QUEENSLAND GOVERNMENT SUBMISSION IN RESPONSE TO THE PRODUCTIVITY COMMISSION DRAFT REPORT:

REVIEW OF NATIONAL COMPETITION POLICY REFORMS

December 2004

Queensland Government
Treasury

BLANK PAGE

CONTENTS

Page

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
BPA	Benchmark Pricing Agreement
CoAG	Council of Australian Governments
CPA	Competition Principles Agreement
LEP	Long-Term Energy Procurement
MCE	Ministerial Council on Energy
MW	Megawatt
NCC	National Competition Council
NCP	National Competition Policy
NEM	National Electricity Market
NTC	National Transport Commission
NWI	National Water Initiative
PBT	Public Benefit Test
PC	Productivity Commission
RIS	Regulatory Impact Statement
ROC	Regional Organisation of Councils
TOR	Terms of Reference
TPA	*Trade Practices Act 1974*

1. Introduction

In November 2000, the Council of Australian Governments (CoAG) agreed to a further review of National Competition Policy (NCP) arrangements to be completed by September 2005. On 23 April 2004 the Australian Government Treasurer commissioned an inquiry by the Productivity Commission (PC) into NCP Arrangements. One of the purposes of the PC inquiry is to inform the overall CoAG Review. In summary, the PC has been asked to:

- report on the impact of NCP and related reforms to date on the Australian economy and community; and
- identify areas offering opportunities for significant gains to the Australian economy from removing impediments to efficiency and enhancing competition.

On 27 October 2004, the PC released a Draft Report for discussion, including a number of draft proposals. This submission represents the Queensland Government's response to the PC's Draft Report. It deals primarily with the second of the above tasks, that is, identifying areas for future reform.

2. Competition Payments

The Commission has indicated (p.297) it does not intend to make recommendations on the role that inter-governmental payments might play in any successor to the NCP or other reform programs co-ordinated through CoAG. It argues that this and other institutional matters are for CoAG to determine as part of its 2005 Review of NCP arrangements. However, it observes that while the competition payments regime has clearly helped in progressing the NCP agenda, it would be unfortunate if an undue focus on the precise distribution of the future reform dividend among jurisdictions were to put at risk progress on policy changes that would be in the national interest.

While the Commission acknowledges the value of the competition payments, it appears to be seriously under-valuing their contribution to the NCP reform process, both in terms of their value as incentives and the recognition of the reason they were put in place in the first instance. As outlined in its initial submission to the Review, Queensland believes the payments should extend beyond 2005-06 on the basis that the loss of monopoly rents and other adjustment costs to States and Territories are ongoing, however, the revenue benefits which are also ongoing, accrue disproportionately to the Australian Government. This has not changed because of the introduction of the GST. While the States' and Territories' tax base widened somewhat with the introduction of the GST, the GST replaced other forms of Commonwealth funding and a number of significant State and Territory taxes which would have grown as well.

Queensland does not agree that the payments issue has been a distraction to any material extent in the sense that reforms were undertaken purely to gain competition payments and for no other reason. Queensland has demonstrated its commitment to worthwhile reform irrespective of the potential for competition payment reductions.

A major problem has been that, unlike States and Territories, the Australian Government has not been subject to the same accountability criteria and sanctions, despite its below average performance in key areas. It is imperative that any new reform agenda include mechanisms to make the Australian Government accountable.

[Note: Table 2.6 needs to be updated to reflect the impact of suspensions and permanent reductions for 2003-04 which are on the public record. It would also assist if the competition payments are shown separately from the real per capita guarantee component of financial assistance grants which were discontinued when the GST came into effect from 2000. The title of Box 2.6 should refer to penalties for 2003-04 not 2002-03.]

3. Priority Infrastructure Sectors

3.1. Electricity

3.1.1. Retail Contestability

The Commission indicates (p.22) all jurisdictions have introduced retail contestability for large customers, and all jurisdictions, except Queensland, have introduced retail contestability for domestic customers. As with other jurisdictions, Queensland has staged the introduction of retail contestability, with the latest stage being the lowering of the threshold for contestability from customers using greater than 200 megawatt (MW) hours per year to customers using greater than 100 MW hours per year.[1] The extension of contestability to this further tranche of customers (referred to as tranche 4A) took place from 1 July 2004.

The decision in 2001 to defer the introduction of full retail contestability (i.e. to all customers) was based on a cost-benefit study which found the costs would outweigh the benefits. As such, the decision was consistent with one of the key tenets of NCP – the requirement that the benefits to be realised from the implementation or a particular policy or course of action outweigh the costs. In making the decision in 2001 not to introduce full retail contestability at that time, the Government undertook to review the decision in 2004. That review is currently being conducted by independent consultants, based on Terms of Reference (TOR) and methodology developed in consultation with the National Competition Council (NCC).

3.1.2. Energy Market Reform Process

In its discussion of the energy reform agenda, the Commission places much reliance on the recommendations of the Parer Review as a justification for further reform. The Parer Review was a significant, but only one, input into the Ministerial Council on Energy's (MCE) consideration (and CoAG's subsequent endorsement) of the reform agenda for electricity and gas. While the Commission is correct when it states that the MCE's energy market reform program has only adopted part of the Parer Review's recommendations, the Commission needs to recognise that the MCE now has the role of defining and implementing the energy reform program.

Queensland agrees with the emphasis the Commission has placed on the benefits of a co-ordinated national approach. As a result, Queensland supports the energy market reform agenda as endorsed by CoAG and implemented through the MCE. Throughout the process,

[1] The threshold in the reference on p.22 to "All large retail customers (those consuming in excess of 200 megawatt hours per year) are now able to choose their supplier" should be amended to 100 megawatt hours following changes in Queensland from 1 July 2004.

the States and Territories have demonstrated their commitment to the timely implementation of this reform package and the establishment of a transparent and robust framework for the delivery of future reforms.

The process embodies the criteria the Commission outlines as underpinning the success of NCP:

- recognition by all governments of the need for reform – through CoAG and the MCE;
- broad agreement by governments on the main problem areas – as captured in the MCE's December 2003 Report;
- a solid conceptual framework and information base to guide policy prescriptions – supported by the revised regulatory regime encompassing the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC); and
- some highly effective procedural and institutional mechanisms to implement reform – including public consultation and transparent rule change procedures.

The general consensus amongst jurisdictions, industry, investors and end-users is that the market has worked well, although there are some areas where reform is required.

Importantly, the revised governance structure for the market (MCE, AER and AEMC) provides an open and transparent framework for the development, analysis, delivery and monitoring of future reforms. Future energy market reform is an issue most appropriately determined by the new governance entities, rather than through a new NCP agenda. Indeed, many of the participant's concerns raised by the Commission regarding process and future reform have either been addressed or have been recognised as issues for MCE consideration and will be addressed in 2005.

The Commission has recognised the potential for 'reform fatigue'. There is a real risk that the imposition of another layer of reform and reporting over the top of the current ongoing reform process and outside of the new governance arrangements – such as that proposed by the Commission – would exacerbate the potential for reform fatigue and increase investor uncertainty regarding the regulatory and investment environment moving forward.

The Commission has recommended the MCE give priority to a number of matters in addition to its current work program. Queensland's position is that the existing reform process should be allowed to progress and the current suite of energy market reforms allowed to 'bed-down', prior to any consideration of further structural reforms. The MCE should be responsible for setting its own work program.

3.1.3. Government Ownership

The Commission has raised issues related to government ownership and market power in the generation market in some jurisdictions.

