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NATIONAL COMPETITION POLICY CONFERENCE

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Today, I want to speak briefly about developments in the National Competition Policy and then discuss

– the forthcoming review of the competition provisions of the *Trade Practices Act 1974* (the Act).

The Government has already announced an independent review of the competition provisions of the Act and details will be released shortly.

Since the introduction of the National Competition Policy (NCP) in 1995, Australia's competition policy has consistently been among world best practice.

Globalisation

The NCP needs to be considered within the context of the world's increasing economic linkages.

This cross-national integration occurs when people, governments, businesses, or decision-makers all around the world affect individual countries and their citizens - communication is faster, transport cheaper, and the connections are more immediate and more intense.

In this world, size does matter if you are selling goods or services or raising capital.

Australia is a market of almost 20 million people

- about US\$200 billion in terms of private final consumption expenditure.

In comparison, the European Union is a market of 375 million people and almost US\$4,600 billion, and the North American Free Trade Area is a market of 400 million people and more than US\$7,500 billion.

There is strong pressure on Australian companies to move to the large markets of the northern hemisphere and to seek capital from the savings of the large block of people who live in the northern hemisphere.

Our first priority is to lure capital here

- to build a business environment that makes us attractive to investment.

This has been an integral part of our thinking in reducing company tax, cutting capital gains tax, and abolishing financial taxes and stamp duties. Rates of income tax are also relevant when companies are deciding where to base their regional headquarters.

Tax is not the only issue. A whole range of pro-investment decisions on labour relations, monetary policy and skill development are needed.

To compete in this economically linked world, we need effective policies that support competition.

National Competition Policy

First, a brief history:

- In 1993, the Hilmer Review recommended the setting up of a national competition policy for Australia. All Australian governments entered into agreements that underpin the NCP.
- Competition policy is not about the pursuit of competition for its own sake, but about creating an environment that encourages effective competition in the interest of efficient resource use and maximum community benefit.

- Competition policy is a critical component of the structural reform of the Australian economy.
- It involves continuing efforts to reduce barriers to market entry and exit,
 - reform of anti-competitive regulations, and
 - exposing government owned businesses to competitive market forces in a competitively neutral manner.
- Competition reform also helps to reduce market transaction costs — principally through a comprehensive program of regulatory reform — and increases the information available to consumers to make informed choices.

NCP reforms have also been supported by *Competition Payments* from the Commonwealth to the States and Territories that are meeting the reform commitments under the agreements. Those payments represent a sharing of the benefits of reform that flow from higher economic growth. While the payments represent untied funds – once the States and Territories have met their reform commitments – the Commonwealth has encouraged States and Territories to share these benefits of reform with local government, industry and community groups. The Commonwealth has also noted that the payments provide capacity for States and Territories to directly address the impact of competition policy reforms on specific industries, regions or parts of the community.

There are many misconceptions about what NCP does and does not require. Some changes have been attributed to this policy even though they are not required by it. For example, NCP does not ignore social, regional or environmental considerations; require asset sales or privatisation; compulsory competitive tendering and contracting out or deregulation.

- The Productivity Commission's 1999 report — *Impact of Competition Policy Reform on Rural and Regional Australia* — found that NCP has become a scapegoat for some of the effects impacting on rural and regional communities. Rural and regional communities are being affected by a range of beneficial and adverse influences of which NCP is one. Most of these influences are of a long-term nature and largely beyond government control for example, declining terms of trade for agriculture, changes in technology and in consumer tastes. The report concluded that there are significant gains for the Australian community, and for country Australia as a whole, from implementing competition policy reforms.
- Competition policy achievements include:
 - : Gas prices have dropped by 22 percent for industrial and residential customers (from 1994 to 1998);
 - : National rail freight rates have fallen 18 per cent (1989-1990 to 1997-1998);
 - : Port authority charges fell by 23 per cent (1989-1990 to 1997-1998);
 - : Since 1995, stevedoring charges have fallen 15 per cent; and
 - : The real price of water for metropolitan customers in NSW has fallen by 30 per cent (1991-1992 to 1996-1997).
 - : (Productivity Commission estimates in 1999)
- Australia has the second lowest priced electricity for both residential and industrial consumers in the world (2001 Electricity Supply Association of Australia survey).

- : Recent ABARE estimates suggest that the total benefits of reform in electricity will deliver around \$16 billion of benefits between 1995 and 2010, of which over 60 per cent – or about \$9 billion – have already been delivered.
- In telecommunications, the introduction of full competition in 1997 has reduced prices and improved choice for consumers and business. Since 1997, international and long distance call prices have fallen substantially for consumers and business.
 - The removal of government restrictions on retail opening hours in some States is providing consumers greater choice as to when and where they can shop. Victoria's experience after restrictions were removed was that employment in the retail sector grew and retail sales grew faster in Victoria than in other parts of Australia.
 - Overall economic growth has been boosted by our surge in productivity through the latter part of the 1990s, with ongoing structural reforms, including competition policy, supporting this growth.

