, 27, 29, 30 May, 18, 20 and 27 June, 9, 10, 11, 12, 16-19 September, 16, 18, and 28 October, 6 November, 5, 9-11 December 1996.


82 Commonwealth, Parliamentary Debates, House of Representatives, 13 and 16 March, 17 August 2000; Senate, 8-9 and 30 October 2000.


(the ‘duck’ defence). If the economy-wide advantages were doubted, the ‘falling man’ defence was deployed: it was said to be too early to quantify the advantages but they were known by modelling to be high. These defences become a common litany of response to critique especially in reaction to various inquiries.

In June-July 1998, the Senate established the key inquiry into the implementation of the National Competition Policy, the Select Committee on the Socio-Economic Consequences of the National Competition Policy. This was the only consequence of any note that could be attributed directly to concerns expressed in Parliament as to the implementation of the National Competition Policy. Even then Senators Margetts and Cook averred that the motivating factors were

(a) the observation expressed in the report of the House of Representatives Standing Committee on Financial Institutions and Public Administration entitled *Cultivating Competition: Inquiry into aspects of the National Competition Policy Reform Package*, that there has been no major analysis of the broader socio-economic costs of the National Competition Policy; and

(b) that many voters in the 1998 Queensland election indicated that they were disillusioned with economic reforms such as National Competition Policy and the broader impacts of such changes.

rather than anything said in Parliament. The report has been considered in detail above.

A number of other Parliamentary inquiries, referred to above and listed in an appendix to this thesis, considered aspects of competition policy, although none were directed at the National Competition Policy. The most wide-ranging of these was that of the Standing Committee on Financial Institutions and Public Administration, Commonwealth House of Representatives, which produced its report in June 1997. This, however, was commissioned on the signing of the *Agreements* and can’t be attributed to reaction to the National Competition Policy. Otherwise there is little in

86 This is an allusion to a rather macabre joke about a man who, asked as to his state of mind while falling from a skyscraper, passing the first floor says, ‘So far, so good!’

Parliamentary debates which can be said to have directly caused reconsideration of the National Competition Policy. That is not to say that electoral results and other political pressures were not effective to some end, as considered in Chapter 6 and somewhat revealed below in media reports.

**Debates on Legislation**

Other than specific reforms as a result of legislation reviews in implementing jurisdictions, the National Competition Policy directly generated only one piece of legislation. This was the *Competition Policy Reform Act 1995*, passed in June of 1995. Oddly enough, the three competition policy Agreements were tabled only at the close of debate in both houses. One would hope that they were available to the Parliament before then.

In the House of Representatives, debate was somewhat stifled. Both sides supported competition policy and the National Competition Policy, although there was the usual carping over details. The exception was Mr Bob Katter, who crossed the floor on the following day to oppose the legislation.

On the other hand, the Senate had referred the National Competition Reform Bill to its Economics Committee. That Committee reported on 7 June 1995, acknowledging many concerns with the National Competition Policy and competition policy generally, nevertheless recommending that the Bill be passed anyway: the majority of its members were of the parties supporting competition policy. The Democrats dissented and, allied to the Greens and Senator Harradine, entered into a substantial debate over competition policy. The report of the Committee has been discussed above.

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88 The *Productivity Commission Act 1998* was also substantially debated in Parliament. It is treated here as context and is dealt with in Chapter 5.


90 The Report is not available on-line in the digital record of parliamentary papers.
The debate in the Senate over the National Competition Reform Bill took place on 7, 22, 26 and 27 June. (It was then referred to Committee for clause by clause debate, which added little for present purposes to the main debate.) It raised every main contention that was to come to the fore in the following ten years. The defenses to be mounted to all critiques, including, as has been noted above, those in reports resulting from inquiries, were also developed. Moreover, the Democrats, appreciating the essential futility of opposing the Bill, committed themselves to monitoring the progress of implementation of the National Competition Policy, and to forcing the establishment of a committee to inquire into its implementation in terms of its effects on society and sectors of society.  

91 This promise was fulfilled in 1998 with the establishment of the Socio-Economic Consequences of the National Competition Policy Select Committee, the 2000 report of which was enormously influential and which is discussed above and in more detail in Chapter 6. However, beyond the promise of a future inquiry and development of the terms of debate to follow, prescient though that process might have been, little actually followed from matters raised in Parliament. Even so, in order to establish what was debated and the fact of little impact, the main themes are set out below.

**Competition policy wrong in itself**

Senator Cooney, closing the debate over the National Competition Reform Bill, said, ‘As far as I can see, it has not been suggested that competition in its proper context is a bad thing. In other words, everybody seems to agree that competition, if confined to its proper place, is a good thing.’  

92 That was an exaggeration. Democrat participants in the debate in particular questioned the place of competition as a government policy. Senator Woodley referred to ‘mythical economic ideology’ and that there were values other than economic efficiency as did Senator Lees.  

93 Senator Lees had the previous

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91 Commonwealth, *Parliamentary Debates*, Senate, 7 June 1995, 1043 (Senator Spindler); 22 June 1995, 1697, (Senator Kernot)


day also talked of priorities beyond competition.95 Earlier in the debate Senator Spindler had characterized the ‘competition policy agenda’ as ‘a radical rethinking of the role of government and government services.’96 Senator Kernot put it this way, ‘competition policy represents the victory of economics over equity, of competition over compassion and of accounting over accountability in the management of public services.’97

Despite these, and other strong statements, there is some truth in Senator Cooney’s comment. Senator Spindler’s statement quoted above raises the question of whether competition is good but later slides away into the claim that debate over whether it is indeed good and what effects implementation of the agenda will have had been inadequate.98 Senator Kernot also slid away: ‘Yet this bill, and the ramifications of this bill, have been the subject of very little public debate. It has been the subject of minimal public scrutiny. It has been debated in closed forums – not by Australian people who own this debate and the outcome of it.’99 They get close to examining what is good and bad about competition but then simply label it as narrow ideology or assert that it has in certain instances bad effects.

Senator Coulter provides perhaps the only challenge to competition itself. He argues that

One cannot legislate for goodness. However, a government can, over time, pass a series of laws which so undermine the fabric of society that anti-social behaviour flourishes and the moral and cultural cement that binds citizens together in a society is inexorably dissolved. The bill before us today marks one of the stages of that dissolution – just one of the stages. For over 200 years Australians have built up a culture of tolerance and mutual helpfulness. In the few short years of this Labor

95 Commonwealth, Parliamentary Debates, Senate, 26 June 1995, 1783.
96 Commonwealth, Parliamentary Debates, Senate, 7 June 1995, 1043.
98 The passage is quoted in full below, 316-7.
99 Ibid.
government, first under Prime Minister Hawke and now under Prime Minister Keating, this mutual respect and support one for the other has been steadily eroded.\textsuperscript{100}

He does not claim that the intentions of the legislation and supporting policies are wrong, indeed he states they are ‘laudable’, merely that the ‘stupid and hazardous assumption that humans are driven by an insatiable material greed’ of the new economic orthodoxy is destructive of Australia’s humanity.\textsuperscript{101} Yet even this is muted by the concession that it is a characteristic of humanity that has its place:

\begin{quote}
In summary, I believe that this legislation is very wrongly conceived. Not surprisingly, of course, it is conceived in the same context that much government legislation has been conceived in in recent years. It makes assumptions that are faulty about the nature of human beings, and it makes assumptions that are incomplete and damaging because of the importance it gives to that one characteristic of seeking to fulfil an endless and insatiable material greed.\textsuperscript{102}
\end{quote}

\textit{Bad impacts}

Competition may or may not be good in itself, but the Greens and Democrats, even some National Party members, identified bad impacts. These were on the regions,\textsuperscript{103} local government,\textsuperscript{104} community services\textsuperscript{105} and the environment.\textsuperscript{106} Equity,\textsuperscript{107} the

\begin{flushleft}
\textsuperscript{100} Commonwealth, \textit{Parliamentary Debates}, Senate, 26 June 1995, 1772.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid.
\textsuperscript{103} Commonwealth, \textit{Parliamentary Debates}, Senate, 22 June, 1995, 1700 (Senator Boswell),
\textsuperscript{104} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 1043 (Senator Spindler)
\textsuperscript{105} Commonwealth, \textit{Parliamentary Debates}, Senate, 27 June 1995, 1866 (Senator Lees)
\textsuperscript{106} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 1043 (Senator Spindler); 26 June 1995, 1768 (Senator Chamarette); 26 June 1995, 1772 (Senator Coulter).
\textsuperscript{107} Commonwealth, \textit{Parliamentary Debates}, Senate, 26 June 1995, 1768 (Senator Chamarette).
\end{flushleft}
community, community services, and mutual respect and support also were thought to susceptible to damage. Senator Harradine worried about utility pricing.

The impacts identified as bad were more often expressed by reference to winners and losers. Winners were identified as ‘big business’, ‘people with economic power’ or ‘corporate members of the Business Council of Australia’, and government Treasuries. There was agreement on the losers too: residents of regional and remote areas, low income users of government services, and public servants. Consumers were not guaranteed to win, despite the purposes of the policy, according to Senator Lees.

The comments about the impacts of competition policy on society and people became the chief argument against the National Competition Policy. It is in the course of such argument that Senators Spindler and Kernot committed the Democrats to pursuing an inquiry into the socio-economic effects of the policy. That inquiry eventuated in

110 Commonwealth, Parliamentary Debates, Senate, 26 June 1995, 1772 (Senator Coulter).
113 Commonwealth, Parliamentary Debates, Senate, 26 June 1995, 1754 (Senator Margetts).
114 Commonwealth, Parliamentary Debates, Senate, 26 June 1995, 1783 (Senator Lees).
116 Commonwealth, Parliamentary Debates, Senate, 7 June 1995, 1043 and 26 June 1995, 1760 (Senator Spindler), 22 June 1995, 1697 (Senator Kernot); 22 June 1995, 1700 (Senator Boswell); 27 June 1995, 1878 (Senator Bell).
117 Commonwealth, Parliamentary Debates, Senate, 22 June 1995, 1697 (Senator Kernot); 26 June 1995, 1760 (Senator Spindler).
118 Commonwealth, Parliamentary Debates, Senate, 22 June 1995, 1697 (Senator Kernot); 27 June 1995, 1878 (Senator Bell).
119 Commonwealth, Parliamentary Debates, Senate, 26 June 1995, 1783 (Senator Lees).
120 Commonwealth, Parliamentary Debates, Senate, 7 June 1995, 1043 (Senator Spindler); 22 June 1995, 1697, 1697, (Senator Kernot).
1998 and its findings, as discussed above, led directly to the muzzling of the National Competition Council and the imposition of a more rigorous ‘public interest’ test.

*Ill researched and insufficient information*

Many Senators referred to the Industry Commission Report on which much of the Government’s (and Opposition’s) case for proceeding with the National Competition Policy was based. They said that it was inadequate. As Senator Margetts put it, the Industry Commission Report set out only the ‘outer envelope of possible benefits, not the real costs and benefits’. Many of the Senators referred to ‘John Quiggin’s report’, although none cited actually what that was. Apparently it referred to his submission to the Economic Committee in its consideration of the Competition Policy Reform Bill.

Senator Kernot provided a representative comment:

> Associate Professor John Quiggin of the ANU and James Cook University concluded that the Industry Commission report did not add up. It was identified that the Industry Commission had double counted a range of ongoing reforms, had overestimated the flow-on effects from the reforms to the general economy, had assumed reforms which go much further than the Hilmer report ever intended and had assumed no negative effects from the displacement of thousands of public sector workers whose job losses will provide the filling for the Hilmer magic pudding.

> Dr Quiggin concluded that there would still be a benefit from the Hilmer reforms, but a much more modest one: 0.5 per cent of GDP—one-tenth of that estimated by the Industry Commission. So then the question becomes: if the benefits are modest, is it worth pursuing? Is there a better way?

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121 Commonwealth, *Parliamentary Debates*, Senate, 9 June 1995, 934 and 979 (Senator Margetts); 22 June 1995, 1697 (Senator Kernot); 27 June 1995, 1868 (Senator Harradine); 27 June 1995 1877 (Senator Bourne); 27 June 1995, 1878 (Senator Bell).

Senator Kernot referred to the concerns raised by the Institute of Engineers as to ‘implications for the provision of electricity and water, in relation to the carry-over of expertise and the possible loss of that experience with the transformation from government provision of utilities to private provision’ as the exemplar for unresearched possible implications of the Bill,\textsuperscript{123} going on to say,

\begin{quote}
Whatever you believe in relation to competition policy, I believe that it is not responsible for this parliament to be jumping in to actually legislate the changes until we have looked responsibly at what the implications are in those places that have made those kinds of changes. So, yes, we have heard some of the political debate about the implications in other countries, but it seems that it is not responsible unless we are prepared to look a little deeper.\textsuperscript{124}
\end{quote}

This concern that costs were not factored in was echoed later that day by Senator Margetts.\textsuperscript{125} Senators Boswell\textsuperscript{126} and Margetts\textsuperscript{127} saw the issue of one of the policy having indeterminate outcomes, the latter declaiming,

\begin{quote}
The government is pushing this through without any real idea of what its effect will be, but, if you ask the government—as I asked recently—it will blithely cite the wonderful benefits according to the Industry Commission. This is a total assurance of the ideologue that if we do the right thing, somehow everything will be better. There is no analysis of that ‘somehow’ and no ‘how’. The simple assertion is that, by selling everything off, by eliminating every regulation parliaments of the past have brought in for some reason and by preventing parliaments of the
\end{quote}

\textsuperscript{123} Ibid.

\textsuperscript{124} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 934.

\textsuperscript{125} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 979.

\textsuperscript{126} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 995.

\textsuperscript{127} Commonwealth, \textit{Parliamentary Debates}, Senate, 26 June 1995, 1700.
future from making many sorts of regulations, this will automatically bring huge benefits.

The evidence has not been presented. The studies have been started but have certainly not been completed. Here we are about to pass this bill. Why? Is this responsible? Is this sensible? The evidence from the UK is not good; we have been told, ‘We will do better.’ Where is the plan? Where are the resources? Apparently, those will be developed later and we should pass this bill entirely on trust – and put our stocking out for Santa while we are at it.128

Senator Harradine took a different tack. He sought answers to questions in Economics Committee and tabled the answers on 27 June. These contained a number of admissions as to a lack of consideration of costs, individual losses and equity measures.129 Further particular issues identified as not being sufficiently thought through were access rights to private providers130 and the communications industry131 (although both of these were in fact later dealt with).

Senator Cook, representing the Treasurer, answered these claims by saying that the Industry Commission had been asked to undertake a ‘modelling exercise to estimate the revenue and broader economic benefits of competition policy and those related reforms.’132 He conceded that it was ‘outer envelope of reforms’ which were modelled.

128 Ibid.


130 Commonwealth, Parliamentary Debates, Senate, 7 June 1995, 1043, the claim being that access rights to private providers would lead to cherry picking and thus higher costs for less profitable natural monopolies with consequent disadvantage for consumers. It is a difficult claim to understand as the question is one of how to reduce the monopoly power of the resource owner and there is provision for National Competition Council determination of disputes: see Part IIIA of the then Trade Practices Act 1974 (Cth), currently Part IIIA of the Competition and Consumer Act 2010 (Cth).


132 Commonwealth, Parliamentary Debates, Senate, 7 June 1995, 979.
Senator Margetts pursued this by referring to an assessment by Professor John Quiggin that ‘the Industry Commission has represented the upper bounds to possible achievement, rather than the likely outcomes’. Senator Cook’s assertion that the assessment remained subject ‘a range of other values – such as social, environmental, occupational health and industrial relations values’ and that governments were to take these values into account when implementing the reforms remained unanswered. This was the foundation of the ‘weave’ defence discussed below.

Apart from the acknowledgement that the other interests were yet to be formalized but that it was up to the implementing Governments within their democratic processes to flesh them out, the claim that the policy was ill researched and insufficient information was provided to decide whether it should be supported or not was met with the ‘falling man’ defence: it was too early to determine what the precise level of benefit was going to be. This relied on the assumption that there would be some good, it was simply the quantum that was uncertain. The possible rejoinders that, first, there may be no good at all for high cost, and, second, the precautionary or conservative principle that one should not act if risks are involved or, at least, until risks can be formulated, were not articulated.

*Insufficiently debated*

Statements that competition policy was ill or insufficiently researched or that it is a flawed concept were frequently followed by claims it was insufficiently debated. Thus Senator Kernot:

> In the Democrat's view, competition policy represents the victory of economics over equity, of competition over compassion and of accounting over accountability in the management of public services. Yet this bill, and the ramifications of this bill, have been the subject of very little public debate. It has been the subject of minimal public

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133 Ibid.
scrutiny. It has been debated in closed forums—not by Australian people who own this debate and the outcome of it.134

Senator Spindler tied this into the problematics of policy driven by intergovernmental agreement:

... The competition policy agenda incorporates a radical rethinking of the role of government and government services.

This rethink has occurred within a narrow ideological framework based on the concept that competition, just like greed, is good at all times. There has been inadequate public debate on what this agenda means, where it is leading and why this narrow framework should be imposed on the provision of community services, the furthering of ecological sustainability, improving consumer protection, health and safety or the promotion of social equity.

These issues were not being adequately debated, in public or in parliament, before the COAG [Council of Australian Governments] agreement was signed. Most of the detail of the government's agenda is contained in the three agreements signed at COAG in April. The Democrats foreshadow that, in an attempt to broaden the debate over the impact of the implementation of the government's agenda, we will be moving to set up a parliamentary inquiry to look at the agreements and how they will be implemented.135

Senator Cooney of the Liberal Party, while defending competition policy and extolling its benefits, made a rather ambiguous response to the claim that it was insufficiently debated. He said, 'is the case is that we are in a federal system, and this legislation evolves from an agreement made between the various governments in Australia. It is a

134 Commonwealth, Parliamentary Debates, Senate, 22 June 1995, 1697; see also 26 June 1995, 1754 (Senator Margetts) and 27 June 1995, 1868 (Senator Harradine).

135 Commonwealth, Parliamentary Debates, Senate, 7 June 1995, 1043.
problem that we are going to face again and again."\(^{136}\) In other words policy implementation by means of intergovernmental agreements sits uneasily within a federal parliamentary system. Ironically, it was exactly this uneasy fit which was deployed in the ‘duck’ and ‘weave’ defences: between the obligations under the Agreements and the provinces of the various levels of government lay opportunities for blame-shifting.

**Ill defined**

Many liberal party members argued in favour of extending the National Competition Policy to the labour market.\(^{137}\) This was a call that resonated in a variety of ways through the ten years of its existence. Both the National Competition Council\(^{138}\) and the Productivity Commission\(^{139}\) considered, without arguing that it should be taken into the National Competition Policy, the benefits of extending the market philosophy into labour markets. The Howard government attempted to do so in the *Workplace Relations Amendment (Work Choices) Act 2005*, only to promptly lose government.

Some senators called for extensions to competition with respect to coal cartage in New South Wales,\(^{140}\) postal services,\(^{141}\) shipping,\(^{142}\) Trans-Tasman markets,\(^{143}\) and compact

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\(^{137}\) Commonwealth, *Parliamentary Debates*, Senate, 7 June 1995, 995 (Senator Boswell); 22 June 1995, 1704 (Senator Abetz); 26 June 1995, 1758 (Senator Calvert); 26 June 1995, 1763 (Senator Chapman); 26 June 1995, 1775 (Senator Campbell).


\(^{140}\) Commonwealth, *Parliamentary Debates*, Senate, 7 June 1995, 935 (Senator Brownhill).

\(^{141}\) Commonwealth, *Parliamentary Debates*, Senate, 26 June 1995, 1758 (Senator Calvert); 26 June 1995, 1763 (Senator Chapman).


\(^{143}\) Ibid.
discs. On the other hand, Senator Spindler raised the issue of the definition of ‘what government activities do or do not constitute a business activity’.\textsuperscript{145}

This section [Clause 75 of the Bill, seeking to insert a new section 2C into the \textit{Trade Practices Act} 1974] may need to be amended to further clarify what is or is not business to ensure that core services such as health, education, welfare, employment and environmental protection programs are clearly excluded. Otherwise, we could be legitimising heading down the Victorian local government road, in which everything from library services to swimming pools is regarded as a business to be run on a user pays basis, without regard to the public benefit.\textsuperscript{146}

As discussed in Chapter 4 and as raised in the Economics Legislation Committee in 1995,\textsuperscript{147} exactly what distinguishes commercial enterprise and government function is problematic and extraordinarily ill-theorised. However, Senator Spindler raised the issue only to allow it to slide into the assumed position castigating the then Victorian Government for contracting out or commercialising many services in the local government sphere, just as he did in relation to his challenge to competition as government policy. Even to the day of writing, the distinction remains as opaque as it was in 1995.