The fact that the Queensland Government continues to own the majority of the State's electricity assets is not an impediment to the existence of a competitive market. Government ownership of the majority of assets also has not been an impediment to private investment.

Since the National Electricity Market (NEM) started in 1998, Queensland has had the greatest level of investment in committed generation – equal to more than 3,750 megawatts (MW) of committed generation capacity. This translates into around $4.7 billion of the $6.3 billion invested in new committed generation across the entire Australian market. Around 40 percent of this investment has been by the private sector including:

- Millmerran ..... $1.462 billion
- Callide-C ..... $420 million (50 percent of $840 million)
- Tarong North ..... $326 million (50 percent of $652 million)
- Oakey ..... $150 million
- Roma ..... $31 million

Queensland is the only NEM State where a 100 percent private base-load generation project (i.e. Millmerran) has been delivered.

3.1.4. Disaggregation

The current level of aggregation in ownership is clearly not an impediment to a competitive market in Queensland.

Last financial year, Queensland had the second lowest average wholesale price in the national market, at around $28/MWh – this compares to an average wholesale price of more than $51/MWh when Queensland joined the national market in 1998.

Since 1998, Queensland has also had the greatest level of investment in transmission infrastructure – equal to approximately $1.3 billion, or approximately one-third of the total invested across the market.

Queensland has engendered a competitive investment environment which has successfully provided capacity to meet growth through our electricity reserves - Queensland has generation capacity of around 10,000 MW. In fact, on a number of occasions this year Queensland has provided 9 percent of New South Wales peak demand via the Queensland-New South Wales interconnect.

Based on current forecast demand, Queensland will have sufficient reserves until 2010 – including Queensland's recently committed $1.2 billion Kogan Creek power station which is due to come on line by summer 2007.

In the push for further competition and wholesale market price benefits that are alleged to result from disaggregation, there needs to be recognition of the costs that will result from smaller generating entities with commensurately smaller portfolio of assets and a reduction in contract market liquidity. It is Queensland's view that further disaggregation of generation assets would result in:

- increased costs of production due to a loss of economies of scale;
- increased governance and corporate overheads;
- a reduction in the availability of hedge contracts resulting from the need to self-insure; and
- increases in the price of hedge contracts due to increased financial risks arising from a smaller portfolio of assets.

3.1.5. Long-Term Energy Procurement

The Commission (p.169) quotes the Parer Review as recommending removal of 'market distorting' mechanisms such as Queensland's Benchmark Pricing Agreement (BPA). This represented a mis-understanding of the role and impact of the BPA on the part of the Parer Review. In any event, the BPA has been replaced by an arrangement known as Long-Term Energy Procurement (LEP). Under LEP, a new energy procurement arrangement has been negotiated by the Government with ENERGEX and Ergon Energy to purchase wholesale electricity to supply the franchise customer load.

As with all previous arrangements for energy procurement, the Government has been careful to ensure that its operation sits outside the wholesale electricity market and is competitively neutral in that the retailer is permitted to contract with generators, irrespective of whether they are private or Government-owned. As part of the LEP, the Government benchmarks contracts purchased by Ergon Energy and ENERGEX against a range of publicly available and retailer-specific data to ensure the retailers' contracts are efficiently priced. The LEP also involves the transfer of risk to the retailers for exposure to the wholesale pool, thereby placing incentives on the retailers to actively manage pool price outcomes.

The LEP requires the retailers to enter the financial market and secure contracts for risk mitigation purposes (or face potential losses from remaining unhedged). The LEP therefore supports the development of wholesale contract market mechanisms as it requires the retailer to bid for financial contracts and encourages generators to offer contracts – this has reinforced and enhanced the underlying liquidity in the market.

In essence, the LEP does not have an anticompetitive effect.

3.2. Gas

The Commission notes (p.23) that since the introduction of NCP, constraints on interstate trade have been removed, contributing to a near doubling of transmission pipeline investment between 1989 and 2001. In reality, the reverse is actually the case. The restraint on interstate trade was the lack of pipelines across State and Territory borders. The majority of investment decisions for pipelines constructed were made before the regime was introduced or have resulted in 'fit for purpose' pipelines. This was supported by the Commission's Review of the National Gas Access Regime which found that the current regime has the potential to distort investment in favour of less risky projects and encourage investment that is fully contracted prior to construction.

The Commission refers (p.24) to the CoAG Energy Markets Review (Parer Review) and notes that the Committee's (sic) recommendations are currently being used by CoAG to develop a National Energy Policy. This might be better expressed as that the Parer Review was considered in the development of the national energy reform program being pursued by the MCE. This is also more consistent with the Commission's wording in Chapter 8.

In its survey of trends in prices for infrastructure services, the Commission (p.54) indicates real gas prices have fallen marginally, but the data is reasonably old and prices may have fallen since the period analysed. The Commission may also need to acknowledge that price changes, particularly for small gas customers, have often been masked through price cap and other regulatory and policy mechanisms used by governments to protect customers from

substantial price rises associated with moves towards more competition. It should also be recognised that some customers have been disadvantaged.

In terms of the reform of gas-related legislation, there is little need for further action from Queensland at this stage. Queensland has already reviewed and reformed all of its gas-related legislation (or is well advanced in doing so). The *Gas Supply Act 2003* which provides for the regulation of gas retail prices in Queensland was drafted with the specific purpose of implementing the licensing principles under the National Gas Access Agreement 1998 and promoting efficient and economic fuel gas supply. The *Gas Pipelines Access (Queensland) Act 1998* is being reviewed as part of the National Gas Access Regime Review.

3.3. Water

The Commission has recommended all governments should complete outstanding NCP water reform requirements and give high priority to resolving the current uncertainty about the future of the National Water Initiative (NWI) by recommitting to its reforms. The Queensland Government remains open to re-engagement with the NWI provided issues associated with the Australian Government's unilateral decision in relation to competition payments can be resolved satisfactorily.

The Commission has also recommended that the CoAG water reform process should give close attention to:

- developing ways to achieve more effective management of environmental externalities;
- exploring new opportunities for cost-effective water recycling; and
- ensuring that monitoring arrangements post-NCP provide a discipline on all governments to progress agreed water reforms.

Queensland believes that, while pricing is an important response to addressing externalities, other approaches are also appropriate and can be equally or more effective because of the difficulty of incorporating externalities into prices to suit widely different circumstances from catchment to catchment etc. For example, Queensland has established a comprehensive water resource planning regime with legislative underpinning in the *Water Act 2000*. The regime is designed, among other things, to provide an appropriate balance between consumptive use and environmental flows. Under this planning process the environmental requirements for each catchment are determined and incorporated in the catchment's Water Resources Plan and Resource Operations Plan.

Because externalities and water scarcity differ vastly between different regions, catchments and towns, any move to incorporate these elements into pricing will need to be based on robust and flexible principles. This is particularly the case in Queensland where urban water supply is the responsibility of local governments. For many councils, particularly small councils, the costs of determining the value of externalities would not be worthwhile.

It is not clear why the Commission has included a recommendation aimed at ensuring that monitoring arrangements post-NCP provide a discipline on all governments to progress agreed water reforms. In the event agreement can be reached on the NWI, the National Water Commission has been assigned this role.

3.4. Transport

In relation to road transport reforms, the Commission (pp.25&331) acknowledges that all the 25 NCP road transport reform initiatives agreed by CoAG have been, or will have been completed during 2003-04 (with a couple of outstanding matters in three jurisdictions). Progress has also been made in implementing the other six initiatives developed by the then National Road Transport Commission. The Commission also quotes the NCC as stating that "the reform agenda to 2001 had not comprised all of the initiatives needed to develop a nationally consistent regulatory regime". It is Queensland's view that CoAG should be the ultimate arbiter of what constitutes a nationally consistent and workable regulatory regime. Therefore, if further reform is needed in relation to the regulation of road transport, it is Queensland's view that CoAG should continue to be responsible for setting the scope and timing of the reform agenda in this regard. [Note: The reference to the NCC 2002-03 Annual Report as the source of the above may not be accurate.]

