RESTRUCTURING GBEs TO IMPLEMENT NATIONAL COMPETITION POLICY:

PROACTIVE MANAGEMENT OF THE NEW COMPETITION LAWS

Brent Fisse, Peter Leonard and Andrew Simpson

Gilbert & Tobin

Paper presented to IIR Conference
Managing Change in GBEs and GTEs: Practical Implications of the National Competition Policy
26 July 1995, Sydney

RESTRUCTURING GBEs TO IMPLEMENT NATIONAL COMPETITION POLICY: PROACTIVE MANAGEMENT OF THE NEW COMPETITION LAWS

Brent Fisse, Peter Leonard and Andrew Simpson

Gilbert & Tobin

1.0 INTRODUCTION

1.1 Strategic Options

The purpose of this paper is to review and commend several possible strategies for managing the new competition laws.

We examine the possibilities for proactive management in three major areas of concern:

- Potential liability under Part IV of the *Trade Practices Act*
- Prices oversight - competitive neutrality and accounting separation
- Subjection to the access regime under Part IIIA of the *Trade Practices Act*

To set the scene, we first outline the changes that lie ahead under the Hilmer reforms to be implemented by the Competition Policy Reform Bill.

2.0 NATIONAL COMPETITION POLICY AND GBEs

2.1 The Hilmer Report: Key Recommendations Concerning GBEs

The Report by the Independent Committee of Inquiry on National Competition Policy (Hilmer Report) recommended structural reform of public monopolies. The Committee was concerned that public monopolies protected from market forces by regulation or by government policies had in many cases developed structures unlikely to be found under normal market conditions and was concerned that:

> While questions of the most appropriate structure for public enterprises may be of interest from a public management perspective generally, competition policy concerns come to the fore when government decisions are being taken that may affect the competitive conditions, and hence efficiency, of markets.[1]

The Committee preferred structural reform of public monopolies to detailed regulation of their conduct and recommended that before competition is introduced to a sector traditionally supplied by a public monopoly:

---

[1] p 216.

- "any responsibilities for industry regulation be removed from the incumbent";

- that there be "a rigorous, open and independent study of the costs and benefits of separating any natural monopoly elements from potentially competitive activities" where both are carried on within a single organisation; and

- that there be "a rigorous, open and independent study of the costs and benefits of separating potentially competitive activities" carried on by a single organisation;[2]

- that "[w]here privatisation of a substantial public monopoly is proposed, there be a rigorous, open and independent study of all related structural issues" with a presumption in favour of vertical separation;[3]

- that a principle of "competitive neutrality" should apply as between government businesses and other businesses, to "neutralise any net competitive advantage" in the former which may flow from their ownership.[4]

2.2 *The* Competition Policy Reform Bill 1995*: Key Reforms Affecting GBEs*

Many of the reforms recommended in the Hilmer Report would be implemented by the *Competition Policy Reform Bill 1995* (Cth.) (CPR Bill). The CPR Bill would effect staged substantive amendment of the *Trade Practices Act 1974* (Cth.) and the *Prices Surveillance Act 1983* (Cth.). Agreements accompanying the CPR Bill would require the State and Territory governments that are parties to implement complementary reforms.

Two draft inter-governmental agreements accompany the CPR Bill. The draft *Competition Principles Agreement* sets out arrangements regarding appointments to the NCC and deciding its work programme; describes principles governments will agree to follow concerning prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulations, access to services provided by means of essential facilities and application of the principle of "competitive neutrality" to government businesses; and addresses the processes by which State and Territory governments will implement further microeconomic reform.[5] Although dates are set for the publication of certain statements and the undertaking of a review, individual governments are not bound by any explicit timetable for reform. The draft *Conduct Code Agreement* sets out principles the governments will agree to follow for making amendments to their competition laws and for making appointments to the ACCC.[6]

---

2 pp 237, 238.
3 p 238.
4 pp 293 - 309.
5 *Competition Policy Reform Bill 1995*, Second Reading speech.
6 *Competition Policy Reform Bill 1995*, Second Reading speech.