\textit{Relative Power of the States and the power of the National Competition Council}

The issue of the relationship of intergovernmental agreements and parliamentary democracy arose under a couple of the above headings. In particular, Senator Cooney even in defending the legislation perceived that it was a fraught relationship.\textsuperscript{148}

\begin{footnotesize}
\begin{enumerate}
\item Ibid.\textsuperscript{144}
\item Ibid.\textsuperscript{145}
\item Ibid. Section 2C remains in the \textit{Competition and Consumer Act 2010} (Cth).
\item Commonwealth, \textit{Parliamentary Debates}, Senate, 27 June 1995, 1875
\end{enumerate}
\end{footnotesize}
Margetts, supported by Senators Boswell\(^{149}\) and Harradine,\(^{150}\) was more explicit.\(^{151}\) She complained that under the scheme Parliament had no capacity to have input or review competition policy and that the States were subject to a non-parliamentary federal body. This came to be the claim that effected the most change in the National Competition Policy, leading to a leashing of the National Competition Council in 2000.

That the National Competition Council was so powerful within the Scheme lead to little more than debate over who should be on it. Senator Boswell argued for representatives from small business\(^{152}\) and Senator Spindler for one (or more) representing consumers.\(^{153}\)

**Defences to critique**

During the debate over the Competition Policy Reform Bill, the defences that would become the mainstay of response to critique were developed. There were three.

The first was the ‘falling man’: that there was no point criticising the policy as the full benefits were not apparent yet. Oddly, Senator Boswell articulated it well in criticising the Bill:

> The difficulty with this type of legislation is that the national competition policy bill assembles a framework to assist, review and reform anti-competitive behaviour wherever it is found in the economy — except the Labor taboo area of the labour market. The bill sets in place a reform process, but it does not tell us what the outcome will be or exactly what can be expected in small business and local government sectors. The bill imposes an economic philosophy — if you like, across an economy — and as such the experts appearing before the committee were

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handicapped in providing answers to specific questions about small business. We will not know the answer until the reform process is under way.\textsuperscript{154}

Similarly, in critique, Senator Margetts identified the ‘weave’ defence, that it was not the Commonwealth that was implementing it, rather the States and Territories:

Unfortunately, the government’s response has tended to be that it is providing – as Senator Boswell suggested – a carrot and stick approach to privatisation and competition policy through the states. However, when the questions are asked the response is, ‘Ah, but that is up to the states’. I believe that is a cop-out.\textsuperscript{155}

Finally, as Senators Lees\textsuperscript{156} and Bell\textsuperscript{157} pointed out, the States and Territories enriched by competition payments were empowered with the ‘duck’ defence, that they were obligated to do whatever they were doing by the Agreements or else they would lose billions of dollars.

\textbf{Other debates and speeches}

The debates over the Competition Policy Reform Bill present fair examples of the arguments that followed over the next ten years. Thus, for example, on 18 November 1996 in question time, Senator Cook of the Labor Party sought to exploit comments by Senator Boswell that competition policy was a ‘giant vacuum cleaner sucking jobs out of rural and regional Australia’ by asking the Assistant Treasurer, Senator Kemp, how many jobs had been lost in rural and regional Australia.\textsuperscript{158} Debate followed, in which

\textsuperscript{154} Commonwealth, \textit{Parliamentary Debates}, Senate, 7 June 1995, 933.


\textsuperscript{156} Commonwealth, \textit{Parliamentary Debates}, Senate, 26 June 1995, 1783.


Senator Margetts reiterated the positions spelled out above\textsuperscript{159} and Senator Boswell, somewhat caught between protecting his rural constituency and Coalition policy in favour of the National Competition Policy, relied on the ‘weave’ defence.\textsuperscript{160}

A new element appeared in Commonwealth Parliament with the first speech by Senator Len Harris of the One Nation Party. Senator Harris attacked the National Competition Policy as a ‘textbook theory which has failed in practice’.\textsuperscript{161} Yet, even the, the argument is about implementation:

> Are milk, bread, electricity or local government rates any cheaper as a result of the national competition policy? A mixture of market forces and government controls in certain circumstances can operate for the overall public benefit. Although the economic purists hate to admit it, this mixture of market forces and government intervention is necessary to preserve an adequate level of competition and consumer choice. This mixture preserves the economic opportunities for the whole community, not just the big end of town.

The main problem with the national competition policy has been its overzealous implementation with little or no regard to the anti-competitive nature of unregulated markets and with little or no regard to the very real social costs of national competition policy. Pauline Hanson's One Nation supports a mixed economy that has two sorts of government controls: controls on big business that prevent oligopolies and outright monopolies forming, and measures that support small and medium size business to compete with big business. This counterbalances advantages enjoyed by the multinationals and big business, which include superior purchasing power, taxation advantages and economies of scale. This helps to ensure that the elusive level playing field can be achieved. The economic cost to consumers of

\textsuperscript{159} Commonwealth, \textit{Parliamentary Debates}, Senate, 18 November 1996, 5405

\textsuperscript{160} Commonwealth, \textit{Parliamentary Debates}, Senate, 18 November 1996, 5406

protecting manufacturing industry is justified by the social benefits, more Australian jobs and less Australian debt. Australia is resource rich. We should be leading world technology, not selling our intellectual resources overseas where multinational companies can exploit them with minimal benefits for Australians.\textsuperscript{162}

It is only with the debate over the report, \textit{Riding the Waves of Change}, of the Socio-Economic Consequences of the National Competition Policy Select Committee,\textsuperscript{163} that new arguments appear amongst the rehearsal of the ones made in 1995. The first is more of a rejoinder: that the response to the Report was to redefine the ‘public interest test’ appearing in a couple of places in the National Competition Policy. Senator Murray argued:

One of the reforms being postulated is to try to form some sort of definition of the expression ‘public interest”. The Democrats have two problems with this approach. The first is that we cannot see that just penning a definition of ‘public interest’ is going to help all that much. ‘Public interest' is a far-reaching term that allows for consideration of almost anything. It is a term that has been considered by courts and is used in a number of pieces of legislation. By trying to redefine the term, you may end up limiting the matters that are considered rather than broadening them. Our second problem with a new definition of ‘public interest’ is that, quite simply, it is too little too late. The problem with national competition policy is not the absence of a definition of ‘public interest’; it is the underpinning philosophy which says that deregulation and free market forces always result in a better allocation of resources and better outcomes for society.\textsuperscript{164}

Accordingly, Senator Murray argued, there should be legislation protecting small business and regulates the market power of big business. Even so, he conceded that this

\textsuperscript{162} Ibid.

\textsuperscript{163} Commonwealth Senate, 2000.

is competition policy, albeit of a ‘totally different approach’. Thus competition policy was still necessary, albeit being ‘about society’ as well.165

Senator Cook on the same day raised two refinements of the arguments that had gone before.166 The first was that the National Competition Policy was ‘being handled by unelected bureaucrats, with the government at arm's length saying, “Don't blame me; it's their fault.”’ It was about time, he said, that ‘that process was taken back by elected representatives’. Senator Cook acknowledged that the Council of Australian Governments had agreed that control over the implementation of the National Competition Policy should be resumed by governments but asserted that the third tranche assessments indicated that that was a mere chimera. Ultimately, however, the National Competition Council was stripped of any assessment role in the successor to the National Competition Policy post 2005.

Second was the question of compensation. The claim was that the adjustment mechanisms were insufficient given the pain that was inflicted. This claim resonated with the National Competition Council, and considerable space was dedicated in its Annual Reports and Assessments to a consideration of what was required. Its response, supported by the Productivity Commission, was that compensation was inappropriate, although adjustment assistance might be consistent with fairness.167 The reasoning was

165 Ibid.

166 Commonwealth, Parliamentary Debates, Senate, 27 March 2001, 23101

167 One of the clearest statements of this position is:

Adjustment assistance should be distinguished from the payment of compensation for changes in government regulatory policy, particularly where people have invested largely or solely on the basis of regulatory restrictions. People undertake such investments knowing that government policies can and do change. There is also a strong argument that the adoption of the NCP in 1995 was a clear signal from all governments that existing regulatory regimes may not endure, particularly given the underlying premise of the legislation review program that competition should not be restricted unless there is a strong public interest justification. Compensation in these circumstances needs to be carefully justified.

that residents all face risks, including risks of market changes. Competition policy was simply the imposition of market mechanisms and therefore to compensate for their imposition was to give those who lost a benefit others who lose due to market mechanisms do not receive. Surprisingly this was never challenged. It is a facile deduction from economic theory and does not adhere to the very public choice theory which impelled the National Competition Policy in the first place. The point is that although cost/benefit analysis of policy choices is justified by Kaldor-Hicks efficiency (the policy must produce a benefit that could be used to benefit the losers, but need not do so), the fact that Kaldor-Hicks efficiency does not require compensation to be paid, does not mean it should not be paid.168 Property rights theory asserts that regulation creates property in the rents that regulation provides and that to take that property away is (in the United States constitutional framework) subject to due process.169 Australia has similar constitutional protection for the terms under which the Commonwealth acquires property,170 although it does not extend as far171 nor does it bind the States.172 Nevertheless, the idea that regulation creates rents which are property is the foundation for the preference for competition,173 yet is denied by the rejection outright of compensation as such.


170 Constitution, s 51 (xxxi).


173 ‘Public choice’ is a set of theories developed in James M. Buchanan, and Gordon Tullock. (1962), The Calculus of Consent (University of Michigan Press, 1962); and Arrow, Kenneth J, Social Choice and Individual Values (Yale University Press, 1951, 2nd ed., 1963) 3. More particularly, the idea of ‘rent seeking’ implies governments are the source of special privileges which market participants seek to garner for themselves, so reducing the efficiency overall of the economy. The privileges are provided in legislation and regulations: Gordon Tullock, ‘The Welfare Costs of Tariffs, Monopolies, and Theft’,

The final matter referred to in the 2001 debate was a reaffirmation of the recommendation of the Report. This was that one of the major issues with the implementation of the National Competition Policy was the misinformation that was being spread about the parlous state of the economy of the rural areas and some regions. The National Competition Policy was not responsible for much that was attributed to it. The solution had already been adopted: publicity. That the populace did not understand was conveniently allied to the ‘falling man’ defence to say, ‘There are substantial benefits to come, if only you wait, and you are mistaken if you think the economic pain you are suffering is due to the National Competition Policy.’ This tack was taken by both Senators Knowles\(^{174}\) and McGauren.\(^{175}\)

### Summary

The debates over the National Competition Policy in both houses of Commonwealth Parliament threw up a number of arguments, some of which had effective rebuttals, some which did not and yet were allowed to slip away. Only some arguments lived to influence the carriage of the National Competition Policy. Over the ten years of debate, the position adopted by the parties hardened, the debates became somewhat ritualistic and suborned to other political purposes.

### Newspaper articles

As noted above,\(^ {176}\) some 7,400 newspaper articles deal with or mention ‘competition policy’. Of those articles, some 234 were substantial considerations of competition policy and not mere mentions *en passant*.\(^ {177}\) Amongst the chaos of reportage and


\(^{176}\) Above, n 3.

\(^{177}\) For example, there were numerous about Alan Fels, Fred Hilmer and Graeme Samuels, in which their part in the National Competition Policy was mentioned as a biographical fact.
critical conversations in the 234 and as is apparent in the speeches made in Parliament, a number of themes are discernible. However, in the case of the print media there is greater diversity of topic and less focus within each topic. There is, accordingly, an increased danger of the observer finding amongst them what they are looking for. Nevertheless, the purpose here is to distil a ‘thick description to the immediate surrounding sphere of prompted reaction and its consequential action’; it can be merely hoped that only the irrelevant has been evaporated off by the researcher to leave a sense of the reaction to the National Competition Policy.  

The identifiable issues in competition policy dealt with by newspapers are set out below. Some articles merely represent reporting of or reflections on Parliamentary debates, reports from inquiries (although there were none doing either in respect of submissions to inquiries), public speeches, various books and reports, and other academic writings. Some were contributions to the debate in themselves; in particular Dr John Quiggin conducted a strong critical campaign through the media, and various competition policy supporters, such as Dr David Clark contributed articles and commentary. That the articles were contributions to the debate in themselves or

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178 Communications studies is a burgeoning field. It looks at both the antecedent conditions of communication content and the effects of the communication, as well as of nature of the content itself, to deploy the analysis in Daniel Riffe, Stephen Lacy and Frederick Fico, *Analyzing Media Messages* (Routledge, 3rd ed, 2014) 11. The study undertaken here is not of this ilk. It is a study of media reports as evidence of what happened. In other words here the study is to gain some sort of idea of the signified not of the signifier. Once we have that idea we may quibble over it in terms of the signifier but the range of possible meanings is too small to have discernible effect of the description here mounted.

179 Referencing such a volume of material is problematic. Does one note every single time a particular topic appears, in which case one must be extraordinarily confident that the research process was sufficiently exact and that the categorisation process sufficiently accurate, both of which propositions are doubtful? Or does one simply give exemplars, in which case one is left open to the (unfair) accusation of argument by anecdote? The choice here leans more to the latter with a numerical backing to the proposition that a certain issue was frequently considered. In this some discrimination between articles can be made, with the force of citation lying in the *quantum*. Of course, the *quantum* is approximate, as errors in attribution of articles to certain issues (and some are to more than one issue) and in identification of an article as dealing with a certain issue are inevitable. (And also in counting.) Nevertheless, the *quantum* is a rough measure of importance. Where a claim is made hereafter that the references are representative of all articles written on the point, they will be simply cited. If they are merely exemplars, the words ‘For example’ will proceed the citations.
reporting of such contributions does not need to be distinguished in this context: it is, after all, an exercise in observation as to what was debated, the critiques that were mounted and the reactions to them rather than an account of the debate as such.

**Narratives of the course of the National Competition Policy**

That governments in Australia had developed a joint competition policy and that it was being implemented, and that it came to an end with a form of replacement was reported on as significant in itself in more than 30 of the articles.

The early development of the National Competition Policy was the focus of most of the articles under this heading, which is to be expected since once a policy is being effected its existence is not particularly newsworthy. The first report identified here was in the *Sydney Morning Herald* on 14 August 1993, some two weeks before the Hilmer Committee reported.\(^\text{180}\) From then until April 1995, when the *Agreements* were signed, there were reports of the progress of their negotiation.\(^\text{181}\) Another ten or so of these were about the federal context.\(^\text{182}\)

Later, as interest in the fact of the National Competition Policy waned, so also did the number of articles simply describing it. There were a couple of useful summaries of


Mostly, however, the commentary was more focussed on and critical of
department application, events and people. Nevertheless, towards the end of the period of
the National Competition Policy, there was some interest in what was to happen on its
expiry, although much of that concentrated on the fate of the National Competition
Council.

Overall, then, newspapers did not show much interest in the National Competition
Policy as a thing in itself. The particular issues, controversies and the politics of its
implementation, as summarised below, are far better represented in the record.

Technical Critique

Particular elements of the policy and certain competition law rules as aspects of the
National Competition Policy were subject to a little commentary, more towards the
beginning of the process. Commentary as to competition law as amended in 1995
included articles as to mergers, access, and the structure of administration of

183 Anne Davies and Brad Norrington, ‘Prices May Rise, Warns Consumer group’, The Sydney Morning
Herald, 12 April 1995, 4; Glenda Korporaal, ‘Wonderful New World of Competition’, Business, The
Sydney Morning Herald, 4 November 1995, 41; Katherine Murphy, ‘Crushing Competition’, The
Australian Financial Review, 8 July 1998, 14; Dr David Clark, ‘Microeconomic reform pros and cons’,

184 For example, David Uren, ‘Costello orders more competition reform’, The Australian, 24April 2004,
8; Morgan Melish and Annabel Hepworth, ‘States urge competition shake-up’, The Australian Financial
Review, 9 August 2004, 1; Laura Tingle, ‘Reform agenda sinks in federal-state mire’, The Australian
November 2004, 11; James McCullough, ‘Lifestyle changes loom in review’ The Courier-Mail, 7
February 2005, 17; David Uren, ‘Competition policy tops reform agenda’, The Australian, 2 January
2006, 2.

185 Tom O’Loughlin, ‘Call for abolition of competition council’, The Australian Financial Review, 27
April 2004, 3; David Uren, ‘Competition council wants wider policy reach’, The Australian, 23 June
2004, 28; Stephen Bartholomeusz, ‘When it comes to success, it’s hard to compete against the National

186 “Competition” Still an Enigma’, The Canberra Times, 11 November 1999, 11; ‘Competition policy

Helen Meredith, ‘Trouble ahead with competition law, say experts’, The Australian Financial Review, 11
competition law. Oddly, given the emphasis on the elements as such in the Agreements, few articles were about or even used the terminology of legislative reviews, competitive neutrality, prices oversight and structural reform, and those about access were purely descriptive. Privatisation received more attention, although the treatment was somewhat conditional and equivocal presumably because the Hilmer Committee’s lack of support for it and the explicit statement in the Competition Principles Agreement that the National Competition Policy was ‘neutral’ with respect to privatisation removed it as a critical target. Moreover, in their discussions there was little distinction between ‘commercialisation’ and ‘corporatisation’, and privatisation, which casts some doubt on the understanding of the journalists concerned.


188 Ergas, above n. 187.


191 Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, National Competition Policy (1993), 226, 234-237.

192 Clause 1(5): ‘This agreement is neutral with respect to the nature and form of ownership of business enterprises. It is not intended to promote public or private ownership’.

193 ‘Corporatisation’ is the process of changing the structure of governance of a government activity to that of a corporation, although the OED conflates them in defining ‘corporatisation’: ‘The introduction or imposition of the practices or values associated with a large business corporation; commercialization; the loss of independence or individual character, homogenization.’ Comp.: Australian Law Dictionary (OUP, 2013): ‘Transformation of state-owned enterprises into incorporated entities that carry out the functions at arm’s length from the government’; Encyclopaedic Australian law Dictionary (LexisNexis, online accessed 3 January 2014): ‘An approach to improving the performance of State enterprises by
Some commentary went a little further, dealing with risk and the international dimension of the applicability of competition laws. Overall, there was no discernible impact from the technical critique, even that revealing some expertise. However, much of the critique of impacts on particular regions and industries, of the party political discussions and of federalism was about the impact of particular elements and the structure of the National Competition Policy itself, yet this was not reflected in the media discussions. The point is that it was not seen as a matter of the elements or the National Competition Policy, rather of competition policy generally and there was little discussion of the technical detail of what was supposed to be happening.

**Impacts on particular industries and regions**

More than fifty of the articles in newspapers identified here as substantially about the National Competition Policy reflected the concerns expressed in Parliament as to the effect of implementation on particular industries and regions. This probably understates the amount of media discussion as the newspapers surveyed were the major Australian periodicals, thus excluding those where one would expect that most of the more local matters would be recognised: when an impact is on a particular region or industry, it is creating managerial forms and structures similar to those of large private enterprises. The aim is to ensure that State enterprises perform in the interests of the owners, in this case the public. Managers are assigned full authority to manage the day to day affairs of State enterprises in accordance with a statement of commercial intent negotiated annually with the responsible Minister; Stephen Bottomley, *Government Business Enterprises and Public Accountability through Parliament*, Research paper 18 1999-2000, Parliamentary Research Service, Department of Parliamentary Library, Parliament of the Commonwealth of Australia, Canberra, 2000: ‘the adoption of private sector management models and legal structures’. The definition of ‘corporatisation’ adopted here focusses on the result of a ‘corporation’, not that which was changed. ‘Commercialisation’ is prior and somewhat similar, although not so frequently referred to in competition policy debates; it involves setting commercial activities for the organisation whatever its form. ‘Privatisation’, in this context, is the transferral of ownership of the consequent corporation away from the government. The other, and contradictory, context is the transformation of a widely or publicly held (usually listed) corporation to a closely held one, usually with ownership by management.


Ergas, above n. 187.
not of significance to a wider audience. In any event, some of the articles noted here are reports of speeches and protests about such effects and others were direct arguments for or against particular implementations of elements of the National Competition Policy in themselves.\(^{196}\) They were spread relatively evenly throughout its currency.

Going from the general to the particular, concern about differential effect was expressed in seven articles,\(^{197}\) about the differential regional impact on rural regions in six,\(^{198}\) on agriculture as such in only two.\(^{199}\) However, the impact on particular rural industries was well documented: statutory marketing of various products,\(^{200}\) wheat,\(^{201}\) sugar,\(^{202}\)

\(^{196}\) While the search term was ‘competition policy’ and it picked up a large number of articles, it is clear that a number of articles escaped the net. For example, the application to prisons produced just one ‘hit’ (Katherine Murphy, ‘Private jails raise key questions’, *The Australian Financial Review*, 17 June 1997, 28) yet the privatisation of prisons was highly controversial. The net was not broadened in response because such articles were not about the National Competition Policy, rather about privatisation as a thing in itself. Nevertheless, the search produced a broadbrush picture of what was discussed and intuitively that picture seems representative.


rice, forestry, dairy and chickens are examples. Other sectors about which there was comment included newsagents, prisons, welfare supply, pharmacies, airlines, education and some local government services.