3.4.1. Freight Transport

In calling for a more co-ordinated approach to transport reform, the Commission cites (p.182) the Australian Government's white paper "*Auslink: Building our National Transport Future*" as being "intended to achieve better national land transport planning, funding and investment decision-making, and provides additional funding for transport programs of $3.6 billion over the next five years." The process used by the Australian Government in developing the white paper does not exhibit the characteristics of the co-operative approach which Queensland believes is necessary, and the Commission states will be required, for the successful development and implementation of any new reform program.

As outlined in Queensland's initial submission to the Commission, while the paper signals fundamental changes to long-standing Commonwealth funding responsibilities under *AusLink*, allocated funding under the program is very limited. In 2004-05 Queensland will receive $415.3 million which is only $22 million more than it received for national highways and Roads of National Importance in 2003-04. Worse still, Queensland's funding will be reduced by $50 million in 2005-06. With one fifth of Australia's rail network, Queensland will only receive approximately 0.5 percent of the available funding for rail.

The *AusLink* proposal effectively provides the Australian Government with greater control over infrastructure planning and enhances its ability to dictate policy to the States and Territories, while at the same time shifting more of the financial responsibility onto States and Territories. The *AusLink* strategy has provided little new funding for Queensland and, with the Australian Government suggesting it will expect State contributions for previously federally funded roads, will significantly disadvantage Queensland road users.

While Queensland supports a nationally focussed, integrated land transport network strategy for Australia, the strategies outlined in the *AusLink* White Paper lack detail, were not based on a well researched co-operative platform and do not address key issues such as the poor condition of the national highway system within Queensland and the structural issues in relation to road/rail investment. Satisfactorily addressing these issues is fundamental to improving and maintaining productivity growth in rural and regional communities in Queensland and elsewhere.

The Commission has recommended that:

- governments should complete all outstanding freight transport matters under the NCP legislation review program;
- CoAG should sponsor the development of a longer-term strategy for achieving a national freight system that is neutral across transport modes; and
- as an immediate priority, CoAG should sponsor the development of a national reform agenda for the rail sector that integrates current work in this area and establishes clear timelines for the implementation of reform.

Queensland agrees governments should complete all outstanding freight transport matters under the NCP legislation review program. It should be noted Queensland has no outstanding matters in this regard.

Queensland also supports the second of the above recommendations. Further action is clearly needed to better integrate policy and planning instruments to achieve an appropriate modal balance – that is, for any given transport task, the transport mode or combination of modes that: minimises total transport costs including externalities; maximises total benefits; and results in the efficient utilisation of existing transport infrastructure before additional infrastructure investment is made. No one action is likely to deliver the desired outcomes. Among the things which will need to be considered by CoAG are the following:

- establishing a set of freight-related policy objectives for the development and management of an increasingly integrated transport and logistics system more directly linked to supporting agreed economic, land use, environmental and social objectives;
- developing an evaluation framework for assessing the full costs and benefits of investment in transport infrastructure, incorporating land use, safety, environmental, noise and urban amenity considerations into modal decision-making; and
- establishing regulatory and pricing regimes that encourage balanced modal choice and provide for the recovery of the cost of damage and externalities caused by freight transport.

Queensland believes the Commission should strengthen its recommendation to reflect these considerations.

Queensland also supports the third of the above recommendations. As with the second recommendation, the Commission should make it clear that social, community development, safety, and environmental performance criteria are necessary elements of longer-term strategies and reform programs as well as basic efficiency objectives. Further, any processes established to develop and implement strategies and programs must be based on genuine co-operation between all parties and supported by robust and independent analysis.

In terms of the development of national rail reforms, priority needs to be given to implementation of a consistent national access regime for rail. Queensland believes the regime in place in Queensland provides a superior model of an effective rail access regime – in particular, the Queensland Rail (QR) Access Undertaking provides a high degree of transparency for access seekers and accountability for QR as the access provider. The Queensland Government believes the role of an effective access regime is to: reduce uncertainty by detailing the terms and conditions on which access will be provided; reduce

the scope for disputes between access seekers and providers; and provide certainty on how disputes will be resolved. The success of the Queensland regime is demonstrated by its effect on coal rail freight rates, which have fallen by 20 percent in real terms between 1998-99 and 2003-04, and the entry of Pacific National as a major new operator in the general rail freight market between Brisbane and Cairns. Similar access regimes are required to facilitate above-rail competition in other States. The need for consistent, independent State access regimes needs to be reflected in the Commission's recommendations.

3.4.2. Passenger Transport

The Commission has recommended CoAG should commission an independent national review of the passenger transport sector to assess the impacts of recent reforms and determine what is now required to deliver further performance improvements in both urban and regional areas. Queensland supports this recommendation, but as with the recommendations in relation to freight reform, this support is conditional on proposals for performance improvements being assessed as much in terms of basic social access, community development, safety and environmental criteria as efficiency criteria.

3.5. Communications

The Queensland Government strongly supports the Commission's recommendations to widen the scope of the scheduled 2007 review of the telecommunications-specific anti-competitive conduct regime to include consideration of the appropriateness of Telstra's structure, and to bring forward the review to ensure appropriate arrangements are in place prior to the sale of the Federal Government's remaining interest in Telstra. The review would help to ensure:

- potential and existing investors in Telstra have a clear understanding of the regulatory risk they face;
- a pro-competitive and innovative telecommunications market; and
- the provision of appropriate services to remote, rural and regional Australia, particularly the standard of access (e.g. broadband).

There are strong economic arguments for the structural separation of Telstra's business which should be explored under the terms of such a review. More detail on Queensland's position on the communication issues raised by the Commission is provided in Appendix 1.

4. Priority Legislation Reviews

4.1. Cabotage

Queensland supports the Commission's recommendation that the Australian Government should review its cabotage legislation.

4.2. Pharmacies

Queensland does not support the need to re-examine the pharmacies legislation at this time. The Wilkinson Review canvassed all relevant restrictions and Queensland has moved to implement the review's recommendations, with the exception of some ownership restrictions following the intervention of the Prime Minister. To undertake a re-examination at this time

would not be appropriate given there would appear to be no prospect of the Australian Government changing its response in the foreseeable future.

4.3. Grain Marketing

A decision on whether to re-examine grain marketing arrangements in terms of restrictions on competition is one for the Australian Government and those jurisdictions which are awaiting action by the Australian Government before they can proceed further. Queensland has completed the review and reform of its grain marketing arrangements.

4.4. Insurance Services

In relation to compulsory third party insurance and workers' compensation insurance, the Commission has recommended they be re-examined sooner rather than later, and unless addressed otherwise, should be afforded priority under a modified legislation review program (pp. 205-207). The Commission's concern relates to the retention of publicly-owned monopolies in some instances and regulatory differences between jurisdictions.

Queensland does not agree there is an urgent need to re-examine the regulation of these insurance services.

Workers' compensation insurance differs from other forms of insurance in a number of key respects. While the employer pays the premium it is the employer's workers that derive benefit from the insurance through compensation benefits, rehabilitation and medical services. It is essential that workers' compensation scheme be fair, balancing the rights of injured workers against the need for competitive and affordable premiums for employers, while maintaining a secure and viable workers' compensation system. Since 1999, the Queensland Government has progressively introduced a number of improvements to the State workers' compensation scheme.