Trade Practices Act Review

We are now planning a review of the competition provisions of the Act.

Details on the inquiry and its terms of reference will be announced soon.

Australian businesses, both large and small, need to be certain that legislation and administrative practice will not act against their continued growth and productivity.

Adequate protection must be provided.

Equally, Australia should have laws and processes flexible enough to assist individual companies and those in regional Australia to attain national and international competitiveness.

We want to determine whether the legislation and its administration:

- encourage business growth and international competition;
- provide adequate protection for the balance of power between small and large businesses;
- support the growth of businesses in regional Australia; and
- deal fairly with affairs of individual companies.

This is not the first time that elements of the competition provisions have been scrutinised:

- the Griffiths Committee Report in 1989,
- the Cooney Committee Report in 1991,
- the Hilmer Committee Report in 1993,
- the Reid Committee Report in 1997,
- the Baird Committee Report in 1999, and
- currently the Senate Legal and Constitutional Committee.

Most of these reviews have considered specific provisions and Parts of the Act.

We have not had a comprehensive review of Part IV since the Hilmer Committee reported in 1993.

Now is a good time to be reviewing Part IV because, over the past 18 months, various provisions of Part IV have been the subject of considerable public debate. There have been particular concerns with the merger regime, the misuse of market power provision, and the authorisation process.

Broadly speaking, Part IV prohibits the following anti-competitive practices: anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts; misuse of market power; exclusive dealings; resale price maintenance; and mergers that would have the effect or likely effect of substantially lessening competition in a substantial market.

Administration of the Act

An important aspect of the review will be the administration of the Act. Potentially, the Act is a powerful piece of legislation and has been vigorously enforced by the ACCC.

The ACCC has had an increased role over recent years. It is the access regulator, and was given an extensive price monitoring and enforcement role during the transition to the New Tax System.

This enforcement has, at times, caused consternation within the business community. There has, rightly or wrongly, been some disquiet. Therefore, the review will also examine the administration of the Act.

Mergers

There has been an extensive debate about the relevance of the current merger regime to the world economy.

Australia prohibits mergers that would have the effect or likely effect of substantially lessening competition in a substantial market for goods and services.

Concern has been expressed that our current law is out of date. That it does not provide sufficient scope to adequately assess factors related to the 'globalisation' of business.

The argument is, essentially, that as a result of globalisation and technological advances, business size is increasingly important to ensuring international competitiveness.

The current law stresses competition in the domestic economy, and is, therefore, viewed by some as an impediment to the emergence of large, globally competitive Australian firms,

- making Australian firms more vulnerable to foreign acquisition.

Some argue that in a relatively small economy, such as Australia, firms should be allowed more freedom to merge in order to respond to the challenges of cross-national integration.

On the other hand, concern has been expressed in the retail sector about the acquisition of size and market power via creeping acquisitions - that is, attaining market share by multiple small acquisitions that do not of themselves amount to a substantial lessening of competition, but in total provide the buyer with increased market share.

The Senate Legal and Constitutional References Committee is currently examining a possible amendment to the Act designed to look at this issue - the amendment would enable the ACCC to seek a divestiture order from the Court where an ownership situation exists that substantially lessens competition.

Misuse of Market Power

This brings me to misuse of market power.

It is a fact that some of Australia's markets are highly concentrated. The Act limits high levels of concentration developing through mergers and acquisitions.

Section 46 of the Act prohibits the misuse of market power, striking a balance between allowing vigorous competition and preventing behaviour which damages competition.

Section 46 does not prohibit the acquisition of market power, but does prohibit the misuse of that power.

Specifically, a firm with substantial market power is prevented from taking advantage of that power for one of three proscribed purposes:

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into a market; or
- deterring or preventing a person from engaging in competitive conduct.

Section 46 is intended to capture a range of conduct, such as predatory pricing, exclusive dealing, and refusal to deal. The debate has been about whether the provision is an adequate balance between encouraging vigorous competitive conduct and capturing economically inefficient monopolist practices.

Those who favour a more stringent test argue that the task of setting a proscribed purpose is too difficult. Therefore, some conduct that is against the public interest is not being captured.

The ACCC, for example, proposed an amendment to Section 46 to add an effects test. The ACCC or a private litigant would only need to show that the conduct had a proscribed effect on competition, rather than proving the purpose underlying the conduct.

The debate about Section 46 has been most significant in the retail sector. For example, the 1999 Report by the Joint Select Committee on the Retailing Sector heard various allegations of predatory pricing.

As a result, the Committee considered, but rejected, replacing the current 'purpose' test in Section 46 with a 'reverse onus of proof' test, which could involve a competitor with market power having to show that it did not possess the proscribed purpose.

This amendment would overcome the perceived difficulty of determining the necessary purpose. The debate on the merits of this amendment has continued, and the Senate Legal and Constitutional References Committee is currently holding an inquiry.