Paul Chamberlin, 'Battle Looms Over Sugar Tariff Issue', The Age, 27 December 1996, 2; Fiona Kennedy, 'Reforms leave sour taste in sugar belt towns', The Australian, 23 December 1996, 3

Katherine Murphy, 'Canberra flags single desk for Rice', The Australian Financial Review, 6 January 1999, 158


Dennis Atkins, 'One Nation sure to capitalise on dairy disaster fallout', The Courier Mail, 12 June 2000, 15.


Katherine Murphy, 'Private jails raise key questions', The Australian Financial Review, 17 June 1997, 28

'Concern over big welfare agencies', The Advertiser, 22 June 1999, 10.


(especially the Belconnen swimming pool in Canberra\textsuperscript{214}). The professions, especially the legal profession\textsuperscript{215} also received some comment.\textsuperscript{216}

Most of the articles reported on various speeches by public figures arguing against the application of competition policy to the industry or region. The argument was generally that it was not a Good Thing for the industry or would devastate the region. In other words, there was a public interest in not applying competition policy. Some articles reported on government decisions not to apply the policy and others on what happened when it was applied; for example, reductions in airline safety or corporate collapses. Certainly the sheer number of these articles demonstrates the concern felt in the community. It was this concern which prompted at least two major government reports\textsuperscript{217} and was referred to in most of the others dealing with the National Competition Policy.

The commentary also highlighted some issues not otherwise apparent in the literature on the National Competition Policy. In particular, the decisions not to apply National Competition Policy procedures to particular industries, such as newsagents, pharmaceuticals and lawyers, do not figure largely in the official literature or even in Hansard. Yet they evidence the fact the application of the National Competition Policy was subject to political influence. Journalists treated this as obvious; however, it was a substantial derogation from the design of the National Competition Policy. This was that States and Territories chose what legislation to subject to legislation reviews and had the role of weighing the public interest but that the National Competition Council

\textsuperscript{214} ‘Competition Policy Gone Mad As ACT Shelves Belconnen Pool’, \textit{The Canberra Times}, 23 May 1998, 1, and many articles in the same newspaper in the following days. Five years later: ‘A Ripple effect, or just Big Splash’, \textit{The Canberra Times}, 10 April 2003, 17.


\textsuperscript{216} Katherine Murphy, ‘Competition reforms “a threat”’, 5 September 1997, 17; Leon Gettler, ‘Costs Warning on Competition Policy’, \textit{The Age}, 18 November 1997, 4

\textsuperscript{217} Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, \textit{Riding the Waves of Change}, 2000; Productivity Commission, \textit{Impact of Competition Policy Reforms on Rural and Regional Australia}, Report No 8, 1999
had the role of determining whether competition payments should be made by assessing the degree of compliance with the intentions of the policy. Certainly the National Competition Council railed against exemptions and attempted to spread the coverage wider, making deductions from the competition payments accordingly but it was just this attempt by the National Competition Council which brought criticism in the late 1990s and its eventual demise as an arbiter of progress in the regime which replaced the National Competition Policy. Moreover, the Commonwealth was not subject to the competition payments regime; as the National Competition Council noted in its final assessments, the Commonwealth was a laggard in application.

**Assessments of the National Competition Policy**

About twenty articles posed the question of whether the National Competition Policy was working or, later, whether it had worked. The first ones appeared in May 1996218 and they continued until 2005.219 Some reported defences220 others criticisms, either that it was good and not being well enough implemented,221 or that it had in its present

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form should be reformed or not implemented at all; most of these accepted that there was a question in the first place. Quite a number of further articles suggested it would work better if the public understood it and that substantial effort should be put into making them do so. These reflected a major concern reflected in the official documentation that criticism arose from ignorance and therefore as much as possible should be done to educate the public. This was discussed in Chapter 6; it is not surprising that newspaper articles complied.

A notable aspect of critique directed at the National Competition Policy was the engagement of the National Competition Council in defending it. This was particularly so after the suggestions, noted immediately above, that the real problem with the National Competition Policy (insofar as one was admitted) was the explanation of it. Indeed the Socio-Economic Consequences of the National Competition Policy Select Committee recommended as much in 2000. Even before that recommendation, the then President, Graeme Samuel, directly replied to a John Quiggin critique. Another


222 ‘Privatisation not only solution, says report’, *The Courier Mail*, 23 January 1999;


exchange was prompted by an Australian Financial Review editorial. A letter was published the next day criticising the editorial, to which Ed Willett, the executive director of the National Competition Council replied in defence of the editorial.

Whatever the imperative to communicate, the assessments and critiques are notable for their lack of detail. It is a matter of polemic rather than reason. There is little assessment of the assessments. This goes to support the point frequently made in earlier chapters that assessment was all but impossible and that debate was therefore ill-informed. For these reasons even the early arguments that competition policy was necessary are evidence of a debate but have little otherwise to add to that debate. They are statements of a position rather than reasoned arguments. At most they assert the ‘falling man’ defence to the criticism that there was no evidence the National Competition Policy was working. This was that there would be no evidence until the completion of the program so there was no point criticising it now.

**Political context**

Politics is the stuff of newspapers, especially national ones. Thus numerous articles were published about the politics of the National Competition Policy: thirty-four of the

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231 There are some exceptions to this, where the issues that were to arise were accurately predicted: for example, Jeff Bateson, ‘Policies Facing Sticky Realities’, *The Australian Financial Review*, 22 March 1994, 17.
articles surveyed for this analysis directly commented in terms of party politics and another 16 in terms of the state politics and election results.

The extent of discussions of the politics of the National Competition Policy represents direct evidence of another matter not obvious in the official literature, although its existence can be inferred from some decisions and comments, and the emphasis in the media on the effects of implementation on rural regions and industries. This was the deep unpopularity of the National Competition Policy in rural and regional areas, and more generally in the states of Western Australia, Queensland and, to a less obvious extent, South Australia. This various politicians seized upon to bolster, or perhaps simply to maintain, their electoral chances. Most notably, Pauline Hanson made the National Competition Policy one of her chief targets for polemic and its extinguishment became one of the chief planks in her One Nation Party platform. While this is commonly commented on in the literature about the National Competition Policy, it was also true of elements in the National Party, putting great strain on the coalition with the Liberal party, a coalition that was in power for most of the currency of the National Competition Policy. Some of this has already been dealt with in the context of Parliamentary proceedings.

The unpopularity of competition policy generally has been a feature of its implementation in many places around the world since the 1980s. There have been innumerable articles in the media and academic literature from a variety of disciplinary perspectives written about it as well as plays, books and even musicals.


233 Bronwen Morgan, Social Citizenship in the Shadow of Competition (Ashgate, 2003); see, for example, Tod Moore, ‘Economic Rationalism and Economic Nationalism’ in Bligh Grant (ed), Pauline Hanson One Nation and Australian Politics (University of New England Press, 1997) 50; Geoff Dow, ‘Beyond One Nation: Interventionist Responses to Economic Liberalism’ in Michael Leach, Geoffrey Stokes and Ian Ward (eds), The Rise and Fall of One Nation, (University if Queensland Press, 2000) 248.


235 For example, Elliot Perlman, Three Dollars, (Picador, 1998); filmed Three Dollars (directed by Robert Connolly) 1998.
However, it is important to distinguish that literature from the topic of this thesis. Here, for reasons set out in Chapter 1, the account is restricted to the National Competition Policy and hence the interest is in political reaction specifically to it. Of course, the reaction might have been to something else yet naming the National Competition Policy as the responsible policy. These reactions are also of interest here because, even if the attribution is erroneous, the National Competition Policy itself might have altered in consequence. Moreover, continual and futile efforts were made to disentangle the effects of the National Competition Policy from other developments of the time, culminating in the Productivity Commission’s final assessment where the impossibility of doing so was conceded. If the Productivity Commission in defending its position that the National Competition Policy was a very Good Thing could not distil out the effects of the National Competition Policy, one can hardly expect anyone else to be able to do so.

As adverted to above, the most famous political reaction to the National Competition Policy was the rise of One Nation. The abolition of the National Competition Policy was one of its major party platform planks. This is easily traced through the newspaper articles, from mid-1998237 when it won 11 seats in Queensland’s 1998 election. The impact of the One Nation’s meteoric rise was felt in the policies of the National Party238 and in a lessening commitment to the policy by the Commonwealth Government239 and the Opposition.240 As mentioned before, the National Competition Council as well as

236 For example, Billy Elliot the Musical (Music by Elton John, script and lyrics by Lee Hall) first produced 2005; also a film Billy Elliot (directed by Stephen Daldry) 2000.


other bodies attempted rebuttal but, in the words of Robert Manne in 2001, One Nation’s attack on the National Competition Policy was too inarticulate to be rationally argued. Oddly enough, after 1998 the commentary died away, to be replaced with dissection of the National Party’s reaction. Perhaps this was perceived by editors to be more interesting as it reflected on the unity of the Government.

The National Party had already suffered from reactions to the National Competition Policy. This came particularly in the form of attacks on it by Senator Boswell and Mr Bob Katter, most of which are recorded above under Speeches in Parliament. In 1995, in the final stages of negotiation of the Agreements and in response to them, there even was talk of splits in the Coalition, if not the National Party itself. These tensions continued for the remainder of the National Competition Policy. In 2001 Bob Katter


left the National Party to form his own party, substantially over the debate over the National Competition Policy.247

The consequence of the ‘hostility’ of many National Party members to the National Competition Policy led to a ‘wobbly’ commitment to it by their Coalition partners, the Liberal Party.248 This appears to be the cause of the exemptions and exceptions provided by the Government from 1996 on, as detailed above under ‘Impacts on particular industries and regions’ above. Labor also diluted its commitment, apparently in response to vigorous urging by the Party in Queensland.249

Most attention was paid to attacks on the National Competition Policy in Queensland250 and, to a lesser extent, in Western Australia.251 That there was focus on Queensland is to

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be expected as One Nation originated in that State. Little was said about the National Competition Policy directed specifically at other states and territories. In respect of Victoria, this is unsurprising as its Government, until it changed in 2001, was stridently pro-competition policy and hence most discussion was internally directed. South Australia received little mention although some of the earliest protests were from there. Nor did New South Wales receive much consideration. There was a little media commentary on the impact of the National Competition Policy on election results, asserting that elections were lost on the issue of electricity and privatisation in New South Wales and Tasmania, but this is far less than the commentary elsewhere which was about changes in government in South Australia, Western Australia and Queensland.

Perhaps the most egregious gap in the coverage was in relation to local government. This, as was seen when the elements of National Competition Policy were discussed in Chapter 7, was the cutting edge of the implementation of the policy yet the national newspapers said little about it.

Overall, then, the media coverage of the politics of the National Competition Policy overwhelmingly focussed on the reaction represented by One Nation and the consequent impacts on the policies of other parties. That there were such impacts is clear, as the Commonwealth Government wobbled in its commitment, especially by granting exemptions. Other Governments deployed the public interest criterion of legislation reviews to escape electoral impact, a process well documented by the National Competition Council as detailed in Chapters 6 and 7 above.

**Particular critiques**

A number of issues and critiques received just a few comments. This is not to say they are any less important or cogent, merely that newspapers did not see them as such in relation to competition policy.

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253 For example, Bronwen Morgan, *Social Citizenship in the Shadow of Competition* (Ashgate, 2003). See the discussion in Chapter 7.
Equity

One of the issues which for an economist is peripheral, if not irrelevant to competition policy, is equity. Efficiency for them is one thing, equity is another. Equity, in the design of the National Competition Policy was to be a matter of the public interest and was a mediation of the impact of its elements.\textsuperscript{254} In other words, the pursuit of competition might derogate from equity, but this was a choice that had to be made in each case. Thus the question of who was to benefit from the National Competition Policy was not a matter of critique of competition, but of implementation actions, including exemption or Community Service Obligations.\textsuperscript{255} Nevertheless, who benefitted from the National Competition Policy and whether overall equity in the community was affected and to what extent was a matter of contention.\textsuperscript{256} The most pointed of these critiques were that consumers were not benefitting\textsuperscript{257} and that it was directed at serving big business\textsuperscript{258} – a proposition the Business Council of Australia

\textsuperscript{254} The Hilmer Committees put it this way (Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, \textit{National Competition Policy} (1993), 5):

\begin{quote}
The promotion of competition will often be consistent with a range of other social goals, including the empowerment of consumers.[Footnote deleted.] However, there may be situations where competition, although consistent with efficiency objectives and in the interests of the community as a whole, is regarded as inconsistent with some other social objective. For example, governments may wish to confer special benefits on a particular group for equity or other reasons.
\end{quote}

Clause 1(3)(e) of the \textit{Principles Agreement} considered ‘social welfare and equity considerations’ to be one of the matters ‘to be taken into account’ when balancing the benefits of a particular policy or course of action against its costs, when determining the merits of those things or when assessing the most effective means of achieving a policy objective.


encouraged by bewailing lack of progress. On the other hand, complaints of lack of equity were met with the claim that competition leaves everyone better off, a proposition about averages of little comfort to individuals who lost employment or towns and regions that lost services.

Social Costs

Related to equity are the social costs of implementing competition policy. Just as with equity, these are defined as outside what competition does. The social costs in relation to particular regions and industries are dealt with above, but a couple of articles explicitly considered social costs in general terms.

Ideological Biases

That the Productivity Commission and the National Competition Council had particular theoretical orientation has been considered in Chapter 5. That this was so was commented on but rarely, particularly considering the degree to which such biases were the stuff of Parliamentary debate. Nevertheless, both the Productivity Commission and the National Competition Council were accused of lack of objectivity, although all but one article were written by just one journalist, Ian Henderson.


Overweening Power of the National Competition Council

Much more obviously than the Parliamentary debates reveal but often mentioned in reports of inquiries, the power of the National Competition Council was also a frequent topic of newspaper discussion. The National Competition Council was given the power of assessment by the Implementation Agreement, but the question that exercised many articles was whether its intended power was exceeded; indeed, some of these explicitly asked whether such power as it had was appropriate. Some, of course, defended its powers or viewed them complacently. The main ground upon which the National Competition Council was argued to be illegitimate was its power over Governments.


Theory of Competition

Just occasionally, journalists ventured into either direct critique of the economics of competition policy or, more frequently, reporting of such critiques. Such matters the contest between co-operation and competition, contestability theory, and what competition really is, can be added to the particular technical critiques mentioned above. John Quiggin added the problem of measurement: even if you accept the theory, was it as effective as the figure assessments generally derived? Despite these interventions, little of the economics was critically considered.

Bureaucrats in Charge

A feature of accounts, including that in Chapter 4, of the development, negotiation and drafting of the Agreements at the core of the National Competition Policy is the centrality of bureaucrats to the policy. This became a political issue in 1999 which was picked up in three articles. Generally it was somewhat allied to the arguments about the ideological biases of the Productivity Commission and the National Competition Council, but there is a hint of Pusey’s ‘economic rationalism’ about at least the reporting, if not that reported on. Thus it is a broader point and one worth noting that there was a challenge to the discursive structure of the way the National Competition Policy was developed and implemented. That being said, it is also worth noting that the


271 See Chapter 5.
issue of the discursive structure of policy formation and implementation is only one of many issues that arise from a study of the National Competition Policy and it is one which had the least impact on that implementation. Moreover, if there was bureaucratic influence it does not follow that there was some sort of plot or bureaucratic self-interest at work: it is wiser to assume incompetence. There was at least one report of the lack of bureaucratic expertise, particularly at the State, Territory and especially local government level, to do the sorts of things expected of them by the Agreements, although one could make the tart remark that lack of expertise does not militate against undue influence.

Federalism

A core feature of the National Competition Policy is that it operated in a federal environment: the Agreements were between governments and were formulated in the context of the federal/state vertical fiscal imbalance. Many of the articles in the newspapers reflected this by discussing the relations between the Commonwealth government and those of the States and Territories. Some were about the differential impact between economies, others about the politics of the situation.

Early articles were about the making of the Agreement. Indeed most of the discussion of the formulation of competition policy was in terms of the impact on federation. This supports the argument that the National Competition Policy was an articulation of

competition policy more generally within the Australian federation, although that still leaves open the possibility that in doing so competition policy itself was reformulated. In any event, the early descriptions of federalism culminated in (surprisingly few) reports on the eventual structure of relations as set out in Chapter 2.\textsuperscript{274}

Later articles began to see the federal aspect of the National Competition Policy as an inhibition or distortion of competition policy.\textsuperscript{275} There were reports of National Competition Council frustration with the progress of States and Territories (and later the Commonwealth) in implementing the various elements of the National Competition Policy.\textsuperscript{276} By 2000, the compact represented by the Agreements was thought to be fraying but there was little agreement on alternative directions.\textsuperscript{277} Few of these drilled down into the public interest test, which circumscribed the freedom of governments to deviate from the competition principle enunciated in the Agreements.\textsuperscript{278}

**Political Economy**

In as much as Bab Katter and Mark Latham gave speeches in Parliament espousing political philosophies of differing varieties, the newspapers picked up two major discussions of the place of competition in the pantheon of policies available to governments. These were as to the nature of ‘civil society’ and the promotion of a

\textsuperscript{274} Mike Nahan, ‘Reform not bound to competition policy’, *The Australian Financial Review*, 28 April 1995, 24


‘third way’ between welfarism and neo-liberalism. Neither appeared to have the slightest effect on the National Competition Policy, although that is not to say that the intellectual legitimisation, or the possibility of it, of countering the hegemony of the goodness of competition did not foster the controversy over the Victorian Auditor-General or the recasting of the public interest test and the constraints placed on the National Competition Council in 2000.

In 1995 Eva Cox delivered the Boyer Lectures, entitled *A Truly Civil Society.* 279 In these speeches, she argued that the quality of life, human needs and the social system itself were undervalued compared to the emphasis placed on wealth creation. Trust, goodwill and co-operation were being undermined. This is in contrast to competition, which in the National Competition Policy is the default when no positive public interest can be shown.280 These lectures were extensively reported, Eva Cox herself contributing,281 and the connection with competition policy made.282 However, there was little rigorous analysis, in terms of the civil society philosophy, of the National Competition Policy as an articulation of competition policy.283 This provided a space for defenders, even proselytizers, of competition to argue against notions of civil society, which they did it surprisingly strong terms.284


280 For a more recent similar essay, see Tony Judt, ‘What is Living and What is Dead in Social Democracy?’, *The New York Review of Books,* 17 December 2009.


283 The only attempt seems to have been Geoff Davies, ‘The crumbling of competitive ideals, *The Canberra Times,* 5 October 2001, 9, and this was a commentary by an academic.

In the 1990s, the sociologist Anthony Giddens coined the term ‘the Third Way’ to describe attempts by governments and theoreticians to develop approaches that lay between left and right, between statism and neo-liberalism.285 These ideas were rapidly adopted by politicians such as Tony Blair in the United Kingdom286 and, relevantly, Mark Latham in Australia.287 The former was Prime Minister of the United Kingdom between 1997 and 2007, and the latter was the Leader of the Opposition in the Parliament of the Commonwealth of Australia between December 2003 and January 2005. Both these politicians published books espousing the Third Way in 1998 and accordingly there was much media discussion (albeit mostly written by Mark Latham himself), in this case extending to 2006.288 Again, there is no traceable direct impact, although the impact on the regions and rural industries received more attention from that time. It is noticeable that Mark Latham did not resile from promoting the benefits of competition, taking an approach very similar to that implicit in the National Competition Policy. Although Latham did not explicitly make the connection, the National Competition Policy itself is an excellent example of the Third Way in practice as it provided for competition mediated by the public interest.


Conclusions

While the themes and topics in each of the main data sources (inquiries, *Hansard* and print media) for this chapter are reasonably obvious, there is a surprising diversity in the topics each covered. Inquiries are directed by terms of reference and accordingly their reports are confined to the topics at which they are directed. Even the submissions to the inquiries are limited, despite there being no requirement for them to be so. In the three here reviewed, only the Senate Select Committee Inquiry into the Socio-Economic Consequences of the National Competition Policy\(^ {289} \) was appointed in reaction to rather than in support of the National Competition Policy. Even then the recommendations were tempered by the bi-partisan responsibility for the National Competition Policy. Speeches in Parliament were mostly similarly confined, although Democrat, Green, One Nation and independent members of Parliament repeatedly denounced it on a number of grounds. Newspaper articles dealt with a different yet discernibly related set of themes, mainly focussing on the politics of the National Competition Policy.

Despite assertions to the contrary in numerous reports and speeches, there was considerable opposition on clear grounds to the National Competition Policy. These grounds were that it:

- implemented competition policy, which is wrong in itself.
- was ill thought out in terms of
  - competition policy as a thing in itself and in terms of the way competition policy was pursued;
  - as enabling the implementation of certain elements of competition policy in a federal state; and
  - in its administrative arrangement, particularly the power of the National Competition Council over sovereign governments and the conferral of power on bureaucrats.
- challenged notions of parliamentary democracy both in respect of the administration as detailed above, but also in relation to governance of governments by agreements made by prior governments;

\(^ {289} \) Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, *Riding the Waves of Change*, 2000.
• had devastating impacts on individuals, regions and industries and that compensation was ruled out; and
• caused disruption to the fabric of Australian society.
• did not do what was claimed it would do are that it did do.