Queensland continues to lead Australia with the lowest average workers' compensation premiums in the nation. The average premium rate is to remain at 1.55 percent – for the fourth consecutive year during 2003-04. This is significantly lower than New South Wales on 2.80 percent, Victoria on 2.22 percent, Western Australia on 2.47 percent, South Australia on 2.46 percent and Tasmania on 2.62 percent (as at 30 June 2003). It is a testament to the strength of the fundamentals underpinning the fund that the scheme is fully funded and maintains full statutory solvency. The Queensland Government wants to maintain the competitive advantage currently afforded to Queensland businesses that compete interstate. This advantage results from having the best performing workers' compensation scheme in Australia with the lowest premiums of any State.

Despite expressing a general preference for more private sector involvement in workers' compensation insurance, the Insurance Council of Australia (ICA) welcomed the findings of the 2000 NCP Review of Queensland's workers' compensation system. The ICA commented that the structure of the Queensland scheme, under which the regulatory and insurance arms are kept separate, was one reason it was the only government run workers' compensation scheme in Australia which was in the black rather than losing significant amounts of money and commented that other State schemes would do well to adopt the Queensland model.[2]

[2] Insurance Council of Australia. *QLD workers comp provides opportunity for insurers* (media release). 27 July 2001

In the case of workers' compensation insurance, which is delivered by a publicly-owned monopoly in Queensland:

- the Commission, which has only recently completed its review of relevant insurance services, did not find there is a powerful case for either public monopoly or competitive private provision;
- the Queensland situation demonstrates that, given the nature of workers' compensation insurance, it is possible for a well-run public monopoly to provide an efficient and effective service;
- Queensland undertook a robust NCP review which recommended some changes, but supported the retention of the public monopoly in the public interest;
- the Queensland Government's decision has been consistent throughout – it adopted the recommendations of the NCP review; and
- it is not clear that circumstances are likely to change sufficiently in the foreseeable future to warrant a re-examination.

5. Competition and Regulatory Architecture

5.1. Trade Practices Issues

5.1.1. Small Business Concerns

While the Queensland Government supports most of the changes to the *Trade Practices Act 1974* (TPA) proposed by the Australian Government, it does not support the changes in relation to providing additional guidance to the courts in consideration of predatory pricing cases, or in relation to the prevention of anti-competitive leveraging of market power by firms. More detail in relation to Queensland's position on this and other trade practices matters is included in Appendix 2.

5.1.2. Government Businesses

Statutory Marketing Schemes

From Queensland's perspective, there is clearly no need for any change in relation to the legislative exemptions for the activities of statutory marketing authorities (pp.213-215). The only remaining statutory marketing arrangement (e.g. vesting and compulsory acquisition) in Queensland relates to raw sugar, which was examined as part of a major NCP review of the legislation which regulates the sugar industry and found to be in the public interest.

Section 51(1) Exceptions

As with the exemptions for statutory marketing authorities, there is no reason for any legislative changes to the current section 51(1) exception arrangements for the following reasons:

- the exceptions are used sparingly (only six are currently in place in Queensland) and, except for transitory matters, are provided for in primary legislation subject to Parliamentary scrutiny;
- in most cases, the benefits and costs of the relevant provisions were reviewed as part of the NCP legislation review program;
- in general, the exceptions have been put in place simply to provide certainty, as in many instances there is a strong case that the activities they authorise would not breach the TPA; and
- during the negotiation of the 1995 NCP Agreements, the ability of States and Territories to provide for legislated exceptions was a key condition of States and Territories agreeing to extend coverage of the TPA to government businesses and unincorporated enterprises. Queensland could not agree to changes to remove the ability to provide for legislated exceptions as proposed by the Australian Competition and Consumer Commission (ACCC).

Government Procurement

In the draft Report, the Commission stated that "there may be a case for legislative changes to ensure that particular government business activities do not inadvertently fall through the coverage net". Queensland does not support there is a need to amend the TPA in this regard (see Appendix 2).

Derivative Immunity

In its submission, the ACCC raised a concern in relation to the issue of derived immunity for parties engaged in business activities with government entities that are subject to the 'shield of the crown'. Queensland does not support there is a need to amend the TPA in this regard (see Appendix 2).

5.2. Consumer Protection Regulation

The Commission's draft report (pp. 217-218) indicates that a range of systemic shortcomings in Australia's standards and other consumer protection regimes were drawn to the Commission's attention, including ineffective co-ordination mechanisms, insufficient recognition of self-regulatory and co-regulatory approaches, and tensions within consumer affairs bodies. As a result, the Commission has recommended the Australian Government in consultation with the States and Territories should establish a national review into consumer protection policy and administration in Australia. Before finalising this draft recommendation, the Commission should consider two issues.

Firstly, other than to indicate a range of systemic shortcomings were drawn to the its attention, the Commission in the draft Report does not provide any evidence, as to the extent or validity of the alleged shortcomings, to support the establishment of a national review at this stage.

Secondly, the Commission has recommended a specific process for such a review with carriage assigned to the Australian Government, albeit in consultation with the States and Territories. If the evidence is robust enough to warrant further consideration of this issue, it would be appropriate to recommend that CoAG, which has responsibility for reviewing the

terms and operations of the NCP Agreements, give the matter consideration as part of the overall NCP review. Such an approach would be consistent with the Commission's recognition of the key role of CoAG in progressing any future reform agenda (pp. 294-295).

In essence, Queensland's support for a national review is subject to appropriate and meaningful input to the conduct and TOR of the review and cross-jurisdictional support for the review process. Any TOR should include specific reference to the need to explore new national regulatory partnerships and decision-making arrangements for determining any national regulatory policy or legislation that responds to the increasingly borderless marketplace. The important role of the Ministerial Council on Consumer Affairs should also be recognised.

Queensland does not support the proposal to include "ways to resolve any tensions between the administrative and advocacy roles of consumer affairs bodies" as there does not appear to any basis for concern:

- State and Territory fair trading offices do not have a core advocacy role for consumers; and
- any "tensions" that do exist are likely to assist in ensuring a wider range of issues are examined in the development of regulatory structures.

5.3. Protecting Intellectual Property

The Commission outlines the importance of intellectual property protection for a country such as Australia and asserts the importance of intellectual property laws continuing to be scrutinised to ensure they are not unduly restrictive (p.219). The Queensland Government would caution the Commission against any findings or recommendations that would inhibit the development of new industries such as biotech and similar industries.

5.4. Trade Policy

The Commission has recommended (p.223) that the periodic review of government procurement provided for under the Australia-US Free Trade Agreement should be used as a means to examine whether restrictions on competition resulting from government purchasing preferences continue to be in the public interest. Queensland Government purchasing preferences in the form of the State Purchasing Policy or Local Industry Policy continue to make a valuable contribution to regional economic policy development in Queensland, including the operation of local governments. As with other proposals in the Draft Report, Queensland's support for such periodic reviews is that Queensland, along with other States and Territories, is accorded appropriate and meaningful input to the review process, including the ability to influence the TOR and conduct of any review.

The Commission has also recommended the recently signed State and Territory agreement aimed at preventing bidding wars should have strengthened provisions to ensure compliance and be extended to include all jurisdictions. Queensland does not support this recommendation. The provision of incentives or other policy instruments to attract investment is entirely a matter for each jurisdiction to determine in light of its individual circumstances. The workability of such agreements is problematic. How would potential breaches of the agreement be identified and who would investigate any allegations? What possible sanctions could be put in place and who would enforce them? Clearly, such roles

could not be allocated to any non-elected body as this would impinge on the legitimate authority of Parliament(s).