The various competition policy reforms which may be expected to pass the Federal Parliament later this year would affect Commonwealth, State and Territory government business enterprises (GBEs) in significant ways and to a substantial degree. GBEs will be particularly affected by:

- the extension of liability under Part IV for anti-competitive conduct to the Crown in right of States and Territories, so far as the Crown carries on a business;

- the extension of prices oversight functions under the *Prices Surveillance Act* to State and Territory authorities;

- the institution of a compulsory services access regime applicable to services supplied by, *inter alia*, the Crown in right of the Commonwealth, a State or a Territory;

- the implications of privatisation, in particular the application of the *Corporations Law* and the importance of discharging "due diligence" obligations;

- their changed status regarding judicial review.

These key reforms will affect GBEs to a significant degree, particularly by exposing them to new potential liabilities. GBEs will potentially be liable for infringements of the *Trade Practices Act 1974*. Liability under the *Trade Practices Act* would expose the GBE and, potentially, officers and directors of the GBE, to stringent sanctions. This paper now proceeds to consider in more detail the likely effects of the main reforms on GBEs and possible initiatives that affected GBEs might adopt in response.

3.0 NEW LIABILITY OF GBEs UNDER PART IV OF THE AMENDED *TRADE PRACTICES ACT*

GBEs will need swiftly to develop an understanding of the kinds of commercial behaviours that are prohibited by Part IV of the *Trade Practices Act*. They will also need to develop effective compliance programs and liability control systems.

3.1 The Hilmer Report: Part IV Liability

The Hilmer Committee was of the view that there were compelling arguments in market efficiency and in equity as between businesses for the uniform and universal application throughout the economy of the competitive conduct rules advocated by the Committee. The Committee considered that the conduct rules of the *Trade Practices Act* were subject to "a number of significant gaps and limitations", some of which were not justified on demonstrated public interest grounds. The Committee recommended:

- that "[c]urrent limitations in the application of competitive conduct rules arising from constitutional factors be removed";[7]

[7] Recommendation 5.6 p 121.

- that the "... shield of the Crown doctrine be removed from the Crown in right of the Commonwealth, the States and Territories in so far as the Crown in question carries on a business or engages in commercial activity in competition (actual or potential) with other businesses";[8]

- limitation to two years duration of exemptions created by means of regulations under the *Trade Practices Act*;[9]

- limitation of specific authorisation or approval of particular conduct by Commonwealth laws to authorisation or approval contained in statutes and not regulations, expressly stating that the authorisation or approval is for the purposes of the relevant provision of the *Trade Practices Act*;[10]

- repeal of the current provision for specific authorisation or approval of particular conduct by an Act, Ordinance or regulations of a State or Territory.[11]

The *Competition Policy Reform Bill 1995* would substantially give effect to these recommendations.

3.2 *The* Competition Policy Reform Bill 1995 (Cth.)*: Part IV Liability*

The *Competition Policy Reform Bill* would extend the application of the TPA Part IV prohibitions against anti-competitive behaviours to the Crown in right of a States or Territories and to State and Territory authorities. The present s 76 of the TPA would apply to make any person (including a director or officer of a GBE) liable to a pecuniary penalty where that person has, *inter alia*, "...been in any way, directly or indirectly, knowingly concerned in, or a party to..." the contravention of a provision of Part IV by a GBE.[12] The pecuniary penalty may be as much as $500,000 for each such act or omission by an individual.[13]

3.2.1 Part IV liability of the Crown in right of the Commonwealth

Presently, the *Trade Practices Act* applies to instrumentalities of the Commonwealth which are not within the shield of the Crown, and to the Commonwealth so far as it "...carries on a business, either directly or by an authority of the Commonwealth."[14] Clause 75 of the CPR Bill would amend the Principal Act, at the fourth commencement time,[15] by substituting a new s 2A(3). The new subsection would clarify the position that nothing in the Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty. As the Explanatory Memorandum indicates, this was formerly thought unnecessary, as the recovery of a pecuniary penalty is on behalf of the Commonwealth, but the new subsection makes the