Governments developed defences to critique. These defences if not persuasively effective, were sufficient to enable them to ignore the critique. They were the ‘duck’, the ‘weave’ and the ‘falling man’.

• The ‘duck’: this was deployed by implementing governments. It was to the effect that since the implementing Government was required by the Commonwealth to do these things and because huge amounts of money depended on it, complaints should be taken to the Commonwealth.

• The ‘weave’: this was deployed by the Commonwealth. It was to the effect that the National Competition Policy only set up a structure which enabled the decisions of implementing governments to be effected without the distortions of the federal/state vertical fiscal imbalance. Implementing governments still had the capacity and were required to take into account the public interest. If the public, individual, regional or industry interests were insufficiently regarded, it was a matter for the processes of the implementing government and not the Commonwealth.

• The ‘falling man’: this was deployed by all governments. It was that at any point in time it was too early to ascertain whether the benefits that would flow from the implementation of the National Competition Policy. That benefits would flow was the best advice that governments had.

It was not only explicit defences that fended off opposition. The very structure of the National Competition Policy confined critique. The terms of reference of inquiries were controlled by Governments and to the extent that they were not the composition of the Committee was sufficient. Moreover, it had been put in place by the major parties acting together and with the implementing governments by agreement. Accordingly party politics in Parliament precluded sustained debate. In the House of Representatives there was virtually none; in the Senate a little, with the same protagonists for the decade. Further, substantial money flows bound governments to the National Competition Policy and bureaucracies adhered to rationalities that made it incontestable.
In the media, a substantial campaign, explicitly encouraged by every Parliamentary report and most National Competition Council reports of various types, argued strongly against any doubt cast on the National Competition Policy. All critique was viewed as the product of ignorance and thus to be combatted by education and commentary.

Competition policy is clearly about the political economy of society. It also, as various submissions argued, is about the nature of society. The Standing Committee on Family and Community Affairs of the Commonwealth House of Representatives in 1998 identified in explicit terms that not enough was known about the impact of competition policy on the welfare system and society generally. Yet it was rebuked by the Government of the day. Debate, or even discussion, about competition policy in these terms was not joined during the currency of the National Competition Policy. The most that can be said of the media is that it picked up on the Civil Society movement, mainly due to the Boyer Lectures by Eva Cox in 1995, and the Third Way, although this was not so much critical as supportive of the formulation of competition policy in the National Competition Policy.

This is not to say there were not many possible ways to locate the National Competition Policy in a sociology of Australia or even within economic theory. Critical discourses substantially ignored in all data sources reviewed here included:

- The debate over the nature of the person within neo-liberalism;
- Intimate citizenship as the other of the consumer-citizen;
- The ethics of competition;


291 It has surfaced occasionally since then too; for example, Glen Lehman and Ian Tregoning, ‘Public-Private Partnerships, Taxation and a Civil Society’, (2004) 15 *Journal of Corporate Citizenship*, 77

292 See above n 36.


The public choice economics as justifying the preference for competition;\textsuperscript{295}
Problems of measurement;\textsuperscript{296} and
Economics itself
\begin{itemize}
\item Transaction cost economics;\textsuperscript{297}
\item Kaldor-Hicks efficiency and compensation;\textsuperscript{298}
\item Feminist economics;\textsuperscript{299}
\item The problem of second best;\textsuperscript{300}
\item Property rights economics as precluding the taking of rents;\textsuperscript{301} and
\item Epistemology.\textsuperscript{302}
\end{itemize}

All of these were available to reporters, parliamentarians and committees, yet none of them had any discernible effect on discussion, let alone on implementation of the policy. What confined the debate is both epistemologically and evidentially difficult to ascertain. It might have been the hermeneutic nature of economic theory, the lack of knowledge and expertise of those involved, the power of government and bureaucracy ranked against it, or the lack of interest of the public in more difficult topics.

\textsuperscript{295} See above n 169.
\textsuperscript{296} This was substantially the points made repeatedly, but to little effect by John Qiggin; see above nn 122, 133, 190, 211, 213, 223, 224, 226, 252, 269, 288. It is also made, \textit{post hoc}, by the Productivity Commission in its final assessment: Productivity Commission, \textit{Review of National Competition Policy Reforms}, Report No 33, 2005
\textsuperscript{298} See, again, above n 169
\textsuperscript{299} Gillian Hewitson, \textit{Feminist Economics: Interrogating the Masculinity of Rational Economic Man} (Edward Elgar, 1999).
\textsuperscript{301} Above n 168.
In the circumstances of a profoundly circumscribed debate, opposition took the form of irrationality. There was no underlying logic to the One Nation platform or even Bob Katter’s agrarian protectionism. Yet of critiques, irrationality was the most effective. The response was a weakening of the administrative arrangements and an increase in exemptions. Paradoxically, heightened efforts to educate and inform were made, to little discernible effect.
Chapter 8
Conclusion

The story of the National Competition Policy, in so far as this thesis relates it, is now complete. This Chapter makes sense of that story and in so doing establishes the arguments of this thesis, thereby concluding it. It does so by taking up the hypotheses and questions posed in Chapter 1 and testing and answering them. It also makes observations on matters thrown up by that story in terms of (in order of generality) the National Competition Policy, policy studies and the epistemology of research. Finally, it reflects on the thesis, considering its limitations in achieving its aims. However, before it moves to those matters, it summarizes the story and how it was narrated.

A Thick Study

Chapter 1 develops out the idea of thick studies. It is a way of minimizing theory contingency. It focusses on the transactions that take place and demands that as detailed a description of those transactions as possible be set out. From that observations are made. It represents a direct challenge to the scientific method of hypothesis and refutation, reverting to the older tradition of conclusion from observation. It also takes up where governmentality leaves off, focussing on discourses constituting power and techniques of exercising it as encapsulating and making possible the transactions of government. Unlike, perhaps even despite, governmentality, it does not abjure evaluation.

The thick approach was adopted here because to date the study of the National Competition Policy has generally been undertaken from particular theoretical standpoints and the conclusions reached have inevitably been confined in relevance to those respective standpoints. Even the obvious question, ‘Was the National Competition Policy worth doing?’ has never been asked from a perspective other than economics and the answer has always been conditioned by the measurements that economics carries out.
On the other hand the volume of material dealing with the National Competition Policy is enormous; this necessitates condensing and abstracting the data. Yet any process by which the data is distilled so that the important remains prejudices the idea of thick study. Even the choice between what is ‘data’ and what is not involves a discourse about epistemology which distorts the study. There is, therefore, a Scylla of theory contingency and a Charybdis of an unbounded volume of material. The path chosen between them was to summarise with current theory contingencies in mind as abstractions to be avoided, to describe the National Competition Policy as multiple stories and to spend ten years looking at the material.

If a thing is to be examined in a thick study – indeed, in any study – it is best to commence by defining it as exactly as possible. This is especially true when looking at matters of human society. However, to do so is fraught with issues; for example, the definition chosen might predetermine the analysis, or the matter might have no fixed boundary. Yet those are not reasons to avoid the task; they are merely reasons for care. Chapter 2 defined the National Competition Policy as certain agreements between the governments of Australia, although not including local government. Those agreements contained a set of prescription, an institutional structure and a set of mutual promises. The necessary care was to ensure that taking those agreements as representing the National Competition Policy did not preclude the examination of other ways of thinking about the National Competition Policy.

Taking the National Competition Policy to be the terms of a set of agreements has the advantage of providing a fixed point for the study, both in time and in terms of contents, in a situation where there is no unanimity as to what ‘National Competition Policy’ means yet the term is bandied about as if it did indeed have a fixed meaning. Accordingly, a story could be developed which, after describing the thing itself, would deal with its context, history and implementation. It is this that is developed in Chapters 3 to 7 and presented in digestible form immediately below. ‘Implementation’, dealt with in Chapters 5 and 6, is divided into an overall timeline and a more detailed focussed timeline for each of the elements of the policy. This story represents the major achievement claimed for this thesis: through it the National Competition Policy is ‘made known, analysed and assessed’ in ways heretofore not possible.
The Story in Brief

In the 1980s there was a Western world-wide movement, variously described, away from state-centred governance to a greater reliance on market mechanisms, contestability of service provision, and strong competition laws. We can call the movement as one implementing competition policy. There was little intellectual challenge to these ideas nor to their foundation in economics. Some argued that government bureaucracies were captured by the ideas of economics; there is very little evidence against that proposition.

Competition policy was evident in most parts of Australia and most particularly in Victoria. However, certain projects were stymied by the federal arrangements obtaining in Australia. These projects included a national electricity market and water reform. Were State and Territory governments to give up revenue flows from government business enterprises any tax revenues deriving from advantages to the community would flow to the Commonwealth, not to the State and Territory government and thus revenues would be compromised. Moreover, there was no established forum in which such matters could be negotiated.

In the early 1990s, a number events coalesced into the development of the National Competition Policy. The first of these was that governments for the most part (Queensland and Western Australia being more reluctant) were keen to keep implementing competition policy, albeit with varying emphases. The Commonwealth, with the agreement of State and Territory governments, set up an inquiry to formulate a universally applicable notion of what competition policy entailed and how it should be implemented. The result of this inquiry was the Hilmer Report. In it competition policy was formalised into a number of elements, procedures for implementation in the federal environment were suggested and a programmatic approach recommended. It strongly, even axiomatically argued that competition was good and that it should displace other ways of doing government business to the extent possible given the public interest. It threw doubt on even that concept, warning against ‘rent-seeking’ in

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1 Committee of Inquiry into National Competition Policy (Fred Hilmer, Chairman), Commonwealth, National Competition Policy 1993.
government. It thus drew a boundary on government: that it should do nothing that could be done in a competitive process and monopoly should be constrained wherever possible. No rigorous counterargument to these propositions were made either to the inquiry or later, apart from union and church-based argument that cooperation was to be valued. The economic ideas were not challenged.

The second major circumstance involved in the development of the National Competition Policy was the development of a forum for meetings of Heads of Australia’s Commonwealth, State and Territory governments. This was the Council of Australian Governments. Prior to its establishment there had been considerable discussion about the federal arrangements in Australia and some structural issues that they were seen to create in relation to policy and governance generally. A forum for negotiation and agreement of the issues by governments was a way of compromising between the separate sovereignties of the State and Commonwealth (or federal) polities and the need for national coordination. The National Competition Policy was one of the earliest matters considered within the Council of Australian Governments. It took the form of a set of agreements between the Governments. Indeed, their negotiation comprised much of the early business of the Council, arguably playing a formative and legitimating influence on its structure and functioning.

The third major influence on the development of the National Competition Policy was a change in the institutional structure of policy advice within the Commonwealth government. Consultative bodies set up in the 1980s were transformed into expert bodies. Out of this process arose the Productivity Commission, the function of which was to research facts, for which consultation was data-gathering or theory testing, rather than consultation as a process of eliciting views. While still sub nom. the Industry Commission, the Productivity Commission produced a legitimating assessment of the benefits of implementing some form of national competition policy. This was an indication of what a particular model of the economy calculated as the best possible outcome, although until about 2000 it was taken to be the probable outcome. Later the benefits were revised down by more than 50%.
The ultimate form of the National Competition Policy was of three agreements (the ‘Agreements’ \(^2\)) between the States and Territories, and the Commonwealth. The first (the *Conduct Code Agreement*) dealt with extensions to competition law made possible by legislative techniques for multi-jurisdictional applicability of laws. Competition law was extended to various State and Territory government instrumentalities and non-corporate firms outside federal jurisdiction. The second agreement, (the ‘*Competition Principles Agreement*’) set out the elements of competition policy: competitive neutrality, structural reform, legislation reviews, prices surveillance, and a regime as to access to essential facilities. It also provided for the application of the Policy to local government – a matter to remain within the competence of the States and Territories. The final agreement (the ‘*Implementation Agreement*’) provided for the payment to the States and Territories of substantial money on achievement of the goals of the Policy as assessed by a National Competition Council to be established in the then *Trade Practices Act 1974* (Cth.).

In terms of competition policy as obtaining prior to the *Agreements*, the National Competition Policy defined as the *Agreements* made the following changes. It:

- Extended the existing competition laws to cover State government business and non-corporate firms.
- Provided a regime for access to essential facilities where interstate issues had defeated previous intra-jurisdictional attempts.
- Removed impediments to and encouraged the development of national markets for various utilities, including water, electricity and gas, and also for various modalities of transport.
- Provided States and Territories (but not the Commonwealth) with incentives to engage with certain well established but newly defined elements of competition policy, including competitive neutrality and structural reform.
- Altered and confined the existing system of prices control to one of surveillance of government monopolies.
- Created a process of legislation reviews in which competition was preferred but also in which the public interest was recognised, if somewhat subordinated.

\(^2\) See Chapter 1, n 12.
Of these, only the last can be considered as a development of competition policy and that only in respect of its programmatic nature and explicit preference for competition. However, at a more theoretical level, it could be said to have attempted to extend competition to a generalised policy position, on the level of human rights, rule of law, financial cost, social welfare and so forth.

In terms of its effects on the procedures and structures of government, the National Competition Policy had more profound implications. It:

- Exemplified the new institutional arrangements for federalism in the form of the Council of Australian Governments.
- Developed the practice of intergovernmental agreements into both more binding and extensive forms.
- Built on the federal/state vertical fiscal imbalance to establish new forms of intergovernmental control; namely that of payment on condition of performance assessed by bureaucratic process. Nevertheless, it did not derogate from the sovereign nature of the States, being careful to retain State and Territory consent to the implementation of the various elements. There was no compulsion, merely financial consequences.
- Reinforced the growing influence of expert institutions at the expense of consultative bodies.

Reaction to the Hilmer Report and subsequently the National Competition Policy as set out in the Agreements was initially somewhat muted. There was political bi-partisan support, hence political challenge was limited to that from minority parties and independents. More generally, there was little perception of the National Competition Policy as different from or even a development of competition policy generally (given that it was so). Mostly responses represented little more than manoeuvring for exemption. The Australian Council of Trade Unions pursued a critique asserting that cooperation and community were suffering under competition policy and there was a brief flaring of a civil society movement. Professions such as the medical profession or lawyers maintained that their activities fell outside the idea of business, those concerned with welfare – particularly charities and churches – were worried about contractualisation, and regions and rural industries continued their long war on privatisation, contracting out and other policies leading to a withdrawal of governmental
presence. Producer boards foresaw the impact of legislation reviews and commenced arguing against restructuring. These reactions remained atomised, no political or intellectual links between them being forged. There was, however, a growing body of literature describing competition policy in terms of ‘neo-liberalism’ (or its softer cousin, ‘economic rationalism’). It did not take the form of evaluation or make serious attempts at alternative policy formation; this was a consequence of the roots of these analyses in postmodernism. There were, however, attempted critiques of competition policy as altering community values, especially in defining the aspirations of society, but these fell on deaf ears. There was no response to such critique from any quarter of the policy process.

From this point, the story turns to what was done to implement the National Competition Policy as set out in the Agreements, changing as it proceeded, and provoking reaction; finally to end in a flurry of assessments. However, this story is not set in an unchanging context: during that ten years, Australian society was also changing. Of particular relevance to assessment of the impact of the National Competition Policy were three forces. First, advances in computer power and memory, and the development of the internet all of which enabled increases in productivity impossible to disentangle from impacts of competition policy. Second, demographic and population movements meant that it was difficult to ascertain the differential impact of competition policy on regions. Finally, ongoing competition policy implementation apart from that undertaken under the National Competition Policy, let alone simple changes in the modalities of government action, also meant that the impact of the National Competition Policy itself is difficult to discern.

Within a short space of time and despite demographic and population changes, particular places and industries quickly claimed to be more severely affected than others by the implementation of the National Competition Policy. Governments succumbed to pressure and rapidly legislated exemptions, these being threatened by the National Competition Council with punishment by competition payment deduction if by the States or Territories but this was of no effect on the Commonwealth. However, exemption and wavering was not sufficient to restrain community anger. The One Nation political party included resistance to the National Competition Policy as one of its platform planks, capitalising on the situation. Member of the National Party, despite
being from 1997 in government coalition with the Liberal party, also expressed uneasiness with the societal changes allegedly wrought by the National Competition Policy. Ultimately this resistance joined with that of the Democrats and the Greens to enable the appointment of a far-reaching and influential Senate inquiry into the socio-economic consequences of the National Competition Policy.

Meanwhile, the National Competition Council had set about its business. The Agreements set out programs of action, calling for statements of intention in relation to legislation reviews and competitive neutrality. The National Competition Council formulated its criteria for assessment of progress against these statements, as well as in relation to the other elements of the Policy. However, it took its role not merely to be one of assessing against agreed criteria, but also of facilitating competition policy in the form of the National Competition Policy. This raised some suspicions amongst the States and Territories that they would not be paid promised monies despite compliance with what they had considered to be their obligations. It also drew the National Competition Council down the road of persuasion of the populace to acceptance of competition policy. It threw considerable resources to countering what it saw as dissent or at least a misinformed populace. This became extreme around 2000 as the Senate responded to the Report of the Socio-Economic Consequences of the National Competition Policy Select Committee.3

In Parliament, various Government-commissioned reports occasioned responses, as did critiques flowing from a few members. These responses settled down into formulae: the ‘duck’, the ‘weave’ and the ‘falling man’. In the first, a State or Territory government would assert that it had little choice but to implement an element of the National Competition Policy because substantial income flows depended on so doing. The ‘weave’ was a statement by the Commonwealth that what was done was done by the relevant State or Territory and it was up to them and therefore they should bear the responsibility. The ‘falling man’ was the deferral of critique until the National Competition Policy was complete, as the benefits would not flow until then. In any case, usually averred the Government, the Productivity Commission had assessed the

3 Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, Riding the Waves of Change, 2000
benefits to come to be over 5% of Gross Domestic Product. That this was a best possible scenario founded in a very limited study was not mentioned, even though it was repeatedly drawn to the public’s attention.

Defences mounted by the National Competition Council and also inferentially by the Productivity Commission and various other government bodies were economic. These were that markets produced efficiency and that this process was simply one of introducing competition. Where differential effects were claimed, the response was a utilitarian one: that the benefit of all was worth the detriment to the few. Early responses allowed for compensation, but as the National Competition Council hardened its views, compensation was considered to be unfair. This counter-intuitive argument was founded in the idea that markets always involved risks. If bad things happened as a result of the exigencies of a market to one person, this was a risk they had taken on, presumably being compensated for it. This included changes in the nature of the market. The exigencies of the implementation of competition policy are no different from any other exigency, ran the argument. Accordingly, sums should be made available, if implementing governments saw the necessity, only for adjustment assistance in the normal run of welfare payments.

Challenge to the economic arguments was little heeded, despite the availability of many intellectual arguments against them. Indeed, there was little debate at a more than populist level. Even Giddens’ Third Way, popularised by Tony Blair and Mark Latham, had little impact, although that might have been because the National Competition Policy already had taken up the framework of competition and public interest in opposition. Church groups and trade unions made repeated submissions to early inquiries about the place and function of competition in society, to little avail mainly, it appears, because such arguments were not directed against the economics; indeed they generally conceded the economic argument.

Despite the absence of coherent or rational argument against the National Competition Policy or even competition policy generally, dissent had become vigorous by 2000. The One Nation Party was vociferous and the Report of the Senate Select Committee had highlighted real harm being done in some communities. 2000 was also the supposed end of applicability of the Agreements, even though the National Competition Policy
was far from complete. The Commonwealth Government dealt with this by extending
the \textit{Agreements} with the consent of the States and Territories, by reigning in the
National Competition Council, demanding an articulation of the public interest test in
greater detail, and further persuasive publicity of the benefits of competition policy and
its moderation by the public interest.

Beyond 2000, the National Competition Policy ran its course. Success in imposing
competitive neutrality can only be said to have been partial although legislation review
programs were concluded mostly to the satisfaction of the National Competition
Council. Progress was made on the major structural changes of the development of a
National Electricity Market, and a national gas market. Reform of the
telecommunication industry cannot be considered otherwise than a failure in terms of
competition policy and the Water industry reforms were started but failed to progress
beyond partial State and Territory initiative. The National Competition Council
continued to proselytise its version of competition policy. It articulated detailed
arguments as to equity, compensation and the environment. In relation to equity,
mainly in the form of community service obligations, it retreated to competition policy
as one plank in a platform of reforms, despite its claim that competition should be
supreme. It refused the idea of compensation for harm, rather asserting that adjustment
assistance was appropriate. In so doing it misstated the report of the Socio-Economic
Consequences of the National Competition Policy Select Committee, Commonwealth
Senate, \textit{Riding the Waves of Change}.