It is difficult to reconcile the Commission's support for increased competition and productivity with its recommendation that States and Territories not actively compete for new business and development opportunities and for increased regulation to prevent competition. A more constructive recommendation would be for States and Territories to focus on building strategic advantage and co-operating at a national level, for example, as provided for under the Australian New Zealand Biotechnology Alliance. This alliance, announced in June 2004, is a cooperative effort between Australian States, the Australian Capital Territory and New Zealand to jointly promote their biotechnology industries internationally. The aims of the alliance are to: co-ordinate Australia and New Zealand's marketing of biotechnology capabilities; foster collaboration on potential research projects; minimise infrastructure duplication; and develop policy and strategies to communicate new developments in biotechnology to the broader community.

5.5. Government Business Enterprises

While Queensland supports the Commission's recommendation that the competitive neutrality regime should be retained beyond the life of the current NCP, it should be noted that the great majority of reform in this area has been completed or is in train.

The Commission makes a number of observations about improving governance arrangements, achieving better outcomes for local government goods and services and fine tuning the competitive neutrality regime. Queensland is generally satisfied that the governance arrangements for government business entities are working satisfactorily.

The State Government is currently undertaking a review of the legislative framework for contracting by councils in Queensland, covering issues such as risk management and value chain analysis to identify the extent of suppliers' market power. In many areas of Queensland, there is no guarantee that contracting out will provide better value for money because an external supplier in a small market could be in a position to extract monopoly rents.

The Commission suggests further council amalgamations, and/or shared service provision arrangements, would allow for greater realisation of economies of scale and lead to considerable cost savings. The Queensland Government has a policy of no forced amalgamations, which means that there will be no mandatory structural reform of local government in Queensland in the foreseeable future. While there is scope for voluntary amalgamation, this is up to individual councils, and the Government is encouraging councils to address and discuss this issue. Additionally, the Government is encouraging councils to explore regional cooperation and resource sharing with the aim of improving community outcomes on a regional basis.

Under the existing legislative framework, councils already have a wide choice of mechanisms to use to undertake joint arrangements with other councils, ranging from joint agreements to Joint Local Governments. Some of these mechanisms, such as a Joint Local Government, involve the establishment of an entity with a separate legal identity. Incorporation is an option which is available to Regional Organisation of Councils (ROCs).

Regional arrangements need to be designed to fit each region's circumstances, so there would be little to gain from applying a uniform approach. In general terms, regional arrangements should enable councils to either capture economies of scale in relation to infrastructure or service provision, or realise synergies in relation to issues where there are net benefits in working together rather than alone. A good example of synergies is in relation to regional land use planning. A regional approach enables councils and the State Government to address issues such as growth management that can't be tackled in isolation. ROCs have been highly effective in this process, without the need for any specific legislative backing from the State Government. They provide an effective vehicle for councils to realise synergies without the need to have specific statutory powers. Other mechanisms such as joint local governments may be a more effective way to deal with scale economies in infrastructure provision, as already occurs in relation to bulk water infrastructure in some regions (e.g. Sunshine Coast). ROCs themselves are just one part of a network of regional arrangements that could be a viable alternative to amalgamation, depending on the transaction costs involved with each option.

The Commission also refers to the Hawker report and cites duplication and poor co-ordination between Federal, State and local governments as another source for potential cost savings. In 2003 the Queensland Government entered into a protocol with the Local Government Association of Queensland that commits the two levels of government to work in partnership. It provides a framework for negotiating roles and responsibilities where there is shared jurisdiction. There are 21 agreements between the State and local government dealing with a range of functions which clarify the roles and responsibilities of each level of government in order to prevent duplication and maximise the use of public resources to achieve shared outcomes.

5.6. Legislation Review

5.6.1. Legislation Review Schedule

The Commission recommends Governments should complete the existing legislation review schedule. Queensland has essentially completed the review and reform of the legislation set out in its 1996 review schedule. The only outstanding matters relate to those delayed by inter-jurisdictional processes over which Queensland has no control and a small number of matters where the NCC disagrees with the Government's decision. Therefore, from Queensland's perspective, completing the existing review schedule is not an issue.

In addition, the Commission has recommended a more targeted program of legislation review should be put in place following the completion of the current NCP. Queensland is not convinced that a new legislation review program is needed at this time. This will be a matter for CoAG during the negotiation of any new NCP-type arrangements. If such a program is considered:

- it should, as the Commission suggests, be limited to reform of anti-competitive legislation likely to be of significant net benefit to the community;
- the requirement that proposed reforms should only take place if they are assessed as being in the public interest, should be strengthened to underpin the legislation review process and other reform agendas which may form part of a continuing or new reform agenda;
- the reversal of the onus of proof should be re-examined. The legislation review concept as envisaged by the architects of NCP was new to most of those who subsequently would be required to implement the process. Those framing the agreements were clearly not aware of the existence of the large numbers of minor or trivial restrictions and more importantly, the lack of readily available data to support the analysis of costs and benefits. Where the impact of the restriction on competition is likely to be significant, the reversal of the onus of proof is less likely to influence the outcome. It is the "line ball" cases or where social, safety, distributional, regional impact or environmental issues (i.e. the hard to measure impacts) are significant that the presumption in favour of removing the restriction without clear supporting evidence falls down;
- decisions on bringing forward second-round reviews should be left to individual jurisdictions on a case by case basis;
- Queensland agrees that explicit recognition should be given to distributional, regional adjustment and other transitional issues in the public interest test. Consideration should also extend to the possible differential impacts on those groups that are already disadvantaged, including Aboriginal and Torres Strait Islander people;
- the meaning of whether "review outcomes are within the range of those that could reasonably be reached", and how it should be applied in practice, should be re-examined and explained more clearly;
- the process used to undertake national reviews needs to be reviewed as the current process has proved clumsy and slow; and
- the importance of the incentive provided by competition payments should not be under-estimated.

5.6.2. Gatekeeping

The Commission's recommendations in relation to "gatekeeping" are founded on a number of misconceptions which need to be corrected. Firstly, in Table 9.1, most jurisdictions are shown as not applying gatekeeping widely (e.g. not covering primary legislation). In part, this stems from the use of different terminology. In Queensland, the term "Regulatory Impact Statement" (RIS) refers to the review process undertaken in relation to subordinate legislation under the requirements of the *Statutory Instruments Act*. Under NCP, reviews are also required where primary legislation is identified as containing restrictions on competition – these are referred to as Public Benefit Tests (PBTs) and are required under the rules applying

to all new and amended legislation (both primary and subordinate) as part of the Cabinet process. The final review reports are generally publicly released.

Secondly, the Queensland Government's *Public Benefit Test Guidelines* require the impacts on business to be assessed along with all other sectors. Under the Guidelines, whether a proposal has an impact on business is considered as part of the process of deciding if an NCP Review/PBT is necessary.

As with current arrangements, jurisdictions should be free to determine their own arrangements for monitoring new and amended legislation, including whether some form of "independent" agency is warranted.

5.7. Monopoly Prices Oversight

The Commission has recommended governments and regulatory agencies should continue to explore opportunities to improve the efficacy of price setting and access arrangements for regulated infrastructure providers – with particular emphasis being given to improving incentives for providers to undertake investment to maintain existing facilities and expand networks, including through the implementation of clear and nationally consistent principles to guide regulators. Consistent with its submissions to the Commission's reviews of the National Access Regime and Gas Access Code, Queensland generally supports this recommendation. However, an over-emphasis on uniformity runs the risk of losing the benefits that come from canvassing and trialling different techniques.