---

8 Recommendation 5.7 pp 121, 122.
9 Recommendation 5.3 p 121.
10 Recommendation 5.4 p 121.
11 Recommendation 5.5 p 121.
12 S 76(1).
13 S 76(1B).
14 S 2A.
15 After twelve months from the date of Royal assent. CPR Bill cl 2(5).

provision concerning the Crown in right of the Commonwealth consistent with new subs 2B(2) which provides that the Crown in right of a State or Territory will not be liable to penalty. A range of alternative remedies might be sought against the Crown, including damages and injunctions.[16] Authorities of the Commonwealth or of a State or Territory are not immune from liability to a pecuniary penalty or from prosecution from an offence.[17] Subsection 2A(4), providing that "Part IV does not apply in relation to the business carried on by the Commonwealth in developing, and disposing of interests in, land in the Australian Capital Territory" remains in the Act.

3.2.2 Part IV liability of the Crown in right of a State or Territory

New s 2B, to be inserted in the Principal Act at the fourth commencement time by cl 76, would remove "shield of the Crown" immunity from the Crown in right of the States and Territories. Under new subs 2B(1), the Crown in right of the States and Territories is to be bound by Part IV and the other provisions of the Act so far as they relate to Part IV, "...so far as the Crown carries on a business, either directly or by an authority of the State or Territory."

When determining what constitutes a "business" for the purposes of ss 2A or 2B, reference may be made to current subs 4(1) and to new s 2C. Subsection 4(1) provides that "'business' includes a business not carried on for profit". New s 2C defines the kinds of activities that do not amount to "carrying on a business" (and therefore are not within the purview of the Act). The *Explanatory Memorandum* summarises these kinds of activities as follows:

> (a) the imposition or collection of taxes, levies or licence fees;
>
> (b) licensing decisions;
>
> (c) activities internal to the Crown (i.e. government departments and instrumentalities which do not have a legal identity separate from the Crown);
>
> (d) activities internal to an authority of the Crown that has a legal identity separate from the Crown; and
>
> (e) acquisition of primary products by a government body under legislation, when the government body has no discretion as to whether to acquire the products.[18]

The *Explanatory Memorandum* indicates, by way of example, that a 'transaction' between the Commonwealth Department of Defence and the Commonwealth Department of Administrative Services would not be regarded as a "business" activity subject to the Act, as the 'transaction' occurs between departments both of which are part of the single legal entity of the Crown in right of the Commonwealth.[19] More difficult questions are likely to arise where the transaction

---

16 Explanatory Memorandum para 326.
17 New subss 2A(3A), 2B(3).
18 Explanatory Memorandum para 329.
19 Explanatory Memorandum para 330.

involves one or more party that is not a government department under the control of a Minister. In particular, it seems clear that a transaction between departments of separate governments would be a "business" activity, as the Crown in right of the Commonwealth (for example) is a separate legal person from the Crown in right of a State or a Territory.[20]

3.3 Proactive Responses by GBEs to Possible Part IV liability

New ss 2B and 2C will not commence until twelve months after the Bill receives Royal assent and pecuniary penalties will not lie against an authority of a State or Territory for conduct taking place in the twelve months immediately after the commencement of that section.[21] This timetabling will provide an opportunity for State and Territory businesses and authorities to take steps to adapt to their new potential exposure to liability. Such steps include implementation of compliance systems, modification of behaviour that might involve infringement of Part IV, and possibly applications for authorisation of conduct.[22]

The prime need will be for compliance programs and liability control systems. To date, relatively little attention seems to have been paid to the internal control implications of the CPR Bill for GBEs and GTEs. Yet the efficacy of the new competition laws and the extent of unwanted pain and suffering from non-compliance will much depend on the calibre of the managerial controls which are introduced. This is where the law ends and the responses or non-responses of organisations begin.

3.3.1 The Organisational Black Box of Compliance and Liability Control - Basic Framework

Numerous episodes of questionable corporate conduct, especially over the past two decades, have led many companies in the private sector to rethink their internal controls and to strengthen them against exposure to liability and related losses. What can be learned from that experience?