At its close, in 2005, the National Competition Policy was acclaimed as a great success.
Both the National Competition Council and the Productivity Commission published
assessments concluding great things had been done. Most of the work for these
assessments had been carried out by the Productivity Commission and, despite its
Executive Summary and reports of its findings, it could not distinguish any real
evidence of achievement. It could only state that, given that economic theory said that
there would have had to have been good effects, and as the economy had done well
during the period 1995-2005, that there no doubt was a causal affect. It could not
demonstrate that causal effect. However, it could demonstrate that the harm done to
regions was not as widespread as was claimed; even so, it resiled from quantifying
harm. It did not nominate how much the reforms had cost.
The Productivity Commission has continued as one of the premier policy advice and assessment institutions in Australia. The National Competition Council made a claim for continued relevance in competition policy, however its role was confined to providing assessments as to access arrangements. Competition policy is not now conducted under the terms of overriding agreements about what it is and how it is to be implemented. Inter-jurisdictional applications are considered on a case-by-case basis in the normal course of intercourse between the governments of Australia. The federal/state vertical fiscal imbalance is accommodated in those negotiations.

**Hypotheses and Questions from Chapter 1**

The above is a description of the National Competition Policy distilled from the detail set out in the previous chapters. It is a very different story to that otherwise available. What that story means for the questions posed and hypotheses identified in Chapter 1 is now explored. The story also allows for some new observations about the National Competition Policy, which follow. The last section of this concluding chapter and, indeed, of the thesis itself considers where this study leaves research into the National Competition Policy and competition policy, and what it says about policy studies in terms of substance and epistemology.

Chapter 1 commences with an argument that the National Competition Policy was an important part of Australia’s history. It asserts that there is so far no comprehensive description, let alone analysis, of it: the map is blank. Yet there is a substantial literature about aspects of it. This is reviewed in a literature review. The upshot of the literature review is a series of unanswered questions. Answering those questions, each in detail, must, however, be left to the future because they each depend on disciplinary perspectives often incompatible with those inherent to other questions. Some metatheoretical understanding of the way it worked is required. Thus the work of this thesis turns to making the National Competition Policy analysing and assessing that made known by the description.

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4 The best kind of map, asserts the Bellman in *The Hunting of the Snark* by Lewis Carroll.
This thesis renders the National Competition Policy thinkable by describing it in as value-free a way as possible. Three core questions, preliminary to those resulting from the literature review in Chapter 1 arise from this description: Did the National Competition Policy achieve what it set out to do for the Australian economy? Was it simply the imposition of an ideology, here called neo-liberalism? Did it rewrite federalism? These are now considered. Answers to the questions are presented as defensible conclusions.

**Question 1: Did the National Competition Policy achieve change?**

A consistent claim by governments and in the media, and also in specific literatures, has been that the National Competition Policy achieved efficiency gains in the Australian economy. This claim is unwarranted. It was not demonstrated in assessments. Moreover price falls in various utilities, the main claim by the Productivity Commission, have been more than reversed since 2005. Even if change between 1995 and 2005 is demonstrable, that it is attributable to the National Competition Policy is not. Even the Productivity Commission admitted as much.

If the claim is simply that it achieved restructuring, without the claim that this was for the good of the economy, there is some truth to the statement. However, a distinction should be made between change that would have happened anyway due to the prevailing implementation of competition policy, and what the National Competition Policy itself achieved. Most of the requirements of the *Competition Principles Agreement* were simply a summary of what was already being done. Exceptions to this were legislation reviews and matters requiring inter-governmental negotiation.

Legislation reviews, in particular, changed many ways of doing government business. There is no evidence of a procedure for the review of legislation existed in any government prior to the inception of the National Competition Policy. Moreover, the preference for competition instilled into the concept by the Hilmer Committee was quite

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novel. However, to the extent they can be disentangled from other elements, legislation reviews occasioned the most vociferous response from the community. The *Agreements* were amended as a result of political concerns. The public interest test had to be clarified to discipline States and Territories in their application of it. Governments and instrumentalities resorted to propaganda to convince voters. Hence while change happened, limits to change were rapidly found. Governments could not be pushed too far in the implementation of competition policy due to voter backlash. To the extent that the National Competition Policy resulted in change, it also resulted in the drawing of lines of resistance to competition policy.

The National Competition Policy can be said to have enabled things to be done which would otherwise have been stymied by Australia’s federal nature. The National Competition Policy provided a mechanism to overcome the federal/state vertical fiscal imbalance. Assets could be sold by States and Territories without fear that the loss of revenue would not be offset by capitalised tax gains. Inter-jurisdictional utility interconnections and market mechanisms could be negotiated with lessened fear of game-playing. Nevertheless, it was a flawed instrument. It was over-ambitious in conception and as a result extended far too long for comfortable implementation. Inherent to its design was a supra-governmental agency which misconceived its role and had to be restrained. Designedly extending beyond the period of any government, the National Competition Policy took little regard of changes in philosophy and voter opinion and thus lost legitimacy. The flaws were such that the mechanism was not renewed beyond 2005. Case-by-case negotiation is now the accepted procedure for resolving such inter-governmental matters. On the other hand, it could be said that such case-by-case negotiation only works because the ground work and principles of transfer payments were set by the National Competition Policy.

**Question 2: Did the National Competition Policy implement neo-liberalism?**

As discussed in the Literature Review in Chapter 1, most literature critical of trends in Australian government cite the National Competition Policy as a case of the implementation of neo-liberalism. This is particularly true of the sociological literature surrounding changes to the social welfare apparatus. Indeed, Morgan argues that the
National Competition Policy institutionalised competition as a metaregulatory ideal in parallel to the Rule of Law.\textsuperscript{7}

The study of the National Competition Policy undertaken in this thesis indicates a more complex reality: while it is undeniable that competition policy is a matter of neo-liberalism, the particular instance of it in the National Competition Policy was an articulation of the Third Way, of a path between neo-liberalism on the one hand and statism on the other. It did lean more to neo-liberalism than erstwhile competition policy in that in legislation reviews competition was preferred yet the public interest was still conceded to have a place. That concession was more precisely articulated than previous incarnation of competition policy and during the continuance of the Policy was ever more precisely articulated. Nevertheless, the precise delineation of the rationality of that path remains debateable at the same time as its processes crystallise.

To add to the complexity of the relation between the National Competition Policy as implemented and neo-liberalism as a discourse of government, the fixing of competition policy in the Agreements provided a target for resistance where previously only particular instances were sufficiently identifiable. Competition policy is a matter of considerable technicality and the economics it represents is robustly argued. However, few writers, if any, familiar with the sociology are also adept at arguing the economics. The economics remains hegemonic, neoliberalism unassailable. As Eagleton describes, in such situations the only resort of those who would disagree is to irrationalism, as defined in the hegemonic discipline.\textsuperscript{8} In relation to the National Competition Policy, the emotion of despair and frustration was expressed in the rise of One Nation. It was also expressed in other fora, for example in the violence of protest at G20 international meetings. The success of irrational politics has thereafter resonated in Australia. Moreover, the claim made early that competition should be metaregulatory, a discourse defining an element essential to good governance, failed in the face of those politics.

While neoliberal politics in Australia has conceded both a place for the public interest and the power of the irrational, the institutional structure of policy has shifted but little.

\textsuperscript{7} Bronwen Morgan, \textit{Social Citizenship in the Shadow of Competition} (Ashgate, 2003); for a discussion see above 15-16.

\textsuperscript{8} Terry Eagleton, \textit{The Illusions of Postmodernism} (Blackwell, 1996) ch 1.
Pusey’s characterisation of the public service as seized by ‘economic rationalism’ remains unfalsified.⁹ Competition already had a place as a metaregulatory ideal, although to be fair to Morgan it was expressed in less compelling form. The Productivity Commission is also a partial exception to this. It has taken a central position in policy advice yet advocates a single hegemonic view. It does not concede either the public interest or the legitimacy of its perception of the irrational. In this it ignores its charter. It should either be constrained to allow alternative conceptions of society either internally or by the establishment of a social policy advice commission, or it should be abolished.

**Question 3: Did the National Competition Policy rewrite federalism?**

The story of the National Competition Policy as related above suggests there would have been little need of it were it not for Australia’s federal structure. Compounding the problem of a non-unitary state, States (but not the Territories) have separate sovereignties. The absence of Commonwealth power to compel the States was the *raison d’être* for the Agreements. Those Agreements established governance of Parliaments by the executive, in this case in the form of the National Competition Council. The regime of competition payments provided a binding power to its bureaucratic decisions. In addition, the development of the National Competition Policy legitimised the development of the Council of Australian Governments as a continuing forum for the development of national programs beyond the power of any single government.

Despite continuing participation in the National Competition Policy itself and the Council of Australian Governments both being voluntary, together they represented a development of the relation between governments in the Australian polity. Yet they could hardly be said to be foundational developments, as the Australian Constitution as federation of separate sovereignties remained unchallenged; indeed, they were enhanced by effective resistance – even strategic use, in the case of the Victorian Government and the Auditor-General – by State governments to National Competition Council strictures, and by deploying the duck and weave defences to political attack, those defences being

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essentially reaffirmations of several sovereignties. Moreover, attempts to include local
government within the scheme as equivalent to signatories failed; the States asserted
their sovereignties and local government remained subordinate.

Yet even such changes to federal structures as occurred came at a cost. The technique
of intergovernmental agreement enabled the National Competition Policy to bind
governments beyond their terms of office. It thus represented a threat to democracy:
payments were contingent on implementation no matter if a government was or was not
elected to implement that which had been agreed but not to implement represented a
large loss of income. However, there are a number of arguments to suggest that this is
not a real threat. First, under the Agreements in respect of every element of competition
policy governments nominated what they would do in Statements and were supposed to
be held only to that. On the other hand, by way of rejoinder, the National Competition
Commission judged the Statements and negotiated their contents, threatening the
withholding of competition payments. This is to say that that the idea of competition as
held by the bureaucrats in the National Competition Commission overrode what
governments thought they had agreed to.

The second argument to say that the National Competition Policy did not threaten
democracy is that Parliaments were always free to disregard their commitments. In
1997, the National Competition Commission almost went so far as to say that
Parliaments were bound but it rapidly resiled from that position, no doubt having been
informed of its unacceptability. The public interest test in legislation reviews,
community service obligations and the status of local government proved most divisive.

Intergovernmental agreements in general are not legally enforceable and there seems
little in the Agreements to suggest that they fall into an exception. Their legal
enforcement was not attempted. Yet the competition payments were designed to bind
governments in a federation where the purse strings are held at the centre. While
special payments and other techniques for tying States and Territories to certain policies
have long been a feature of Australian intergovernmental relations, the National
Competition Policy agreements took those techniques to a new level. Not only did they
extend for a long time, but also they bound States and Territories to legislate in certain
ways in almost every field of State and Territory competence. Commonwealth
government adherence to competition policy is a test of the proposition that the competition payments were the binding force because it was not a recipient; the Commonwealth (as well as the wealthy Western Australia) were laggards.

The changes to the manner of working of Australia’s federation also came at the cost of accountability. The defences to critique deployed the intergovernmental structure of the National Competition Policy to escape scrutiny. Both the duck and the weave were ways of asserting responsibility lay elsewhere, and the falling man defence temporally shifted responsibility to final assessments. Moreover, the structure of the National Competition Policy in shifting assessment to a bureaucratic body, informed by an expert body in the Productivity Commissions, with responsibility de facto to the Council of Australian Governments excluded political responsibility.

The third cost to the proper functioning of the Australian polity was the above-described reconstruction of institutional advice structures to reflect a single expert view. The National Competition Commission, having the power to assess governments was constrained to a particular view of governance in which competition was raised to be a vital, even the most important or best in some way, component of the means by which policy should be implemented. The Productivity Commission was stripped of consultative processes and became a body whose task was to view the world and assess it through particular disciplinary lenses. There was no consent given to the adoption of this way of thinking, there was little debate on the net value of competition.

Observations

In this set of ‘Observations’ matters which are observable in the description but are not obvious in prior literature are indicated. Some of these are mentioned above, but are not there fully articulated. Others arise out of the study itself. They are set out in order of increasing generality: first as to the National Competition Policy, then as to policy studies, and finally as to epistemology. As observations they are refutable by reference to the evidence. They are thus invitations to further, albeit structuralist, research.
As to the National Competition Policy

A constant theme in the story as narrated above is the absence of debate about competition itself. The extent to which competition is wrong, evil or bad is not challenged. That it might be so is hardly a novel thought. At its initial showing in 1840, a poem was placed next to Turner’s famous painting, the Slave Ship, reproduced below:

Aloft all hands, strike the top-masts and belay;
Yon angry setting sun and fierce-edged clouds
Declare the Typhon's coming.
Before it sweeps your decks, throw overboard
The dead and dying – ne'er heed their chains
Hope, Hope, fallacious Hope!
Where is thy market now?
The picture depicts a real event, the throwing overboard of 133 slaves for the purpose of claiming insurance. Turner places human beings above the market, saying that there are things in which markets should not deal.\textsuperscript{10} It is more than a matter that perhaps slaves should not be bought and sold, it is that the market is intrinsically evil – a point also made by Thomas Hobbes.\textsuperscript{11} The debate that has not been had is about the balance between the alleged good of competition and its certain bad. The mantra of competition leading to efficiency (in three varieties), so often repeated in government reports, is simply not challenged. There is ample critique of the lack of reality of microeconomics and there are responses in the development of workable competition as a principle that is supposed to capture the benefits of markets without being unreal.

Critique of economics was not carried over into the consideration of Australian competition policy. Indeed, the economic principles deployed by the National Competition Council and the Productivity Commission in their considerations of competition policy were poorly constructed, simplistic and contingent, especially in respect of compensation and in the characterisation of the public interest, yet they escaped the critique which should have been laid against them.

The absence of articulation of critique against the principles of competition policy might have been benign were it not for the resentment that their implementation brought. Again, as Terry Eagleton eloquently demonstrates,\textsuperscript{12} without a reasonable voice resentment spreads into irrational anger. As with Turner, plays, musicals and novels expressed this in terms not accepted within policy debates. From the anger also arose the politics of legitimated irrationality.

The second observation here made about the National Competition Policy itself is that it set a dangerous precedent. Long-term intergovernmental agreement secured by payment allowed the development of methodologies of responsibility evasion. The fiscal imbalance between governments worked to the advantage both States and the

\textsuperscript{10} See also Michael J Sandel, ‘What Isn’t for Sale?’, \textit{The Atlantic}, April 2012.


\textsuperscript{12} Eagleton, above n 8.
Commonwealth. It allowed for the subversion of democratic processes and the raising of the executive over the legislature.

The third observation, one already made in a slightly different context, is that through the National Competition Policy the Productivity Commission cemented its position as the premier policy advice institution in the Australian polity. All disputation with its biases and methodology has faded. No alternative institutionalised view is supported.

As to Policy Development

If the National Competition Policy did not achieve change or even if change was only partial, 2.5% rather than 5.9%, and not the far-reaching alteration in the balance between government activities and the private sector which may have been sought, a consequential question is, why not? The implication of Lindblom’s ‘Muddling Through’ is that far-reaching change is beyond the capacities of a single policy. Sparrow would argue that all that is possible is focussed change: pragmatic solutions to identifiable problems. In this sense the National Competition Policy was about federalism, although clothed in grand ambition. To the extent it was about more than the particular, it was destined to fail. It was for this reason that the National Competition Commission resorted to propaganda: as the practicalities of change on a national scale across institutions, laws and regulatory formations undermined the purity of its conception of competition policy and its role within it, it could only conceive that the world was wrong and should change to fit. In the same way, the Productivity Commission could not concede that the impact of the National Competition Policy was unmeasurable: the grandness of the plan simply meant that aggregation with all its defects was all the more necessary. Thus impacts other than those sought were rendered invisible in the interstices of the data. It was a matter of policy hubris and represents a warning for policy development generally – a conclusion at complete odds


14 This is more than the commonplace point that ‘Not everything that counts can be counted’ (James Spigelman, ‘Quality in an Age of Measurement’, (2002) *Quadrant* 9, 13), or even that that something is measurable means that it is therefore worth doing, rather it is that it was unable to concede the point that the benefits of competition were unmeasurable.

Second, the claim that the Australian National Competition Policy is an excellent model for other countries\footnote{See above Chapter 1, n 4.} should be regarded with scepticism. This is so even if all that is contemplated is the particular element of legislation reviews. There is simply too much about the National Competition Policy that is unique to Australia. First, the history leading up to any definition of the National Competition Policy is in contrast to that of many of the jurisdictions contemplating or implementing a programmatic competition policy. Some, such as Vietnam or China, are economies in transition from communist or socialist regimes where the private sector was not acknowledged to exist, let alone be regulated;\footnote{See Vito Tanzi, \textit{Transition to Market. Studies in Fiscal Reform} (IMF, 1993).} others, such as Hong Kong, are in transition from hyper-capitalist regimes where government was not interested in the conduct of the private sector. Yet each place has a unique history. Unique histories should surely impact on competition policy. So also should the consequence of unique histories: unique societies in which the way individuals are constructed differ. Competition policy, unthinkingly applied, may well lead to unintended consequences; in particular in relation to the values inherent in citizenship and community plurality. Second, competition policy is often deployed as a device to attack corruption – the public choice argument writ larger. However, the process of change is as susceptible of corruption as government control in the first place.\footnote{See, for example, Ting Gong and Nan Zhou, ‘Corruption and marketization: Formal and informal rules in Chinese public procurement’, (2014) \textit{Regulation and Governance} 1.} Thus, for example, rigorous definition of ‘the public interest’ is essential to the implementation of competition policy, especially for legislation reviews and community service obligations in structural reform. It is easy for governments to carve out areas in this guise, just as did the Commonwealth for newsagents, lawyers and so forth in the early years of the National Competition Policy. Third, the process in Australia was made possible by the constitutional vertical fiscal imbalance, without it
there was no reason for implementing governments to risk the opprobrium of interest groups. The non-compliance by the Commonwealth and the reform of the Victorian Audit Act 1994 are instances of this. Fourth, those countries for which competition policy is most frequently proselytised often lack the institutions necessary for its implementation. Competition policy requires an independent national institution applying trustworthy objective standards. It also must not overreach itself. Especially in previously communist or socialist countries, a separation from the Party is necessary but is often unattainable. 19 Indeed such an institution can easily be thought of as above current governments and this may be anathema in countries placing a high value on democracy, as is exemplified by the fate of the National Competition Council in Australia.

As to Policy Studies

Analyses of the National Competition Policy as a policy, one amongst many others, fail to deploy a coherent approach to its evaluation. There appears to be no general framework by which a policy can be judged other than within the terms of its own presuppositions. Hence the National Competition Policy was assessed in terms of whether it created an increase in Gross Domestic Product. It has been considered to be solely a matter of the economy regardless of whether the impact was otherwise social.

That disciplinary approaches fail to break out of their silos is to be expected. Yet for the National Competition Policy the disciplinary approaches more than failed, they were deployed to defeat each other. When political critique, that it was turning voters away or that it was not considered to be good for the community, was attempted, economics was called into action to say that the theory was so well established that it was reality, or at very least that the burden of proof lay upon the critique to say why the economics was wrong. Where economic effects were produced which showed that particular places were suffering, utilitarianism was deployed to show how the whole community would benefit more than the costs to the smaller one. Agreement was used to defeat

19 See, for example, Thang Long Tran, The Application of Competition Law to Vietnam’s State Monopolies: A Comparative Perspective (PhD Thesis, La Trobe University, 2011).
political pressure. Missing is some sense of how the disciplines work in relation to each other. If policies are to be analysed, such work is crucial.

Policy studies also fail to account for the manner in which the National Competition Policy came to exist. It doesn’t fit either Lindblom’s ‘Muddling through’ 20 or the other extreme of Simeon’s ‘Funnel of Causality’. 21 As competition policy it was foundational in the sense of formulating a set of prescriptions (the elements of competition policy) founded in a particular theory (economics) to achieve a particular end (greater efficiency of three kinds). It was not designed to be incremental. It did not rely on a succession of comparisons. Yet it also did not rely on detailed analysis of all alternatives. The theory and approach were chosen with little consideration of what other way might achieve what was wanted, or even whether what was defined as the objective was wanted. Lindblom accounts for the incremental nature of political change in the United States as a function of its system of democracy and interest group support. In relation to competition policy in Australia there was little argument against it. It could be said to be hegemonic. From this perspective, as it continued, the defences were little challenged; they were sufficient in the circumstances.

The National Competition Policy was, however, about more than competition policy. It was about federalism, achieving particular changes across jurisdictions. In this respect it better fits the idea of incremental change, with State and Territory sensitivities and interests representing the interest groups in Lindblom’s analysis. If the ideas of competition policy were hegemonic, their formulation in the Agreements was of minor concern, more important was the fact of the Agreements, the formulations or techniques to reward and bind, the institutional structures of negotiation, the bureaucracies of implementation and so on. The defences take central stage here as they reinforce the Agreements and the necessity of muddling through the exigencies of federalism.

The National Competition Policy was about both federalism and competition policy. Each reinforced and made possible the other. Without federalism the defences could not be mounted to defer examination of consequences to other places and times.