6. Other Priorities

6.1. Human Services

While the Queensland Government agrees there is scope for competition and market-based initiatives in the human services sector, it also agrees the consideration of reforms in this sector should be on a case-by-case basis. Accordingly, Queensland agrees examination of human services should not form part of any new co-ordinated reform program.

6.2. Health Care

The Commission has recommended CoAG should initiate an independent public review of Australia's health care system as a whole as the first step in the development of an integrated reform program to address structural problems of long standing that are preventing the health care system from performing to its potential. The Commission suggests the review should include consideration of the determinants of future demand for and supply of health services; health financing issues (including Federal/State responsibilities and their implications); co-ordination of care (including with aged care); the interaction between private and public services; and information management. It could also incorporate the proposed CoAG review of medical workforce issues.

Queensland supports the conduct of a CoAG sponsored independent review as recommended by the Commission. While noting the range of matters suggested by the Commission for consideration, Queensland believes that, rather than seek to set the direction for any review at this stage, the Commission should amend the recommendation to provide for CoAG to determine the scope of any review. Further, it is important that any review be truly

independent, with the States and Territories having a material influence over its establishment, TOR and conduct.

6.3. Education and Training

The Commission has not made any specific recommendations in relation to the education and training sector. Queensland agrees that education and vocational and educational training should not be brought within the purview any proposed new CoAG sponsored NCP-type program at this stage. Nevertheless, Queensland would like to make a number of observations in relation to this section of the Draft Report:

- while Queensland agrees education and training matters should not form part of any new NCP-type program at this stage, it is axiomatic that States and Territories retain the right to refer relevant education and training matters to CoAG as circumstances require; and
- the Commission (p.271) suggests that competitive neutrality problems where universities provide ancillary business services, are among important impediments to better performance in the education system as a whole. The Commission has not provided any information or analysis to support this rather sweeping contention or evidence that there are significant competitive neutrality problems in universities' ancillary business services in the first instance.

6.4. Natural Resource Management

The Commission has recommended CoAG should immediately take a greater role in addressing fragmentation and uncertainty in relation to greenhouse gas abatement matters.

Queensland considers that the recommendation has merit and supports a national approach to dealing with greenhouse gas abatement. In particular, the continued development of various state-based schemes has the prospect of increasing business administration costs and uncertainty, and imposing additional regulatory burden on business operating nationally. However, any proposed review by COAG or other designated body should include consideration of appropriate mechanisms to address any adverse effects and structural adjustment.

Queensland considers there is a wide range of possible stakeholders from energy supply through to consumption that would have to be included in an assessment of the impacts on a range of issues such as social equity, simplicity, efficiency and effectiveness. The sorts of mechanisms to be considered include recognition of prior actions that have been undertaken by businesses under one of the many national and state-based schemes that currently operate, such as the Mandatory Renewable Energy Target Scheme or the Queensland 13 percent Gas Scheme. Another is transitional assistance for adversely affected businesses, such as energy intensive users. In this way, adjustment costs associated with the move to a carbon constrained economy are recognised for many businesses with large energy intensive capital stock.

In addition, further research may focus on measures for specific groups that may be exposed to additional energy costs. For example, there may be an opportunity to utilise existing structural adjustment programs for workers in adversely affected industries, especially those in regional areas. Other groups that may be affected include low income groups that would

face potentially regressive price increases related to higher energy prices in a carbon constrained future.

The Commission has recommended CoAG should also initiate a review to identify other areas of natural resource management where the payoffs from nationally co-ordinated reform are likely to be high. Queensland supports such a review but it should be clearly understood that the emphasis should indeed be on identifying areas where the benefits of national co-ordination are likely to be high. Many of the areas which participants have raised as potentially benefiting from national co-ordination involve location-specific activities which involve little if any cross-border interaction or nation-wide implications.

6.5. Labour Market and Tax Policy

Queensland agrees there is no need to include labour market and tax policy issues in a new agenda for nationally co-ordinated reform oversighted by CoAG or any other body. However, this does not mean that matters, such as tax-related impediments to efficient infrastructure investment, should not be addressed on a case by case basis (e.g. the lack of recognition by the Australian Government of the adverse impact on investment of the proposed taxation treatment of leases).

7. A New Agenda

If a new agenda to continue and possibly expand the current NCP program is agreed, it is Queensland's view that:

- it should concentrate on those areas where the benefits are likely to be significant and clearly identifiable – the first step for any reform area should be to establish an unequivocal case of the need for and benefits of reform. Only then will the reform enjoy wide community support. It is better to concentrate on fewer areas of potentially significant reform (and get them right) than dissipate resources too widely;

- any processes designed to initiate and implement the various elements of any new agenda should be based on effective co-operation between jurisdictions, with States and Territories afforded the opportunity to materially influence the TOR and conduct of reviews, not just be consulted;

- whatever governance structure is used, CoAG should have ultimate responsibility, even if the most appropriate and workable arrangements involve Ministerial Councils or other national standard setting bodies;

- CoAG should have responsibility for deciding on any compliance, monitoring or reporting arrangements. The Commission should recognise this in its recommendations regarding independent monitoring and public reporting on progress and mechanisms to lock-in gains of past reforms;

- the continuation of competition payments as an incentive to continue past reforms is an essential element of any future regime;

- it should give due recognition to the autonomy of individual States and Territories as the ultimate decision makers of the public interest. Additionally it should recognise the

differences between jurisdictions in the scope of local government operation and jurisdiction and provide for flexibility in implementation. Distributional and adjustment issues should be given due recognition. As the Commission has indicated, the provision of adjustment support should be subject to criteria which ensure any support is carefully targeted to those significantly affected; and

- although the current criteria for assessing community impacts require consideration of social, regional and environmental impacts, they have not always been given due weight in comparison to that afforded economic efficiency considerations. This applies to both the conduct of specific reviews and the assessment of the adequacy of the review process.

APPENDIX 1: Communications

As indicated in the body of the submission, the Queensland Government strongly supports the Commission's recommendations to widen the scope of the scheduled 2007 review of the telecommunications-specific anti-competitive conduct regime to include consideration of the appropriateness of Telstra's structure, and to bring forward the review to ensure appropriate arrangements are in place prior to the sale of the Federal Government's remaining interest in Telstra.

This should be done, not least, to ensure potential and existing investors in Telstra have a clear understanding of the regulatory risk they face. More importantly, it is critical to Australia's future economic growth to ensure the regulatory framework and market structure will support:

- a pro-competitive and innovative telecommunications market able to keep pace with the requirements of the global market; and
- the provision of services to remote, rural and regional Australia to allow all Australians to participate in the global market and have the opportunity to capture productivity improvements.

NCP obliges an owner government, prior to the privatisation of public monopoly, to review a number of issues including:

- the merits of separating natural monopoly elements from potentially competitive elements;
- the merits of separating any potentially competitive elements of the public monopoly;
- the merits of any community service obligations (CSO) and the best means of funding and delivering any mandated CSOs; and
- the price and service regulations to be applied to the industry.

There are strong economic arguments for the structural separation of Telstra's business. The ACCC has highlighted the need for strong facilities based competition to drive innovation and provide sufficient competitive discipline on Telstra. This could be achieved by separation of Telstra's networks from its retail business. With vertical structural separation, there are greater incentives on a network to increase throughput and incentives to provide favourable treatment to one retailer over another are eliminated. Horizontal separation (as has been recommended by the ACCC in relation to Telstra's content provider, Foxtel) may generate even further competition.