The core elements of well-designed compliance programmes and liability control systems in private sector companies are typically these:

- Systematic identification and management of risks to which the company is exposed
- Clearly-stated compliance policies reinforced by top- as well as by middle-level management
- Clear allocation of responsibility to specified personnel
- Readable manuals setting out relevant standards (legal, corporate, and industry self-regulating), operating procedures for particular units in the organisation, and concrete examples indicating what exactly is expected of personnel in risky situations likely to arise

---

[20] See subcl 2C(1)(c)(i).
[21] CPR Bill cl 83.
[22] EM 327.

- Routine controls for monitoring and enforcing compliance together with safeguards for ensuring command of compliance problems by senior management

- Standard procedures for avoiding the creation or retention of unnecessarily damaging or incriminating documentation and for structuring investigative and reporting procedures so as to maximise the extent of protection possible from legal professional privilege.

- Action plans in the event of discovery of illegality and for resolution of complaints received from employees, consumers, members of the public, or enforcement agencies

- Education and training of personnel

- Interaction with relevant enforcement agencies, as by submitting compliance materials for preview and engaging in ongoing dialogue about regulatory issues[23]

3.3.2 Examples

- Know your risks

- Take it from the top - reinforcement of corporate compliance policy by motivated managers for motivating staff.

- Early warning systems

- Getting efficiencies

- Bullet-proof training

- Coming to grips with interactive compliance - Sigler and Murphy's law.

3.3.3 Objectives, Philosophy and Focus for Managing Compliance and Liability Control

Several features of this approach to compliance and liability control may be noted:

- The objective is to have a comprehensive and integrated set of compliance and liability controls which work and continue to work. The point has repeatedly been made by the courts in the context of the *Trade Practices Act* that compliance policy is one thing and effective implementation quite another. Thus, in *TPC v General Corporation Japan (Australia) Pty Ltd*,[24] General was penalised $130,000 for resale price maintenance largely as a reflection of the "totally inadequate" steps taken

---

[23] See further Sigler, J.A. and Murphy, J.E., *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988).

[24] (1989) ATPR 40-922. See also TPC v BP Australia Ltd (1986) ATPR 40-652.

to impress upon employees and senior management the need to adhere to a compliance policy established by the board of directors.

- The animating philosophy is that effective liability control requires risk management by management, with policies and procedures geared to making compliance happen as a matter of organisational routine. Inputs from lawyers are relevant as part of the backdrop, but program and process are hardly driven by legalistic advice or legal auditing by outside law firms.

- The task of achieving compliance and liability control is approached head-on and not from the oblique or top-down angle of "corporate governance".

- There is a hard-edged focus on liability control as distinct from the more moralistic stance of codes of ethics.

3.3.4 Why Bother?

Are compliance and liability control systems overkill and not worth the time, cost and effort?

Although a system which is feigned, sloppily implemented, or too idealistic may prove more of a hazard than a cost-saver, it is difficult to accept the suggestion that it is best to do nothing toward compliance. Such a strategy seems ill-advised, for three basic reasons:

- Flying blind, or proceeding on the basis of "creeping incrementalism", is inconsistent with sound managerial theory, in particular the postulate of strategic decision-making.

- Doing nothing may result in situations where the corporation is taken by surprise and hence placed at a disadvantage in litigation or dealings with enforcement agencies or news media.

- The potential losses far outweigh the costs of developing and maintaining a control system.

The main areas of potential loss are:

- Corporate liability - damages, injunctions, pecuniary penalties and forthcoming introduction of corporate probation.

- Individual liability for being knowingly concerned in a contravention of the TPA and individual accountability as a result of corporate disciplinary action required under a s 87B undertaking.

- Personal liability of corporate officers for negligence or for failing to exercise due diligence in contravention of s 232(4) of *the Corporations Law*

- Adverse publicity

- Disruption and loss of morale as a result of involvement in litigation or a publicity crisis

- Legal costs in defending claims or prosecutions

- Due diligence problems during the course of privatisation.