Without the hegemony of competition policy, the developments of federalism could not occur. The National Competition Policy, then, throws up the challenge of multiple purposes, of concealed agendas, of the impossibility of pinning down just what a policy is, even in a situation where the policy was so precisely defined. A public choice theorist might say that this is of no concern because it is a matter of interest group rent seeking, that the policy merely shows the diverse impacts of exercises of power. Yet that is to assume away the point of policy analysis and government itself. The irony of that position is that the public choice theorist denies any public interest other than the public interest that they themselves recognise, that of market efficiency and materialism.

The Funnel of Causality is more concerned with the discursive influences on the singular policy formulation and less on the outcome. The National Competition Policy does not fit into this schema either. There is no sense of progression from the domains of ideology to pragmatism. The National Competition Policy arose out of the demands of an inadequate constitutional framework, through the personality politics of the early 1990s and into reconstructions of the pragmatics of federalism. At the same time it is a gathering together of ideological principles, mediated by public service mentalities. Its form is hammered out not in policy circles but in intergovernmental fora.

The conclusion from both these accounts is the same: the development and continuance of the National Competition Policy was unique in process but the elements of that process are identifiable. For policy study generally it means that there is no easy way out: policies have to be studied in detail by polymaths. In particular, economics should not permitted to be used as a shield, impenetrable to all but the initiated.22

**As to Epistemology**

That previous examinations of the National Competition Policy were theory contingent is amply borne out in the foregoing chapters. The solution adopted in this thesis is to

22 See, for example, Lasse F Henriksen, ‘Economic models as devices of policy change: Policy paradigms, paradigm shift and performativity’. (2013) 7 Regulation and Governance 481 where it is argued that ‘seemingly microscopic’ model design changes can induce huge changes in can induce large policy change. There is a possibility that models in this way can be understood as devices used by actors.
undertake a ‘reflexive thick’ study. The questions that remain are whether it works, what its limitations are and whether it is useful in other contexts.

Whether it works depends on what is meant by ‘works’. Certainly, the thick study reveals far more than studies hitherto, including those testing various hypotheses and assumptions. However, the claim here is only that it does better than prior studies, not that it reveals everything or that it removes all theory contingency. It may still contain a hidden structuration; after all, Kant would claim that all knowledge is the product of theory. The volume of material, both primary and secondary, is such that choices had to be made, culling has to be performed, abstraction allowed a place.

Subject to the qualification that it involves enormous work for few words of publishable content, that it is simple hard graft, as a technique for policy studies and legal studies thick studies is useful. It is de rigueur in fields such as anthropology, whence it originated. Perhaps most usefully, it throws up further hypotheses for testing and observations for investigation. Thus a more detailed examination of the development of the National Competition Policy might have much more to say about policy development, investigation of the bureaucracies of the National Competition Council and Productivity Commission might test Pusey’s approach23 as supported here, Morgan’s conclusions about competition as metaregulation challenging the rule of law24 might be susceptible to testing through data about the processes of legislation drafting, detailed analysis of the Hansards of States and Territories might reveal different stories about the implementation of the National Competition Policy.

Reflection

The aim of this thesis is to make known, analyse, and assess the National Competition Policy. The final words of this thesis are a reflection on how well and the extent to which it achieves this.

21 Pusey, above n 9.
Certainly and despite its claims to being a thick study, it is an incomplete study. Vast amounts of material are ignored and avoided, and will probably remain unknown. Most particularly, detailed transactional accounts of implementation are missing, as are interview material of people involved. There are defences to this – space in the first place, and that interviews require detailed prior knowledge and are subject to confabulation – but that is beside the point in assessing how well the aims are met. However, at every point care has been taken to be aware to the extent possible of the matters that the material might have shown. There seems little room for unknown unknowns.

As noted repeatedly in the body of the thesis, maybe it predetermines its conclusions. Particular ways this might have happened might be in the choice of the Agreements as the articulation of the National Competition Policy or in the perspectives (context, development, periodisation, competition policy element, and responses and defences) from which the story was told. This is for others to determine; at this point here the possibility is exposed.

Despite these qualifications, this thesis describes the National Competition Policy in a level of comprehensiveness and detail not available elsewhere. It has proffered a language for the study of the National Competition Policy: that a policy, fortuitously expressed in a determinate form, with express and implicit purposes formulated within a context of knowledge and technique, is a program for government action which can be assessed in in terms of whether it achieved its purposes and what the unintended effects were. The National Competition Policy thus has been made known. The story accordingly told avoided the theory contingency elsewhere displayed. The National Competition Policy has been found to have been multifaceted, developing a particular version of competition policy in which the public interest is itself formulated and located against in varying positions competition; further, the chief impact of the policy was to achieve some implementations of competition policy and extensions of competition law otherwise denied by Australia’s federal structure. It also created a process of legislation reviews and an access regime. Moreover, quite apart from being an expression of competition policy, the National Competition Policy provided the impetus for developments within Australia’s federal arrangements and facilitated the substitution of expertise for consultation within policy development circles. It impacted
heavily on Australia’s politics, legitimating irrational polemic and rewriting ideas of how negative impact on regions and people are to be treated. It also resulted in a great deal of unhappiness, destruction of livelihoods and disruption.25

This thesis has rendered problematic the idea of evaluation of a policy and demonstrates how evaluative frameworks suggested for the National Competition Policy are inadequate due to confused epistemologies or, at least, were isolated and treated as insignificant. Pusey,26 and Lindy Edwards later,27 had prior to the National Competition Policy found the public service to be imbued with economic rationalism, yet that economic rationalism survived even the demise of the National Competition Commission. Kain, in response to the *Hilmer Report* questioned the impact on individuals and the conception of the public interest as the other of competition yet, while the public interest continued to be refined as a concept, its definition remained problematic.28 Kain also challenged the impact on Parliamentary democracy of the National Competition Policy, an argument taken up by Rix in 199929 (only to receive swift rebuke from a project manager for the National Competition Council30).

Governmentalists identified neo-liberalism as the prevailing discourse constituting the techniques of governance represented by competition yet resistance was well articulated, the discourse was rendered problematic and alternatives were expressed. Bell, similarly, identified economic rationalism as a prevailing ideology formative of the processes of competition policy yet other ways of thinking imbued the policy from the very start.31 Geoff Edwards questioned the use to which the notion of competition

25 Amply explored in Socio-Economic Consequences of the National Competition Policy Select Committee, Commonwealth Senate, *Riding the Waves of Change*, 2000 and in the submissions to it.

26 Pusey, above n 9.


was put and yet no official doubt was ever cast on the proposition that competition is good whenever it can be applied. Church groups and the Australian Council of Trade Unions submitted that competition encouraged as a prevailing societal process resulted in a loss of good in society through rampant self-serving activity, the proper province of business and of government was repeatedly questioned, the impact on democracy of the techniques by which implementation of the National Competition Policy was required was noted by Quiggin and others. The place of competition policy in the platform of social policies was repeatedly questioned in Parliament. Hugh Stretton has again and again questioned public policy made in the absence of the goals and aspirations of social democracy. None of these impacted of the thrust of the policy. To be sure, irrationalism was responded to, but not reason.

On a simple evaluative framework of whether the National Competition Policy did harm, clearly and admittedly it did. Indeed, compensation for that harm was rejected. A democratic outlook would note the subversion of democratic values implicit in the structure of the Agreements and the referral of assessments to the National Competition Council. A Habermasian outlook suggests that communities should govern themselves through reflective debate, and that the core reflection as to the nature of competition was absent. And equally there is no suggestion that a Rawlsian approach would come to a different conclusion. As Jonathan Wolff puts it, ‘[a] society that has a tendency to create ruthless egotistical exploiters is worse than one with a tendency to produce charitable altruistic co-operators, even if, in formal terms, both societies can be


described as just’. 36 The core moral question of whether it should have been done was and is simply assumed. This thesis, then, ends as it should with another question: What is it about the Australian polity that allows policy ideas to remain unsullied by reason?

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Appendices

Appendix 1

COMPETITION POLICY REFORM BILL 1995

INTER-GOVERNMENTAL AGREEMENTS

- CONDUCT CODE AGREEMENT
- COMPETITION PRINCIPLES AGREEMENT
- AGREEMENT TO IMPLEMENT THE NATIONAL COMPETITION POLICY AND RELATED REFORMS

APRIL 1995
CONDUCT CODE
AGREEMENT

BETWEEN

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE AUSTRALIAN CAPITAL TERRITORY, AND
THE NORTHERN TERRITORY OF AUSTRALIA
CONDUCT CODE

AGREEMENT

WHEREAS the Council of Australian Governments at its meeting in Hobart on
25 February 1994 agreed to the principles of competition policy articulated in the report of the
National Competition Policy Review;

AND WHEREAS the Parties intend to achieve and maintain consistent and complementary
competition laws and policies which will apply to all businesses in Australia regardless of
ownership;

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE STATE OF TASMANIA
THE AUSTRALIAN CAPITAL TERRITORY, AND
THE NORTHERN TERRITORY OF AUSTRALIA agree as follows:

Interpretation

1. (1) In this Agreement, unless the context indicates otherwise:

"Commission" means the Australian Competition and Consumer Commission established
by the Trade Practices Act;

"Commonwealth Minister" means the Commonwealth Minister responsible for
competition policy;

"Competition Code" means the Code:

(a) the Schedule version of Part IV of the Trade Practices Act;
(b) the remaining provisions of that Act (except sections 2A, 5, 6 and 172), so far as
they would relate to the Schedule version if the Schedule version were substituted
for Part IV; and
(c) the regulations under that Act, so far as they relate to any provision covered by
paragraphs (a) or (b)
applying as law of a participating jurisdiction;

"Competition Laws" means:

(a) Part IV of the Trade Practices Act and the remaining provisions of that Act, so far
as they relate to Part IV; and
(b) the Competition Code of the participating jurisdictions;
"Council" means the National Competition Council established by the Trade Practices Act;

"fully-participating jurisdiction" means:

(a) until the end of twelve months after the day on which the Competition Policy Reform Act 1995 receives the Royal Assent — a State or Territory that is a Party to this Agreement; and

(b) after that date — has the meaning given by section 4 of the Trade Practices Act;

"Jurisdiction" means the Commonwealth, a State, the Australian Capital Territory or the Northern Territory of Australia;

"legislation" includes Acts, enactments, Ordinances and regulations;

"modifications" has the meaning given by section 120A of the Trade Practices Act;

"participating jurisdiction" has the meaning given by section 120A of the Trade Practices Act;

"Party" means a jurisdiction that has executed, and has not withdrawn from, this Agreement;


(2) Where this Agreement refers to a provision in legislation which has not been enacted at the date of commencement of this Agreement, or to an entity which has not been established at the date of commencement of this Agreement, this Agreement will apply in respect of the provision or entity from the date when the provision or entity commences operation.

Exceptions from the Competition Laws

2. (1) Where legislation, or a provision in legislation, is enacted or made in reliance upon section 51 of the Competition Laws, the Party responsible for the legislation will send written notice of the legislation to the Commission within 30 days of the legislation being enacted or made.

(2) After four months from when a Party sends written notice to the Commission pursuant to subsection (1), the Commonwealth Minister will not be able to the Commonwealth Parliament Regulations made for the purposes of paragraph 51(1)(b)(f) of the Trade Practices Act in respect of the legislation referred to in the notice unless the Commonwealth Minister tables in Parliament at the same time a report by the Council on:

(a) whether the benefits to the community from the legislation referred to in the notice, including the benefits from transitional arrangements, outweigh the costs;

(b) whether the objectives achieved by regulating competition by means of the legislation referred to in the notice can only be achieved by regulating competition; and

(c) whether the Commonwealth should make regulations for the purposes of paragraph 51(1)(b)(f) of the Trade Practices Act.

(3) Each Party will, within three years of the date on which the Competition Policy Reform Act 1995 receives the Royal Assent, send written notice to the Commission of legislation for which that Party is responsible, which:

(a) existed as at the date of commencement of this Agreement;

(b) was enacted or made in reliance upon section 51 of the Trade Practices Act (as in force at the date of commencement of this Agreement); and

(c) will continue to except conduct pursuant to section 51 of the Trade Practices Act after three years from the date on which the Competition Policy Reform Act 1995 receives the Royal Assent.

Funding of the Commission

3. The Commonwealth will be responsible for funding the Commission.

Appointments to the Commission

4. (1) When the Commonwealth proposes that a vacancy in the office of Chairperson, Deputy Chairperson, member or associate member of the Commission be filled, it will send written notice to the Parties that are fully-participating jurisdictions inviting suggestions as to suitable persons to fill the vacancy. The Commonwealth will allow those Parties a period of thirty five days from the date on which the notice was sent to make suggestions before sending a notice of the type referred to in subsection (2) or (3).

(2) The Commonwealth will send to the Parties that are fully-participating jurisdictions written notice of persons whom it desires to put forward to the Governor-General for appointment as Chairperson, Deputy Chairperson or member of the Commission.

(3) The Commonwealth will send to the Parties that are fully-participating jurisdictions written notice of persons whom it desires to put forward to the Commonwealth Minister for appointment as associate members of the Commission.

(4) Within thirty five days from the date on which the Commonwealth sends a notice of the type referred to in subsection (2) or (3), the Party to whom the Commonwealth sends a notice will notify the Commonwealth Minister in writing as to whether the Party supports the proposed appointment. If the Party does not notify the Commonwealth Minister in writing within that period, the Party will be taken to support the proposed appointment.

(5) The Commonwealth will not put forward to the Governor-General a person for appointment as a Chairperson, Deputy Chairperson or member of the Commission.
unless a majority of the fully-participating jurisdictions support, or pursuant to this clause are taken to support, the appointment.

(5) The Commonwealth will not put forward to the Commonwealth Minister a notice for appointment as an associate member of the Commission unless a majority of the fully-participating jurisdictions support, or pursuant to this clause are taken to support, the appointment.

The Competition Code

5. (1) The Parties agree that the Competition Code...rearise. Legislation to do the territorial legislation which implements the principles set out in subclause (1).

(2) Each State and Territory is a Party will put forward for the consideration by the...of the competition Code text in its application to jurisdiction the Commonwealth Minister is so notified. Any such notice is to be published before the expiry of two months from the date on which the Commonwealth received written notice pursuant to subclause (3).

(4) If the Commonwealth Minister has published a notice of the type specified in subclause (3), the Commonwealth Minister may revoke that notice by publishing a further notice in the Commonwealth of Australia Gazette.

Modifications to the Competition Laws

5. (1) It is the intention of the Parties that where modifications are made to provisions of either Part IV of the Trade Practices Act or the Schedule to Part IV of the Act, similar modifications will be made to corresponding provisions of the other.

(2) The Commonwealth will consult with fully-participating jurisdictions before it puts forward for parliamentary consideration any modification to Part IV of the Trade Practices Act or the Competition Code text.

(3) At the conclusion of the Commonwealth's consultation with the fully-participating jurisdictions in relation to proposed amendments to the Competition Code text, the Commonwealth will call a vote on the proposed amendments by sending written notice to each fully-participating jurisdiction.

(4) For the purpose of voting:

(a) the Commonwealth will have 2 votes;

(b) each fully-participating jurisdiction will have 1 vote; and

(c) the Commonwealth will have a casting vote.

(5) If a fully-participating jurisdiction does not vote in respect of a proposed amendment within thirty days of the Commonwealth sending notice under subclause (4), that jurisdiction will be taken to have voted in favour of the amendment.

(6) The Commonwealth will not put forward the parliamentary consideration an amendment to the Competition Code text unless a majority of the votes of the Commonwealth and the fully-participating jurisdictions support the amendment.

(7) The Commonwealth will not be obliged to put forward for parliamentary consideration any amendment which it does not consider.

(8) Each Party will send written notice to all other Parties setting out modifications to the Competition Laws that have been made by the legislature of that Party, or by any person.

Consultation

7. Where clause 6 requires consultation between the Parties or some of them, the Party initiating the consultation will:

(a) send to the Parties that must be consulted a written notice setting out the matters on which consultation is to occur;

(b) allow those Parties a period of three months from the date on which the notice was sent to respond to the matters set out in the notice; and

(c) where requested by one or more of those Parties, convene a meeting between it and those Parties to discuss the matters set out in the notice and the response, if any, of those Parties.

New Parties and Withdrawal of Parties

8. (1) A jurisdiction that is not a Party at the date this Agreement commences operation may become a Party by sending written notice to all the Parties.

(2) A Party may withdraw from this Agreement by sending written notice to all other Parties. The withdrawal will become effective six months after the notice was sent.

(3) If a Party withdraws from this Agreement, this Agreement will continue in force with respect to the remaining Parties.

Sealing of 'Notice'

9. A notice is sent to a Party by sealing it in the Minister responsible for the competition legislation of that Party.

Review of this Agreement

10. Once this Agreement has operated for five years, the Parties will review its operation and terms.
Commencement of this Agreement

11. This Agreement commences once the Commonwealth and at least three other jurisdictions have executed it.

Signed for and on behalf of the Parties by:

The Honourable Paul John Keating,
Prime Minister of the Commonwealth of Australia,
on the 14th day of April 1995
in the presence of:

The Honourable Bob Carr,
Premier of the State of New South Wales,
on the 11th day of April 1995
in the presence of:

The Honourable John Uddington,
Premier of the State of Victoria,
on the 11th day of April 1995
in the presence of:

The Honourable Wayne Swan,
Premier of the State of Queensland,
on the 11th day of April 1995
in the presence of:

The Honourable Kim Beazley,
Premier of the State of Western Australia,
on the 11th day of April 1995
in the presence of:

The Honourable Neil Brown,
Premier of the State of South Australia,
on the 11th day of April 1995
in the presence of:
The Honorable Raymond Joly Groom.
Premier of the State of Tasmania,
on the 11th day of April 1999.
In the presence of:

Karen Oldfield.
Chief Minister of the Australian Capital Territory,
on the 11th day of April 1999.
In the presence of:

The Honorable Marshall Bruce Feeney.
Chief Minister of the Northern Territory of Australia,
on the 11th day of April 1999.
In the presence of:

COMPETITION PRINCIPLES
AGREEMENT

BETWEEN

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE STATE OF TASMANIA
THE AUSTRALIAN CAPITAL TERRITORY, AND
THE NORTHERN TERRITORY OF AUSTRALIA
COMPETITION PRINCIPLES

AGREEMENT

WHEREAS the Council of Australian Governments at its meeting in Hobart on
25 February 1994 agreed to the principles of competition policy articulated in the report of the
National Competition Policy Review;

AND WHEREAS the Parties intend to achieve and maintain consistent and complementary
competition laws and policies which will apply to all businesses in Australia regardless of
ownership;

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE STATE OF TASMANIA
THE AUSTRALIAN CAPITAL TERRITORY, AND
THE NORTHERN TERRITORY OF AUSTRALIA agree as follows:

Interpretation

1. (1) In this Agreement, unless the context indicates otherwise:
   "Commission" means the Australian Competition and Consumer Commission established
   by the Trade Practices Act;
   "Commonwealth Minister" means the Commonwealth Minister responsible for
   competition policy;
   "constitutional trade or commerce" means:
   (a) trade or commerce among the States;
   (b) trade or commerce between a State and a Territory or between two Territories; or
   (c) trade or commerce between Australia and a place outside Australia;
   "Council" means the National Competition Council established by the Trade Practices
   Act;
   "jurisdiction" means the Commonwealth, a State, the Australian Capital Territory or the
   Northern Territory of Australia;
   "Party" means a jurisdiction that has enacted, and has not withdrawn from, this
   Agreement;
(2) Where this Agreement refers to a provision in legislation which has not been enacted at the date of commencement of this Agreement, or to an entity which has not been established at the date of commencement of this Agreement, this Agreement may apply in respect of the provision or entity from the date when the provision or entity commence operation.

(3) Without limiting the matters that may be taken into account, where this Agreement calls:

(a) for the benefit of a particular policy or course of action to be balanced against the costs of the policy or course of action;
(b) for the means or appropriateness of a particular policy or course of action to be determined; or
(c) for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

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

(4) It is not intended that the matters set out in sub-clause (3) should affect the interpretation of "public benefit" for purposes of authorisations or exemptions under the Trade Practices Act.

(5) This Agreement is neutral with respect to the nature and form of ownership of business enterprises. It is not intended to promote public or private ownership.

Price Oversight of Government Business Enterprises

(1) Price oversight of State and Territory Government business enterprises is primarily the responsibility of the State or Territory that owns the enterprise.

(2) The Parties will work cooperatively to resolve issues associated with price oversight of Government business enterprises and may seek assistance in this regard from the Council. The Council may provide such assistance in accordance with the Council's work program.

(3) In accordance with these principles, State and Territory Parties will consider establishing independent sources of price oversight advice when these do not exist.

(4) An independent source of price oversight advice should have the following characteristics:

(a) it should be independent from the Government business enterprise whose prices are being assessed;
(b) its prime objective should be to use of efficient resource allocation but with regard to any explicitly identified and defined community service obligations imposed on a business enterprise by the Government or legislation of the jurisdiction over the enterprise;
(c) it should apply to all significant Government business enterprises that are monopoly, near monopoly, supply of goods or services (or both);
(d) it should permit subsidies by internal means; and
(e) its pricing recommendations, and the reasons for them, should be published.