Telstra's strongest commercial incentive is to protect, and grow, its existing customer base. The most effective way for it to do this is to retain control over the major facilities used for delivering telecommunications products and services. In this respect, it owns the three major networks (copper wire, hybrid fibre coaxial and fibreoptic) which serve the Australian economy.

To the extent Telstra is able to use its market power to draw customers away from other providers or hinder its competitors from developing their own customer bases, it will diminish the ability for those competitors to build critical mass to enable them, for example,

to invest in competing facilities or to innovate. Evidence that Telstra is adopting this strategy is apparent in the retail broadband market where it has engaged in an aggressive marketing strategy to reach its broadband penetration targets well ahead of time.

While customers are the beneficiaries (through price reductions) of this initial round of competition, this may only be a short term phenomenon which disappears once effective competition is eliminated.

It is noted the ACCC has the ability to utilise access regulation and competition notices to address Telstra's dominance – and has done so to a degree. However, there are reports these tools are not entirely effective and the ACCC has indicated it is cautious of using access regulation given its potential impact on investment.

The Commission appears to have downplayed the potential benefits of separation in its comment, for example, that separation is unlikely to make much difference to prices due to the existence of price regulation. This comment seems to have missed the question of whether it would be preferable to have competitive constraints on pricing as opposed to regulation. Similarly, the Commission appears to have overstated some of the costs of separation, for example, in its assessment that a separated network business would require the design of a new regulatory regime. The telecommunications specific access regime should be able to be readily applied to such a business.

Evidence that competition is not strong in the telecommunications market is provided by the recent conclusions of the ACCC regarding competition in telecommunications. In the ACCC's November 2004 draft report into Telstra's price control arrangements it was outlined local, domestic and international long-distance and fixed-to-mobile calls should remain subject to price-cap regulation because of the lack of competition found in these markets. Also, in relation to mobile and internet services, it was concluded "the ACCC does not currently consider that the markets are effectively competitive".

The Commission has mentioned the existence of accounting separation as an alternative to separation and possible competition from both the mobile sector and the voice over internet protocol (VOIP) to counter Telstra's monopoly in the local loop. As noted by the Commission, while accounting separation makes it easier for the ACCC to identify instances of unfair pricing, there are other practices, apart from pricing, which a monopolist may use to hinder access and competition. In relation to competition from the mobile sector and VOIP, the ACCC reported in November 2004 (Review of Telstra's price control arrangements – an ACCC draft report) that it is unable to form a view as to whether these markets will be sufficiently competitive to justify the removal of price controls in 2005. In fact, "information presented by Telstra indicates that it has experienced negligible loss of demand to Voice over IP."

Structural separation (assuming the Federal Government is willing to contemplate it) will not address all concerns regarding a privatised Telstra. There are of course markets and regions where it must be commercially attractive for a privatised Telstra to wind back its focus on service provision or where it is simply not commercially viable to provide services. A review must address the best way of ensuring services (including repair times, installation, mobile coverage and broadband) to regional Australia are commensurate with levels needed to allow all Australians a reasonable opportunity to participate in and keep pace with the global market. In particular, the best way to deliver broadband to remote rural and regional

Australia must be considered. There is evidence Australia is falling behind in this respect and the programs employed by the Commonwealth Government may not be sufficient – for example:

- **Repair times:** It is noted the ACA's most recent report shows Telstra is meeting many of its targets. However, it is not clear a fully privatised Telstra will remain committed to, or be obliged to, comply with these repair standards. For example, Telstra has voluntarily committed to a 3 day repair time for remote areas. This voluntary target is significantly less than the legislative target of 130 days. Will a privatised Telstra remain committed to 3 days or revert to the 130 day target?

- **Broadband deployment and penetration:** The estimated number of broadband services in Australia at June 2004 was 1,047,800 a growth of 925,000 from 31 July 2001. However, at June 2003 Australia's broadband penetration rate (broadband access over 100 inhabitants) was 2.65 percent compared with the OECD average of 6.06 percent. At this time Australia ranked 20th out of the 30 OECD countries, compared to 18th in the previous year.

- **Provision of Broadband internet services in rural areas.** Broadband is most commonly delivered via ADSL, cable or satellite (one or two way). Whilst satellite provides 100 percent coverage, ADSL is only available to approximately 75 percent of the Australian population and cable is only available in parts of the capital cities, Newcastle and the Gold Coast. Therefore, the only broadband option for many rural customers is via satellite.

  The Regional Telecommunications Inquiry (RTI) found a one-way satellite option was not comparable to ADSL due to the need to rely on a dial-up service for uploads. The price of a two-way satellite broadband option is only comparable to ADSL and cable once current government subsidies under the Higher Bandwidth Incentive Scheme (HiBIS) are taken into account. However, this program is only a commitment over 4 years beginning 2004. The comparison prices also do not take into account the travel costs associated with installation and repair for satellite, nor the longer minimum contract terms required for satellite plans (18 months versus 12 months for cable and ADSL). For example for a Telstra 500MB 256/64kbps ADSL plan[3] the minimum 12 month package cost with professional installation is $898.40 and the minimum cost of a 500MB Telstra cable plan with professional installation is $858.40. This is in comparison to a Telstra 256/64 500MB two-way satellite plan with professional installation being $2,657.40 (and $968.40 with the HiBIS subsidies) for the first 12 months. However, the two-way satellite ongoing costs are greater with monthly fees being $49.95 a month with ADSL and cable compared to $104.95 (and $69.95 with the HiBIS subsidy) for two-way satellite.

  Dial up internet is available over Telstra's copper wire to the majority of Australians. It is capable of speeds up to 56kps, however, in reality the speeds delivered are often slower. This technology is not suitable for uses such as video and also has disadvantages associated with drop-outs (and having to pay to dial up again) and customers cannot use their telephone line at the same time (as they can with

[3] Note: Since this response was prepared, this package is no longer available. The nearest comparable package currently on the market is the Telstra Unlimited 256/64kbps ADSL plan with a minimum 12 month package cost of $1,018.40.

broadband). The Federal Government's Internet Assistance Program guarantees speeds of 19.2kbps for dial-up users however, as concluded by the RTI "dial-up modem technology, limited as it is currently to speeds below 56kbps, can no longer satisfactorily support the growing bandwidth needs of many internet users, who increasingly need better and faster performance as they spend more and more time using the internet for business, education and social interaction".

There are 1,080 ADSL-enabled exchanges across Australia providing broadband access to about 75 percent of the population. The Telstra Demand Register records interest for ADSL in the remaining exchange areas. A required demand threshold is set and once that threshold is met and customer interest is verified Telstra will begin the planning to enable the exchange. Once the decision to enable has been made the exchange should be enabled within 3 to 6 months. However, if an exchange is ADSL enabled this does not guarantee a customer within the exchange area will qualify for ADSL. Each ADSL request is subject to an ADSL Service Qualification process. Also, the user must be located within approximately 3.5kms from the exchange and those customers who receive access via pair gain technology cannot obtain an ADSL service. (Most of the pair gain technology is found in metropolitan areas.)

Even though Telstra's ADSL demand register is a positive step towards increasing ADSL availability, demand thresholds have not been set for 66.2 percent of Queensland's 920 exchanges. Some rural areas of Queensland where there has not been a threshold set, record significant amounts of interest. For example, Herberton records an interest of 45 users, Esk an interest of 31 users and Walkamin an interest of 42 users.

APPENDIX 2: Proposed Amendments to the TPA

Small Business Concerns

The Senate Economics Reference Committee recommended (in relation to s46) that:

- the Act be amended to state that where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy.