Authorisation

The authorisation process is another area of concern for the review.

The general principle behind the Act is that the competition laws apply uniformly across the economy, subject to limited exceptions.

Part VII provides for authorisation and notification of conduct.

Under the authorisation and notification procedures, the ACCC has power to grant immunity from legal proceedings for conduct that might otherwise breach anti-competitive provisions of the Act. While there are several specific tests for authorisation and notification of conduct, the general rule is that there must be a sufficient public interest in the conduct to outweigh any lessening of competition.

The authorisation and notification processes are a feature of Australian competition regulation. There is concern now from some in the business community about the authorisation process.

There are general concerns about the length of time authorisations can take,

- the cost of applying for an authorisation, and
- the uncertainty associated with the process.

There are also concerns about the cost, in money and time, of pursuing the appeal process at the Australian Competition Tribunal.

Concerns with the authorisation process have also been expressed in certain industries undergoing transition, particularly rural industries.

Points have been raised that the authorisation process does not adequately take into account the imbalance of power between large numbers of producers and small numbers of powerful purchasers.

Specifically, that

- authorisation is too expensive,
- the process of assessing applications too long, and
- authorisations may not be sufficiently long term to provide necessary certainty.

In this context, it should be noted that the ACCC has granted authorisations to small business operators to negotiate collectively with larger suppliers/acquirers in several industries

- for example, the newsagents in 1999, and the chicken growers in 2001
- in order to ease the move from a regulated to a de-regulated environment.

Commitment to Regional Australia

On 29 August 2001, the Government's *Stronger Regions, A Stronger Australia* statement announced changes to the application of NCP, which will ensure that rural and regional communities are properly consulted when decision about NCP matters are being taken and their interests properly considered. These changes will also help to respond to concerns about the effects of NCP that reflect misunderstandings about what NCP involves.

- This proposal includes changes to the public interest test to ensure that the interests of rural and regional communities are taken into account by the policy. Further, to avoid misunderstandings about the operation of NCP, the Commonwealth has proposed that the *Competition Principles Agreement* be amended to require governments, in undertaking reform commitments, to commit to public consultation where reform is proposed and public education where reform is implemented.

- To facilitate accountability, the Commonwealth has suggested that the National Competition Council be required to assess whether jurisdictions have met the commitments to consultation and education.
- State and Territory Governments will also be asked to agree to amending the *Competition Principles Agreement* so that the President of the National Competition Council designates a member of the Council to give particular consideration to rural and regional interests.
- The Commonwealth's proposals will ensure that rural and regional communities get the facts about changes which are attributable to NCP so that they are fully informed about the basis of government decisions and about which level of government is responsible for particular decisions.
- It is clear that governments at all levels can do more to consult regional communities about possible regulatory changes and to provide information and education about the decisions they take.

The *Stronger Regions, A Stronger Australia* statement was a demonstration of our Government's willingness to listen to rural and regional communities and respond with practical and affordable policy.

Over the past five years, more than \$28 billion has been provided for specific regional measures. But there is always more to be done. Many of the current programs have several years to continue rolling out.

A further vision for regional Australia was outlined in the statement:

- \$115 million over four years for the Stronger Regions Program, including 'Sustainable Regions'
- targeted assistance to specific areas of need rather than a one size fits all approach.

While the new tax system provided more than \$4 billion in savings for exporters, ongoing feedback called for further reductions in the cost of agricultural exports.

To help, last August, the Government announced a reduction in the cost of AQIS inspection fees for export commodities by 40 per cent (\$30 million a year).

The \$83 million *Regional Solutions Program* helps communities build their economic base and strengthen their social structure. The program funds local ideas and is particularly flexible in the range of activities supported. It is designed to fill the gaps not covered by other government programs.

We will continue to improve the program and look at ways of increasing flexibility to encourage creative partnerships between communities, business and government.

The Government continues to provide targeted support to regional industries and communities undergoing significant economic changes. Major adjustment packages have been delivered in rural industries

- dairy and sugar,
- forestry and fisheries,
- as well as to regions such as Newcastle, Eden, south-west Western Australia and Wide Bay Burnett.

Dairy deregulation has resulted in a huge upheaval and is an interesting case. Critics claim it illustrates the problems of NCP pushing deregulation too hard. Those critics seem to ignore that NCP was not involved and that deregulation was driven from within. It appears to be a classic case of part of an industry resisting the need to change over time and having to face massive upheaval when the inevitable occurred.

Nevertheless, the Commonwealth Government moved quickly to ease the change which was occurring in the industry and the communities which have been built around them.

CONCLUSION

The need for competition policy is driven by the concept of interdependence or economic linkages.

Effective competition in markets for goods and services provides the main impetus for firms to seek productivity improvements.

Our aim is to ensure that the gains are distributed fairly, including in the form of lower product prices rather than simply higher profits.

A competitive economy also maximises the flexibility and incentive to adjust in a faster and cheaper manner to changes in the domestic and international environment.