(5) A Party may generally or on a case-by-case basis:

(a) with the agreement of the Commonwealth, subject to Government business enterprises to a price oversight mechanism administered by the Commission; or
(b) with the agreement of another jurisdiction, subject to Government business enterprises to the pricing oversight process of that jurisdiction.

(6) In the absence of the consent of the Party that owns the enterprise, a State or Territory Government business enterprise will only be subject to a price oversight mechanism administered by the Commission if:

(a) the enterprise is not already subject to a source of price oversight advice which is independent in terms of the principles set out in sub-clause (4); and
(b) a jurisdiction which considers that it is sufficiently affected by the lack of price oversight ("affected jurisdiction") has consulted the Party that owns the enterprise, and the matter is not resolved to the satisfaction of the affected jurisdiction;

(c) the affected jurisdiction has then brought the matter to the attention of the Council and the Council has decided:

(1) that the condition in paragraph (a) exists; and
(g) that the pricing of the enterprise has a significant direct or indirect impact on constitutional trade or commerce;

(d) the Council has recommended that the Commonwealth Minister declare the enterprise for prior surveillance by the Commonwealth and

(e) the Commonwealth Minister has consulted the Party that owns the enterprise.

Competitive Neutrality Policy and Principles

3. (1) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities. Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.

(2) Each Party is free to determine its own agenda for the implementation of competitive neutrality principles.

(3) A Party may seek assistance with the implementation of competitive neutrality principles from the Council. The Council may provide such assistance in accordance with the Council's work program.

(4) Subject to subclause (6), for significant Government business enterprises which are classified as "Public Trading Enterprises" and "Public Financial Enterprises" under the Government Financial Statistics Classification:

(a) the Parties will, where appropriate, adopt a corporatisation model for these Government business enterprises (noting that a possible approach to corporatisation is the model developed by the inter-governmental committee responsible for GFE National Performance Monitoring); and

(b) the Parties will impose on the Government business enterprise:

(i) full Commonwealth, State and Territory taxes or tax equivalent systems;

(ii) debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and

(iii) those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, on an equivalent basis to private sector competitors.

(5) Subject to subclause (6), where an agency (other than an agency covered by subclause (4)) undertakes significant business activities as part of a broader range of functions, the Parties will, in respect of the business activities:

(a) where appropriate, implement the principles outlined in subclause (4); or

(b) ensure that the prices charged for goods and services will take account, where appropriate, of the issues listed in paragraph (4)(b), and reflect full and realisation of these activities.

(6) Subclauses (4) and (5) only require the Parties to implement the principles specified in these subclauses to the extent that the benefits to be realised from implementation will be significant.

(7) Subparagraph (6)(i)(b) shall not be interpreted to require the removal of regulation which applies to Government business enterprises or agency that does not apply to the private sector where the Party responsible for the regulation considers the regulation to be inappropriate.

(8) Each Party will publish a policy statement on competitive neutrality by June 1996. The policy statement will include an implementation timetable and a compliance mechanism.

(9) Where a State or Territory becomes a Party to a new treaty on December 1995, that Party will publish its policy statement within six months of becoming a Party.

(10) Each Party will publish an annual report on the implementation of the principles set out in subclauses (1), (4) and (5), including allegations of non-compliance.

Structural Reform of Public Monopolies

4. (1) Each Party is free to determine its own agenda for the reform of public monopolies.

(2) Before a Party introduces competition to a sector traditionally supplied by a public monopoly, it will remove from the public monopoly any responsibilities for industry regulation. The Party will re-locate industry regulation because so to prevent the former monopoly enjoying a regulatory advantage over its existing and potential rivals.

(3) Before a Party removes competition to a sector traditionally supplied by a public monopoly, and before a Party privatised a public monopoly, it will undertake a review to:

(a) the appropriate commercial objectives for the public monopoly;

(b) the merits of removing any residual monopoly elements from potentially competitive element of the public monopoly; and

(c) the merits of ensuring potentially competitive elements of the public monopoly;
(a) the most effective means of recovering the regulatory functions from commercial functions of the public monopoly;
(b) the most effective means of implementing the competitive neutrality principles set out in this Agreement;
(c) the merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations;
(d) the price and service regulations to be applied to the industry; and
(e) the appropriate financial relationship between the owner of the public monopoly and the public monopoly, including the role of cross-subsidies, dividends and capital repayment.

4. A Party may seek assistance with such a review from the Council. The Council may provide such assistance in accordance with the Council’s work program.

Legislation Review

5. (1) The guiding principle is that legislation (referring Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

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

(2) Subject to subclauses (3), each Party is free to determine its own agenda for the reform of legislation that restricts competition.

(3) Subject to subclauses (4), each Party will develop a timetable by June 1995 for the review, and where appropriate, reform of all existing legislation that restricts competition by the year 2000.

(4) Where a State or Territory becomes a Party at a date later than December 1995, that Party will develop its timetable within six months of becoming a Party.

(5) Each Party will prepare proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principles set out in subclause (1).

(6) Once a Party has reviewed legislation that restricts competition under the principles set out in subclauses (3) and (4), the Party will systematically review the legislation at least once every ten years.

(7) Where a review shows a national discretion or effect on competition (or both), the Party responsible for the review will consider whether the review should be a national review. If the Party determines a national review is appropriate, before determining the terms of reference for, and the appropriate body to conduct the national review, it will consult Parties that may have an interest in those matters.

(8) When a Party determines a review should be a national review, the Party may request the Council to undertake the review. The Council may undertake the review in accordance with the Council’s work program.

(9) Without limiting the terms of reference of a review, a review should:

(a) clarify the objectives of the legislation;
(b) identify the nature of the restriction on competition;
(c) analyze the likely impact of the restriction on competition and on the economy generally;
(d) assess and balance the costs and benefits of the restriction; and
(e) consider alternative means for achieving the same result including non-legislative approaches.

(10) Each Party will publish an annual report on its progress towards achieving the objectives set out in subclause (3). The Council will publish an annual report summarizing the reports of each Party.

Access to Services Provided by Means of Significant Infrastructure Facilities

6. (1) Subject to subclause (2), the Commonwealth will not forward legislation to establish a regime that third party access to services provided by means of significant infrastructure facilities where:

(a) it would not be economically feasible to duplicate the facility;
(b) access to the service is necessary to enter a new market or to expand existing markets;
(c) the facility is of national significance having regard to the size of the facility, its importance to the national economy and its importance to the national economy;
(d) the use of the facility by the person seeking access can be achieved at an economically feasible cost and, if there is a regulatory requirement, appropriate regulatory arrangements exist.

(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in the following examples:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
(6) substantial difficulties arise from the facility being closed in more than one jurisdiction.

(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:
   (i) it would not be economically feasible to duplicate the facility;
   (ii) access to the service is necessary in order to promote effective competition in a downstream or upstream market; and
   (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost, and, if there is a safety requirement, appropriate regulatory arrangements exist; and

(b) incorporate the principles referred to in subclause (4).

(4) A State or Territory access regime should incorporate the following principles:

(a) whenever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an arm's length process.

(d) Any right to negotiate access should include a date after which the right would lapse unless renewed and subsequently extended, however, existing contractual rights and obligations should not be automatically continued.

(e) The owner of a facility that is used to provide a service should use reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

(h) The decision of the dispute resolution body should bind the parties, however, rights of appeal under existing legislative provisions should be preserved.

(5) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of connecting the facility but not costs associated with issues setting from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) any and binding contractual obligations of the owner or other persons for both already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility, and

(viii) the benefit to the public from having competitive markets.

(6) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) each extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

(ii) the owner's legitimate business interests in the facility being protected; and

(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(7) If there has been a substantial change in circumstances, the parties should be able to apply for a modification or renewal of the access arrangements which was made as a condition of the dispute resolution process.

(8) The dispute resolution body should only impose the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

(a) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

(b) Safeguards surrounding arrangements should be required for the elements of a business which are covered by the access regime.

(c) The dispute resolution body, or relevant authority whose provisions for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.
(9) Where more than one State or Territory access regime applies to a service, these regimes should be consistent and, by means of vested jurisdiction or other corporate legislative patterns, provide for a simple process for parties to seek access to the services, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

Application of the Principles to Local Government

7. (1) The principles set out in this Agreement will apply to local government, even though local governments are not Parties to this Agreement. Each State and Territory Party is responsible for applying these principles to its local government.

(2) Subject to subclauses (3), where clause 4.4 is satisfied, each Party may determine its own agenda for the implementation of the principles set out in that clause, each State and Territory Party will publish a statement by June 1996.

(a) which is prepared in consultation with local government; and

(b) which specifies the application of the principles to particular local government activities and functions.

(3) When a State or Territory becomes a Party at a date later than December 1995, that Party will publish a statement within six months of becoming a Party.

Funding of the Council

8. The Commonwealth will be responsible for funding the Council.

Appointments to the Council

9. (1) Where the Commonwealth proposes that a vacancy in the office of the Chairperson or Councilor of the Council be filled, it will send written notice to the States and Territories that are Parties indicating suggestions as to suitable persons to fill the vacancy. The Commonwealth will allow those Parties a period of thirty-five days from the date on which the notice was sent to make suggestions before sending a notice of the type referred to in subclauses (2).

(2) The Commonwealth will send to the States and Territories that are Parties written notice of persons whom it desires to put forward to the Governor-General for appointment as Chairperson or Councilor of the Council.

(3) Within thirty-five days from the date on which the Commonwealth sends the notice of the type referred to in subclauses (2), the Party to whom the Commonwealth sends a notice will notify the Commonwealth Minister in writing as to whether the Party supports the proposed appointment. If the Party does not notify the Commonwealth Minister in writing within that period, the Party will be taken to support the proposed appointment.

(4) The Commonwealth will not put forward to the Governor-General a person for appointment as a Councilor or Councilor of the Council unless a majority of the States and Territories that are Parties support, or pursuant to this clause are taken to support, the appointment.

Work Program of the Council, and Referral of Matters to the Council

10. (1) The work of the Council (other than work relating to a function under Part IIIA of the Trade Practices Act or under the Privacy Act 1988) will be the subject of a work program which is determined by the Parties.

(2) Each Party will refer proposals for the Council to undertake work (other than work relating to a function under Part IIIA of the Trade Practices Act or under the Privacy Act 1988) to the Parties for possible inclusion in the work program.

(3) A Party will not put forward legislation conferring additional functions on the Council unless the Parties have determined that the Council should undertake those functions as part of its work program.

(4) Questions as to whether a matter should be included in the work program will be determined by the agreement of a majority of the Parties. In the event that the Parties are evenly divided in a question of whether the inclusion of a matter in the work program, the Commonwealth shall determine the outcome.

(5) The Commonwealth Minister will only refer matters to the Council pursuant to subsection 205(1) of the Trade Practices Act in accordance with the work program.

(6) The work program of the Council shall be taken to include a request by the Commonwealth for the Council to examine and report on the matters specified in subsection 205(2) of the Conduct Code Agreement.

Review of the Council

11. The Parties will review the need for, and the operation of, the Council after it has been in existence for five years.

Consultation

12. Where this Agreement requires consultation between the Parties or some of them, the Party initiating the consultation will:

(a) send to the Parties that must be consulted a written notice setting out the matters on which consultation is to occur;

(b) allow those Parties a period of thirty days from the date on which the notice was sent to respond to the matters set out in the notice; and

(c) when requested by one or more of those Parties, convene a meeting between the Parties to discuss the matters set out in the notice and the responses, if any, of those Parties.
New Parties and Withdrawal of Parties

13. (1) A jurisdiction that is not a Party at the date this Agreement commences operation may become a Party by sending written notice to all the Parties.

(2) A Party may withdraw from this Agreement by sending written notice to all other Parties. The withdrawal will become effective six months after the notice was sent.

(3) If a Party withdraws from this Agreement, this Agreement will continue in force with respect to the remaining Parties.

Sending of Notices

14. A notice is sent to a Party by sending it to the Minister responsible for the competition legislation of that Party.

Review of this Agreement

15. Once this Agreement has operated for five years, the Parties will review its operation and terms.

Commencement of this Agreement

16. This Agreement commences upon the Commonwealth and at least three other jurisdictions having ceased to.

Signed for and on behalf of the Parties by:

The Honourable Paul Keating, Prime Minister of the Commonwealth of Australia, on the 11th day of April 1995 in the presence of:

The Honourable Robert John Carr, Premier of the State of New South Wales, on the 11th day of April 1995 in the presence of:

The Honourable John Githa Kereh, Premier of the State of Victoia, on the 11th day of April 1995 in the presence of:

The Honourable Neil Keith Coax, Premier of the State of Queensland, on the 11th day of April 1995 in the presence of:

The Honourable Richard Peter Coax, Premier of the State of Western Australia, on the 11th day of April 1995 in the presence of:

The Honourable John Craig Brown, Premier of the State of South Australia, on the 11th day of April 1995 in the presence of:
AGREEMENT TO IMPLEMENT THE NATIONAL COMPETITION POLICY
AND RELATED REFORMS

BETWEEN

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE STATE OF TASMANIA
THE AUSTRALIAN CAPITAL TERRITORY, AND
THE NORTHERN TERRITORY OF AUSTRALIA

WHEREAS the Council of Australian Governments at its meeting in Canberra on
11 April 1995 agreed on a program for the implementation of the National Competition Policy
and related reforms;

AND WHEREAS the Commonwealth and the States have agreed to financial
arrangements in relation to the implementation of National Competition Policy (NCP)
and related reforms:

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE STATE OF TASMANIA
THE AUSTRALIAN CAPITAL TERRITORY, AND
THE NORTHERN TERRITORY OF AUSTRALIA agree as follows:

The provision of financial assistance by the Commonwealth is conditioned on the States
making milestone progress with the implementation of NCP and related reforms (as set
out below). The Commonwealth's commitment is on the basis that the financial
arrangements will need to be reviewed if Australia experiences a major deterioration in
its economic circumstances.
The Commonwealth will moderate the real per capita payments of the FOGs pool on a rolling three-year basis.

- This will involve the Commonwealth extending the payments to 1997-98 now.
- The per capita element will have an estimated annual cost to the Commonwealth of $2.4 billion by 2005-06 (see Table 1).
- Local government will benefit from the link between the State and Local Government FOGs payments.

There will also be three tranches of general purpose payments in the form of a series of Competition Payments.

- The first tranche of Competition Payments will commence in July 1997 and will be made quarterly thereafter.
- The annual payments from 1997-98 under the first tranche will be $200 million in 1994-95 prices.
- It will be indexed annually to maintain its real value over time.
- Commencement of the first tranche of the Competition Payments and the per capita payments is subject to the States meeting the conditions set out below.

The second and third tranches of the Competition Payments will commence in 1999-2000 and 2001-02. The annual Competition Payments will be $450 million, in 1994-95 prices, from 1999-2000 and $500 million, in 1994-95 prices, from 2001-02. These payments will also be indexed in real terms.

The Commonwealth Payments to be made to the States to support the implementation of National Competition Policy (NCP) and related reforms will be a pool separate from the FOGs pool and be distributed to the States on a per capita basis. These Commonwealth Payments will be quantified based on revenues by the Commonwealth Grants Commission.

If a State has not undertaken the required action within the specified time its share of the per capita component of the FOGs pool and of the Competition Payments pool will be reduced by the Commonwealth.

Prior to 1 July 1997, 1 July 1998, and 1 July 2001 the National Competition Council will assess whether the conditions for payments to the States to commence on those dates have been met.

Conditions for Payments to the States

The first payments will be made in 1997-98 to each participating State at the date of the payment and depending upon:

(1) the State's giving effect to the Competition Policy Intergovernmental Agreements and, in particular, ensuring the delivery of specified results, in relation to the review of regulations and competitive restrictivity;

(2) effective implementation of all COAG agreements on:
- electricity arrangements through the National Grid Management Council,
- the national framework for line and full scale sales gas, and
- effective observance of road transport reforms.

Payments under the second tranche of the Competition Payments will commence in 1999-2000 and be made to each participating State as at the date of the payment and depending upon:

(3) the State's continuing to give effect to the Competition Policy Intergovernmental Agreements, including those in the definition;

(4) effective implementation of all COAG agreements on:
- the establishment of a competitive national electricity market,
- the national framework for line and full scale sales gas, and
- the strategic framework for the efficient and sustainable delivery of the water resources industry, and

(5) effective observance of road transport reforms.

Payments under the third tranche will commence in 2001-02 and be made to each participating State as at the date of the payment and depending on the State's:

- having given effect to, and continuing to observe fully, the Competition Policy Intergovernmental Agreements; and
- having fully implemented, and continuing to observe fully, all COAG agreements with regard to aluminium, gas, water and road transport.

Full details of the conditions are set out in the memorandum.
Signed for and on behalf of each of the Parties by:

The Honourable Paul John Keating MP
Premier of the Commonwealth of Australia
on the 11th day of April 1995
in the presence of:

The Honourable Robert John Carr MP
Premier of the State of New South Wales
on the 11th day of April 1995
in the presence of:

The Honourable Jeff Kennett MLA
Premier of the State of Victoria
on the 11th day of April 1995
in the presence of:

The Honourable Wayne Keathha Clark MLA
Premier of the State of Queensland
on the 11th day of April 1995
in the presence of:

The Honourable Richard Fairfax Court MLA
Premier of Western Australia
on the 11th day of April 1995
in the presence of:

The Honourable Dean Craig Brown MP
Premier of the State of South Australia
on the 11th day of April 1995
in the presence of:

The Honourable Raymond John Gorman MLA
Premier of the State of Tasmania
on the 11th day of April 1995
in the presence of:

Kim Carr MLA
Chief Minister of the Australian Capital Territory
on the 11th day of April 1995
in the presence of:

The Honourable Marshall Bruce Peterson MLA
Chief Minister of the Northern Territory of Australia
on the 11th day of April 1995
in the presence of:
CONDITIONS OF PAYMENTS TO THE STATES

(a) Per capita Guarantee and First Tranche of the Competition Payments

Payment under the extension of the per capita guarantee and the first tranche will start in 1997-98 to each State and Territory that:

- has signed the Competition Principles Agreement and the Conduct Code Agreement at the COAG meeting in April 1995;
- in accordance with the Conduct Code Agreement, passed the required application legislation so that the Competition Code applied within that State or Territory jurisdiction by 12 months after the Commonwealth's Competition Policy Reform Bill received the Royal Assent;
- is a fully participating jurisdiction under the Competition Policy Reform Bill and a party to the Competition Principles Agreement at the time at which the payments are made (States and Territories must apply the Competition Code as a law of the State without making significant modifications to the Code in its application on persons within their legislative competence and must remain a party to both Competition Policy (intergovernmental Agreement))
- is meeting all its obligations under the Competition Principles Agreement, which include, but are not limited to:
  - when undertaking significant business activities or when corporating their Government Business Enterprises, having imposed on those activities or enterprises full government taxes or tax equivalent prices, debt guarantees, fees directed towards offering the competitive advantages provided by government guarantee and other regulations to which private sector businesses are normally subject on an equivalent basis to the enterprise's private sector competitors;
  - having published a policy statement on competitive neutrality by June 1995 and published the required annual reports on the implementation of the competitive neutrality principles;
  - having developed a timetable by June 1995 for the implementation of any legislative action required to implement the competitive neutrality principles.

(b) (for relevant jurisdictions) has taken all measures necessary to implement an interim competitive National Electricity Market, as agreed at the July 1991 special Premiers' Conference, and subsequent COAG agreements, from 1 July 1993 or on such other date as agreed by the parties, including signing any necessary Heads of Agreement and agreeing to
subscribe to the National Electricity Market Management Company and National Electricity Code Administration;

- (for relevant jurisdictions) has implemented any arrangements agreed between the parties as necessary to introduce free and fair trading in gas between and within the States by 1 July 1996 or such other dates as agreed between the parties, in keeping with the February 1994 COAG agreement; and

- effective observance of the agreed package of road transport reforms.

(b) Second Tranche of the Competition Payments

Payments under the second tranche will commence in 1999-2000, and be made each year thereafter to the States and Territories that have undertaken the following specified reforms by July 1999 as far as they apply in these:

- (for relevant jurisdictions) completion of the transition to a fully competitive National Electricity Market by 1 July 1999;

- (for relevant jurisdictions) full implementation of free and fair trading in gas between and within the States including the phasing out of transitional arrangements in accordance with the schedule to be agreed between the parties;


- continuing to be a fully participating jurisdiction under the Competition Policy Reform Bill and a party to the Competition Principles Agreement at the time at which the payment is made;

- continued effective observance of the agreed package of road transport reforms; and

- meeting all obligations under the Competition Policy Intergovernmental Agreement.