  The Australian Government's response was that "s.46 should be amended so that a court may consider whether a corporation has a reasonable prospect or expectation of recoupment as a relevant factor when assessing whether a corporation has misused its market power. Although a reasonable prospect of recoupment is not to be legally essential to a finding that a corporation has breached section 46, it often provides a good test of whether price-cutting is predatory, as Government Senators noted. It is therefore appropriate that the section clearly state that a reasonable prospect of recoupment is factor that maybe taken into account."

  The Queensland Government does not support either the Committee's or the Australian Government's position. Queensland's position is that *Boral Besser Masonry Limited v Australian Competition and Consumer Commission (ACCC)* [2003] HCA 5 confirms the possibility of recoupment by a corporation is not legally essential to prove a breach of s.46 of the Act. An explicit statement that it is not necessary to demonstrate a capacity to recoup could hinder the analysis and approach taken by the courts, if the interpretation of this amendment is that it is not necessary in all claims of predatory pricing. Additionally, such an amendment may actually function to rule out legitimate low pricing strategies to the detriment of the consumer. It is suggested that if it is found that s.46 does not adequately deal with all types of predatory pricing claims (as suggested by some commentators) then it may be appropriate to consider the introduction of a specific and separate offence rather than making changes to s.46 of the Act".

- s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, in that or any other market, for any proscribed purpose in relation to that or any other market.

  The Queensland Government does not agree that *Rural Press v ACCC* (2002) HCA 75 overturns or alters the previous case law position that, in appropriate circumstances, a corporation may be found to have taken advantage of its market power when the impugned conduct takes place in another market. The insertion of the words *in that or any other market* may see the courts attempting to interpret the meaning of this phrase and arrive at an interpretation of s.46 different to that currently applied by the courts, which is not desirable.

Government Procurement

In the draft Report, the Commission stated that "there may be a case for legislative changes to ensure that particular government business activities do not inadvertently fall through the coverage net". It notes, for example, the decision of *Corrections Corporations of Australia Pty Ltd v Commonwealth of Australia* which involved the procurement by the Australian Government of services for its detention centres. In that case, the Federal Court found that the Department concerned was not attempting to trade in goods or services.

In this regard, Queensland makes the following observations:

- as a result of numerous cases on this point, Queensland considers that the meaning of "carrying on a business activity" to be clear and fairly settled. In the context of government procurement, the courts have consistently held that the following activities carried out by government are not business activities:

  (i) the inviting of tenders and contracting activities where they are for goods or services for the government's own use; and

  (ii) the inviting of tenders to be submitted and dealing with prospective tenders when selling a government asset.

  See *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337; *Siarway Asia Pacific Pty Ltd v Commonwealth* (2002) ATPR (Digest) 46-226; *Corrections Corporations of Australia Pty Ltd v Commonwealth of Australia* [2000] FCA 1280; *Team Employment & Training Network Pty Ltd v Secretary, Department of Employment Workplace Relations & Small Business* [1999] FCA 1792. (In relation to the above mentioned cases, it is noted that all of the cases involved allegations of misleading and deceptive conduct which allegedly arose out of the tendering process conducted by the Commonwealth.);

- Queensland considers the above-mentioned authorities on this point to be correct; and

- the current interpretation is consistent with the legislative intention behind sections 2A and 2B of the *TPA*, that is, the Commonwealth, States and Territories are only subject to the *TPA* in so far as they are "carrying on a business". The *TPA* does apply in relation to procurement so long as it occurs as part of the day to day operations of the business activity but not otherwise.

  For example, in *JS McMIllan Pty Ltd v Commonwealth*, the Court held that the fact that the Australian Government Printing Service carried on a publishing business did not mean that the Commonwealth, in the sale of that business, was carrying on a business. The officers engaged in the sale had nothing to do with the day to day operations of the enterprise; the Commonwealth did not conduct any business of selling assets. The recent decision of the High Court in *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 reconfirmed the correctness of this construction.

Derivative Immunity

In its submission, the ACCC raised a concern in relation to the issue of derived immunity for parties engaged in business activities with government entities that are subject to the 'shield of the crown', before concluding that:

> "other than contracts protected by transitional provisions of the *Competition Policy Reform Act 1995*, any immunity from the *TPA* conferred in relation to Crown entities should not extend beyond that provided to the Crown where it is not carrying on a business and, in particular, should not extend to parties engaging in business dealings with Crown entities."

In this regard, Queensland makes the following observations:

- traditionally, the principle of Crown immunity was that the Crown was presumed to be immune for the operation of the general words of a statutory provision in relation to the activities of governmental instrumentalities or agents acting in the course of their functions or duties;

- the current position is that a statute will be held to apply to and bind the Crown if its purpose, policy and subject matter disclose an intention that the Crown is bound. The paramount consideration in construing the presumption is the legislative intention of parliament. Hence, this is why the TPA contains an express provision providing that the States are subject to the Part IV of the TPA in so as they are "carrying on a business";

- generally, Crown immunity can only be claimed by those having the status of Crown. However, it is true that, in very limited circumstances, a private sector organisation may enjoy the benefit of Crown immunity (referred to as derivative immunity). However, it is a benefit that is rarely conferred on private sector organisations;

- derivative immunity is only allowable for a certain class of cases:

  (i) where a provision creating a liability by reference to the ownership or occupation of property would, in its application in respect of certain kinds of property, impose a burden upon the performance of functions which, though not performed by servants or agents of the Crown, are looked upon by the law as performed for the Crown;

  (ii) where a provision, if applied, to a particular individual or corporation, would adversely affect the exercise of an authority which he or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself; and

  (iii) in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown; (legal, equitable or statutory);

- for example, in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, the High Court held that the Queensland Commissioner for Railways enjoyed the privileges and immunities of the Crown in right of the State of Queensland and was

therefore not bound by the *TPA*. The High Court held that not only was the Queensland Commissioner of Railways immune from the operation of the *TPA* but so were the companies which had entered into contracts with the Commissioner. It was alleged in *Bradken* that the contracts were in breach of Part IV of the TPA. However, it was held that it was impossible to grant immunity to the Commissioner and to apply the Act to the other parties because this would, in effect, be applying the Act indirectly to the Commissioner;

- in *Bradken*, the High Court pointed out that the immunity is not a personal immunity but instead applies to particular actions undertaken by companies contracted to the government, stating that "[a]ny immunity that exists is not for the benefit of the respondents, but in order to avoid the Act frustrating the government's activities.";

- another example is found in *Ventana Pty Ltd v Federal Airports Corporation* (1997) 95 LGERA 58. In that case, Ryan J held that, not only was the Federal Airports Corporation, a Commonwealth statutory corporation immune from the *Planning and Environment Act 1987 (Vic)*, but so too was a tenant which held a lease from the Corporation. It is noted that the purpose of the lease (a retail market) was in no way connected to the functions or purposes of the Corporation;

- recently, in *NT Power Generation Pty Ltd v Power and Water Authority*, the High Court rejected a number of arguments put to it that supported expanding the class of cases for derivative immunity. This case confirms the trend of the High Court to narrowly construe any claim for immunity, albeit statutory or otherwise;

- it must be emphasised that derivative immunity is a well established concept within constitutional law and applies equally to all legislation including the *TPA*. Given its history, it is reasonable to assume that the drafters of section 2A and 2B of the TPA would have had in their mind the concept of derivative immunity; and

- Queensland's view is that an express provision in the *TPA* would be required to over-ride its application. Of course, this could only occur if the Commonwealth, States and Territories agreed to it. This would involve a significant constitutional change of position on the part of the States and the Commonwealth and one not to be taken lightly.