(c) Third Tranche of the Competition Payments

Payment under the third tranche will commence in 2001-02 and be made each year thereafter to the States and Territories on the basis of each State's or Territory's progress on the implementation of the following reforms:

- the extent to which each State and Territory has actually complied with the competition policy principles in the Competition Principles Agreement, including the program made in reviewing, and where appropriate, reforming legislation that restricts competition;

- whether the State or Territory has maintained a fully participating jurisdiction as defined in the Competition Policy Reform Bill.

- the setting of national standards in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Advice from the Office of Regulation Review in compliance with these principles and guidelines; and

- continued effective observance of reforms in electricity, gas, water and road transport.
Appendix 2

LEGISLATIVE COUNCIL
- 2105 -
Question Without Notice
(of which some notice has been given)
Thursday, 11 September 2003

Hon Dee Margetts to the Leader of the House representing the Premier

I refer the Leader of the House to amendments to the National Competition Policy Arrangements attached to the COAG Communiqué of the 3rd of November 2000 and I ask:

(1) Who represented Western Australia at this meeting?

(2) Is the Government happy that COAG Senior Officials were given the responsibility for determining the forward work program of the National Competition Council, effectively taking that control away from the parties to COAG, as per the NCP Legislation in 1995?

(3) If not, what action has the State Government taken or will the State Government take in COAG or elsewhere in the future to address the issue about agreements made by the previous State Government in this regard?

(4) What background information can the Government provide about the "Senior COAG Officials" who were given this task, which is obviously having such a major impact on a range of sectors in Western Australia? And

(5) Can the Leader of the House provide a copy of the letter from the Prime Minister to COAG on the 27th of October 2000 regarding "measures to clarify and fine-tune implementation arrangements for NCP" as cited in the November 2000 Communiqué?

________________________
I thank the Hon. Member for some notice of this question.

As there was no attachment to the COAG Communiqué of 3 November 2000 on the National Competition Policy, I assume the Hon Member is referring to the Communiqué itself.

(1) Western Australia is always represented at COAG by the Premier.
(2) COAG Senior Officials were not given the responsibility for determining the National Competition Council's forward work program. Rather, the decision at COAG was for the National Competition Council to determine its forward work program in consultation with COAG Senior Officials. The role of COAG is to initiate, develop and monitor the implementation of policy reforms which are of national significance and which require cooperative action by Australian governments. Given that this includes the National Competition Policy (NCP), it is essential that COAG provides guidance to the National Competition Council on its requirements in relation to the reform commitments under the NCP. In this case the guidance is provided through the COAG Senior Officials.

(3) Not applicable.

(4) COAG Senior Officials are senior officers from the departments of the Premiers, Chief Ministers and the Prime Minister. They are responsible directly to COAG.

(5) Copy is tabled.
The Hon R F Court MLA
Premier of Western Australia
Capita Building
197 St George's Terrace
PERTH WA 6000

My dear Premier

I am writing in relation to proposed changes to the operation of National Competition Policy (NCP) following a review of current arrangements by a working group of Senior Officials, and to finalise the agenda for the meeting of the Council of Australian of Governments (COAG) on 3 November 2000.

As you will be aware, the review was required by the terms of the Competition Principles Agreement (CPA) and the Conduct Code Agreement, which were concluded in 1995. The review was conducted by an intergovernmental working group of officials against terms of reference agreed by Heads of Government. These required that a report be made to COAG through COAG Senior Officials.

COAG Senior Officials have considered the issues raised by the review and propose that COAG agrees to a number of modifications. Accordingly, I am now seeking your agreement to their implementation. I propose that this letter and the responses from you and other Premiers and Chief Ministers should constitute an agreement to vary the NCP agreements where this is required.

It is proposed that COAG note the report of the intergovernmental working group review and agree to the continuation of NCP. It is further proposed that COAG agree to a range of measures which will improve the operation of the current arrangements regarding the implementation and assessment of the NCP reform commitments. These measures are set out in detail in the attachment to this letter.

The adoption of these changes will establish a practical framework for the ongoing, effective implementation of NCP, while demonstrating our ongoing commitment to this policy and safeguarding the flow of benefits it is delivering to Australians as a whole. The changes will also serve to address a number of
community concerns regarding the application of NCP which were identified in the recent Productivity Commission and Senate Select Committee inquiries into competition policy.

I look forward to your early response indicating your agreement to these proposals.

I would also like to take this opportunity to confirm a final agenda for the 3 November COAG meeting in light of the meeting of COAG Senior Officials held in Brisbane on 13 October.

Senior Officials agreed to propose that labelling of genetically modified (GM) foods should no longer remain as an agenda item, since adequate progress had been made on developing an implementation protocol. It was also agreed to propose that the item on food regulation reform not involve consideration of the wider issue of variation of nationally agreed standards. Senior Officials also agreed to propose that COAG consider a review of the number of Ministerial Councils as an agenda item.

I agree with the above proposals and can now confirm a final agenda for the meeting, with the following items being dealt with in the order shown:

1. Natural resource management;
2. Food regulation reform;
3. Quarantine restrictions and international trade obligations;
4. NCP;
5. Gambling;
6. Aboriginal reconciliation; and

I have written in similar terms to all Premiers and Chief Ministers, and also to the President of the Australian Local Government Association informing him of the final agenda.

Yours sincerely

[Signature]

(John Howard)
ATTACHMENT

CHANGES TO NATIONAL COMPETITION POLICY ARRANGEMENTS

TRANSPARENCY

- In meeting the requirements of sub-clauses 1(3)(a)(b) and (c) of the CPA, which relate to the application of the public interest test, Governments should document the public interest reasons supporting a decision or assessment and make them available to interested parties and the public.

- When examining those matters identified under clause 1(3) of the CPA, Governments should give consideration to explicitly identifying the likely impact of reform measures on specific industry sectors and communities, including expected costs in adjusting to change.

- COAG to undertake an enhanced role in guiding the NCC in relation to its role in explaining and promoting NCP policy to the community.

NCC WORK PROGRAM

- The NCC will determine its forward work program in consultation with CAOG Senior Officials.

- The NCC will provide a six monthly report to Senior Officials detailing its draft forward work program and current activities, including its communications and future assessment activities.

- Senior Officials will continue to provide guidance to the NCC to clarify COAG's requirements in relation to the interpretation of reform commitments under the NCP and related reform agreements, including appropriate assessment benchmarks, as required.

FUTURE ASSESSMENT PROCESSES

- The NCC's assessment as to whether jurisdictions have met their commitments under clause 5(1) of the CPA will be guided by the following amendment to the CPA.

   "In assessing whether the threshold requirement of Clause 5 has been achieved, the NCC should consider whether the conclusion reached in the report is within a range of outcomes that could reasonably be reached based on the information available to a properly constituted review process. Within the range of outcomes that could reasonably be reached, it is a matter for Government to determine what policy is in the public interest."

- Following the third tranche assessment to be conducted before 1 July 2001, the NCC will undertake an annual assessment of each party's performance in meeting its reform obligations, as specified in the Agreement to Implement the National Competitors Policy and Related Reform or as subsequently advised by COAG, and provide a recommendation on the level of competition payments to be received by each State and Territory.

- In making a recommendation that a penalty be applied to a particular State or Territory, the NCC is to have regard to the following statement:

   When assessing the nature and level of any financial penalty or suspension, the NCC must take into account:
the extent of overall commitment to the implementation of NCP by the relevant jurisdiction;
the effect of one jurisdiction’s reform efforts on other jurisdictions; and
the impact of failure to undertake a particular reform.

- Where the NCC recommends a penalty, a statement of reasons identifying the basis for this penalty is to be published in the NCC’s annual assessment.
- Commencing in 2001, the assessments should be provided to the Commonwealth Treasurer and each State and Territory at the same time, but will remain confidential until a decision has been made by the Commonwealth on the level of competition payments.
- Where an assessment recommends a penalty be applied to a State or Territory, the Commonwealth will provide a period of one month following receipt of the assessment before making a decision on the level of competition payments to be received by that jurisdiction. This will allow the relevant jurisdiction to respond to the Commonwealth on the recommendation made by the NCC.
- The timing of the imposition of any penalty will be discussed on a bilateral basis between the Commonwealth and the affected jurisdiction.

LEGISLATION REVIEW SCHEDULE

- The deadline for legislation reviews conducted under clause 5(3) of the CPA is extended so that all jurisdictions must complete all legislation reviews and implement appropriate reforms by 30 June 2002.
- Satisfactory implementation of reforms may include, where justified by a public interest assessment, having in place a firm transitional arrangement that may extend beyond the revised deadline.
- The revision to the deadline does not alter the schedule of competition payments.

COMPETITIVE NEUTRALITY – ASSESSMENT

The assessment of a party’s compliance with the competitive neutrality requirements under clause 3 of the CPA should have regard to:

- the adoption of a “best endeavours” approach to assessment, in those circumstances where a government business is not subject to the executive control of a party. This would require parties, at a minimum, to provide a transparent statement of CN obligations to the entity in question;
- the term “full cost attribution” accommodating a range of costing methodologies, including fully distributed cost, marginal cost, avoidable cost etc., as appropriate in each particular case;
- there being no requirement for parties to undertake a competitive process for the delivery of Community Service Obligations (CSO); and
- parties being free to determine who should receive a CSO payment or subsidy, which should be transparent, appropriately costed and directly funded by government. This position refers
directly to the implementation of CN requirements under the CPA, and is not intended to
impact on consideration of CSO matters arising in the context of the related reform
agreements.

REVIEW

- The terms and operation of the Conduct Code Agreement, the Competition Principles
  Agreement and the Agreement to Implement the National Competition Policy and Related
  Reforms, and the NCC's assessment role, will be reviewed before September 2003.

- The Commonwealth and States give early consideration to the best means of ensuring NCP
  commitments arising from the CCA continue to be met in light of the High Court case
  re: Hughes.

PROPOSED AMENDMENTS TO THE CONDUCT CODE AGREEMENT

- The reference in clause 2(2) of the CCA to paragraph 51(1B)(1) of the Trade Practices Act
  1974 should be changed to paragraph 51(1C)(1), to correct a previous drafting error.

- References in clause 7 of the CCA to 'the Parties' should be replaced with 'fully participating
  jurisdictions'; the words 'the Party initiating the consultation' should be replaced with 'the
  Commonwealth'; and the words 'or some of them' should be deleted.

PROPOSED AMENDMENTS TO THE AGREEMENT TO IMPLEMENT THE NATIONAL
COMPETITION POLICY AND RELATED REFORMS

- References to the per capita Financial Assistance Grants (FAGs) component of the NCP
  payments to be removed, and 'States' to be replaced with 'States and Territories';

- The payments table attached to the Agreement to be deleted.
Appendix 3

HEADS OF GOVERNMENT MEETING
CANBERRA 11 MAY 1992

COMMUNIQUE

INTRODUCTION

The Prime Minister, Premiers and Chief Ministers and the President of the Australian Local Government Association held wide-ranging discussions in Canberra today on national issues of mutual concern. These issues included Commonwealth-State financial arrangements and a range of measures for improving national economic and structural efficiency, including measures in the areas of road and rail transport, the electricity industry, mutual recognition of regulation and vocational education and training.

COMMONWEALTH-STATE FINANCIAL ARRANGEMENTS

Heads of Government discussed the immediate and medium-term outlook for their respective budgets and intergovernmental financial relations.

In discussing the paper prepared by the States on Commonwealth-State financial relations, the Commonwealth acknowledged that the States needed to be adequately resourced and that the predictability, flexibility and growth of State funding were agreed objectives. The States will decide later this week whether the June Premiers' Conference should consider financial arrangements for 1992-93 only or also for a longer period.

The Conference agreed that a Committee of Commonwealth, State and Territory Treasury officials would prepare a report on budgetary prospects and issues for consideration at the forthcoming financial Premiers' Conference. It would take account of both cyclical and structural factors at both the Commonwealth and State level in the context of a national budgetary strategy for all governments. This report could provide a basis for considering general purpose funding for the States in 1992-93 and, if necessary, longer term financial arrangements.

If the June Premiers' Conference decides only on 1992-93 funding arrangements, a report on longer-term arrangements will be prepared by early 1993.

MEETINGS OF HEADS OF GOVERNMENT

Leaders and representatives agreed to establish a "Council of Australian Governments" as a permanent body or on-going consultation between the Prime Minister,
Premiers, Chief Ministers and the President of the Australian Local Government Association.

Leaders and representatives have agreed that there will be a meeting of the "Council of Australian Governments" at least once each year, in addition to the financial Premiers' Conference, and that the Prime Minister will chair the meetings.

The role of the "Council of Australian Governments" is:

- increasing co-operation among governments in the national interest;
- co-operation among governments on reforms to achieve an integrated, efficient national economy and single national market;
- continuing structural reform of government and review of relationships among governments consistent with the national interest; and
- consultation on other major issues by agreement such as:
  - international treaties which affect the States and Territories and which have not been resolved through the agreed processes;
  - major initiatives of one government which impact on other governments;
  - major whole-of-government issues arising from Ministerial Council deliberations.

The venue for meetings of the Council will rotate between the States and Territories and there will be joint Commonwealth and State/Territory involvement in providing secretariat arrangements.

Leaders and representatives agreed that the first meeting of the Council should consider broad protocols for the operation of Ministerial Councils. Heads of Government noted the significant cooperation and consultation between Governments which now occurs through Ministerial Councils of Commonwealth and State Ministers. However, there are now more than 40 such Councils, many meeting several times a year.

MUTUAL RECOGNITION

The Heads of Government of the Commonwealth, States and Territories signed a final Agreement to introduce legislation to eliminate regulatory impediments to a national market in goods and services. It is expected to greatly enhance the international competitiveness of the Australian economy and is recognised by Heads of
Government as a vital initiative in the achievement of microeconomic reform.

The Agreement provides for all jurisdictions to enact legislation so that goods that can be sold lawfully in one State may be sold freely in any other State or Territory. The legislation will not apply to certain products, such as firearms, prohibited and offensive weapons and pornography.

Similarly, with occupations, if a person is registered to carry out an occupation in one State or Territory he or she will be entitled to be registered to undertake the equivalent occupation in any other State or Territory.

The States and Territories agreed that they will request and empower the Commonwealth to pass a single Act which will apply equally throughout Australia and will automatically override any State or Territory laws or regulations which are inconsistent with the principles of mutual recognition. The Commonwealth will be a full Party to the Agreement.

The Agreement also provides a mechanism for achieving negotiated uniform national standards, where necessary in the interests of public health or safety or environmental protection. States and Territories reaffirmed their agreement to be bound by the decisions of two thirds or more of Commonwealth, State and Territory Ministers voting within Ministerial Councils to develop a national standard when the need for such a standard becomes evident as a result of the operation of mutual recognition. The Commonwealth has agreed to be bound by recommendations of the Commonwealth-State Consumer Affairs Product Safety Advisory Committee, approved by Commonwealth, State and Territory Ministers, with respect to standards for goods under the Trade Practices Act.

Heads of Government agreed on a revised timetable for implementation of mutual recognition. It is proposed that States and Territories enact their necessary legislation by 31 October 1992; and that the Commonwealth legislation be enacted by 1 January 1993, with proclamation by 1 March 1993.

Heads of Government noted a report on progress in the development of national competency standards for professions and occupations. They expect that where these are available, national competency standards will do much to facilitate the smooth operation of mutual recognition in respect of the occupations. They also noted work done on the development of uniform standards in relation to occupational health and safety and dangerous goods. They reaffirmed that a national solution to the treatment of partially regulated occupations is a matter of high priority.
Heads of Government also endorsed the other recommendations contained in the Report of the Commonwealth-State Committee on Regulatory Reform.

ROAD TRANSPORT

Leaders and representatives noted the Commonwealth's decision to provide an additional $25 million in 1991-92, $437.5 million in 1992-93 and $140 million in 1993-94 for augmenting and rehabilitating the National Highway System, accelerating selected National Arterial projects and expanding the Black Spots program. They also noted the positive employment effects of this expenditure in the period up to 1993-94.

Leaders and representatives agreed to the role and functions of the National Road Transport Commission. An Agreement has been signed by the Commonwealth, New South Wales, Victoria and South Australia to this end. Queensland indicated its intention to sign.

The Commission was established after the July 1991 Heads of Government meeting to develop national road transport legislation and regulations and to recommend on charges to apply no later than 1 January 1993 for vehicles over 4.5 tonnes. It will now also be responsible for developing regulations for all other road users.

In addition, the Commission is to assemble and publish comparative information on the funding and management of roads, performance indicators for the road system and the efficiency and effectiveness of road authorities.

Leaders and representatives agreed that it was important to delineate clearly Commonwealth and State road responsibilities. The Prime Minister indicated that he would shortly be advising the States of the Commonwealth position on the National Highway System.

It was confirmed that $350 million of the Commonwealth roads program would be untied. The Prime Minister indicated that he would be writing to other Heads of Government soon on an appropriate basis for this distribution, including continuing the distribution currently applying to the road funding being untied, with a view to settling the matter before the June Premiers' Conference.

RAIL REFORM

The Commonwealth's readiness to provide $454 million over the next two years to complement the National Rail Corporation's 10-year $1.7 billion investment program was noted.

Leaders and representatives agreed that further rail reform is required if the significant potential economic gains are to be realised.
They noted that a number of the reforms were consistent with measures already adopted by the States, but that there was still considerable scope for increasing the efficiency of the rail sector.

Acknowledging this and the importance of early reform, the New South Wales, Victorian, Queensland, and Western Australian Premiers agreed to continue to pursue and accelerate reform of their rail systems over the next three years.

ELECTRICITY GENERATION, TRANSMISSION AND DISTRIBUTION

It was agreed to develop an interstate transmission network across the eastern States and that the National Grid Management Council would report on the precise nature and operating guidelines of the structure by the end of 1992. To achieve this, Heads of Government agreed to the principle of separate generation and transmission elements in the electricity sector.

Western Australia, while not part of a national grid, supports the above. South Australia wishes to look further at the implications for its system. Tasmania's participation in a national grid will be dependent on the development of a Basslink proposal.

Heads of Government agreed to finalise the draft national grid protocol prepared by the National Grid Management Council via correspondence by the end of June.

VOCATIONAL EDUCATION AND TRAINING

Heads of Government agreed on the necessity of achieving a major increase in the level of vocational education and training opportunities across Australia, consistent with the national participation targets arising from the recent report of the Finn Committee.

In line with this objective, Heads of Government resolved that:

(a) governmental responsibilities for the funding and resourcing of vocational education and training should be settled as a matter of urgency;

(b) there was an urgent need also to advance the agreed agenda of national training reform, including consideration of the proposals for reform of entry-level training flowing from the recent report of the Employment and Skills Formation Council (Carmichael Report);

(c) governments should work further to clarify issues for the June Premiers' Conference on funding and administrative arrangements under the Commonwealth model and the National Partnership model for
vocational education and training, with particular reference to:
- the detailed financial implications;
- responsibility for decision making; and
- the relationship between proposals for
government schools and TAFE and training.

Heads of Government agreed that the issue of youth
employment and training is one of national priority and
will be further progressed at the June meeting.

ABORIGINAL AFFAIRS

Heads of Government endorsed the document "Achieving
Greater Coordination of Aboriginal and Torres Strait
Islander Programs and Services". This establishes a
framework of principles and a plan of action for improved
intergovernmental relations in Aboriginal affairs.

Heads of Government recognised the role of ATSIC, but
noted that its creation had introduced complexities into
the relationship between governments. These would be
addressed in the period ahead, in particular the
operation of section 18 of the ATSIC Act in relation to
grants to States and Territories.

The great majority of the 339 recommendations of the
Royal Commission into Aboriginal Deaths in Custody had
been accepted by governments. Heads of Government were
committed to continuing to address issues of Aboriginal
disadvantage. The Prime Minister reiterated the
Commonwealth's commitment to announce an additional
package of measures by mid-year and Premiers and Chief
Ministers indicated that they would continue to give
Aboriginal needs high priority in their 1992-93 budgets.

ENVIRONMENT

Intergovernmental Agreement on the Environment

Leaders and representatives noted that the Agreement has
now been signed by all parties and affirmed their
commitment to co-operating on its implementation. It
provides a framework for co-operation in this area to
achieve better environment protection and greater
certainty of government and business decision making.

ESD/Greenhouse

Leaders and representatives noted progress on the
development of national strategies on Ecologically
Sustainable Development (ESD) and Greenhouse. In the
light of the range and complexity of issues involved and
in order to facilitate effective public consultation,
leaders and representatives agreed that the draft
strategies should be released by the end of June as officials' discussion papers. They further agreed that officials should bring forward proposals for the definitive strategies by the end of October with a view to agreement being reached in time for the release of the strategies by the end of 1992.

Leaders and representatives emphasised the importance of linkages between the ESD process and other relevant Commonwealth environmental initiatives and activities.
ANNEX A: Terms of Reference
NATIONAL COMPETITION POLICY REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) the past and present justification for the current exemptions from application of the Trade Practices Act.
Annex A — Terms of Reference

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

(a) take into account:

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

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

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

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

(v) overseas experience.

(b) take written submissions; and

(c) consult interested parties where necessary; and

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

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