4.0 PRICES OVERSIGHT

4.1 The Hilmer Report: Prices Oversight

The Hilmer Committee believed that in markets in which the conditions for effective competition are absent the "primary response" of competition policy should be to increase competitive pressures, by measures including the extension of part IV liability, reform of public monopolies and access to "declared services" recommended elsewhere in the Report.[25] Nevertheless, the Committee conceded that "[w]here these measures are not practicable or sufficient, some form of price-based response may be appropriate." Price oversight mechanisms remain important, therefore, and the effect of amendments that the CPR Bill would make to the *Prices Surveillance Act 1983* (Cth)[26] (PS Act) should be considered by GBEs.

4.2 The Competition Policy Reform Bill 1995 (Cth.)*: Prices Oversight*

The CPR Bill would introduce three main reforms to prices oversight.

1. First, the Prices Surveillance Authority (PSA) would be merged with the TPC to form the new ACCC.

2. Secondly, a prices monitoring role performed by the PSA would be formalised as an explicit function of the ACCC, in addition to the explicit functions of carrying out prices surveillance and holding price inquiries (in this paper the expression "prices oversight" refers to all three functions).

3. Thirdly, prices oversight of State and Territory businesses will become possible in certain circumstances.

4.2.1 Prices Surveillance in Respect of GBEs' Prices

Key definitions in the PS Act would be amended so as to extend the scope of application of the PS Act to the supply of goods or services by the Crown in right of

---

[25] Hilmer Report p 187.
[26] CPR Bill s 72 and Third Schedule.

each of the States and Territories. Clearly, the majority of GBEs will fall within the terms of this definition.

The amendments to PS Act s 21 effected by the CPR Bill would enable the Commonwealth Minister, or the ACCC with the approval of the Minister, to declare, *inter alia*, a State or Territory authority "... to be, in relation to goods or services of a specified description, a declared person for the purposes of..." the PS Act.[27] The effect of declaration would be to restrain the declared person from charging a price that is higher than the highest price charged for the good or service in the preceding twelve months.[28]

4.2.2 Prices Monitoring

An amendment to PS Act s 17 would confer on the ACCC the functions of "... monitor[ing] prices, costs and profits in any industry or business that the Minister directs the Commission to monitor, and ... report[ing] to the Minister the results of the monitoring."[29] This would formalize a role previously carried out by the PSA without an express statutory obligation. Under new s 27A, the Minister may issue a monitoring direction "...relating to the supply of goods or services by persons in a specified industry..." or "relating to the supply of goods or services by a specified person...".[30]

4.3 The Competition Principles Agreement*: Prices Oversight*

The *Competition Principles Agreement* sets out principles to govern prices oversight of GBEs.[31] Those principles stress cooperation between the parties to the agreement (i.e. the Commonwealth, the States and the Territories) and between each party and the NCC. Primary responsibility for oversight of prices charged by GBEs is agreed to lie with the State or Territory that owns the enterprise.[32] States and Territories who are parties are required to "...consider establishing independent sources of prices oversight where these do not exist"[33] which, it is provided, should have the following characteristics:

> (a) it should be independent from the [GBE] whose prices are being assessed;
>
> (b) its prime objective should be one of efficient resource allocation but with regard to any explicitly identified and defined community service obligations imposed on a business enterprise by the Government or legislature of the jurisdiction that owns the enterprise;

---

27 PS Act s 21; new subss 21(1A) - 21(1E) to be inserted by CPR Bill s 72 and schedule 3.
28 PS Act s 22, as amended by by CPR Bill s 72 and schedule 3.
29 New subs 17(1)(c).
30 New subs 27A(1).
31 Clause 2.
32 Subcl 2(1).
33 Subcl 2(3).

(c) it should apply to all significant [GBEs] that are monopoly, or near monopoly, suppliers of goods or services (or both);

(d) it should permit submissions by interested persons; and

(e) its pricing recommendations, and the reasons for them, should be published.[34]

Under the *Competition Principles Agreement*, provisions concerning competitive neutrality and structural reform will require accounting separation of activities within GBEs. Subclause 3(4) requires the parties to the Agreement to take certain steps to implement the principle of competitive neutrality in relation to "significant Government business enterprises which are classified as "Public Trading Enterprises" and "Public Financial Enterprises" under the Government Financial Statistics Classification. The required steps (under para 3(4)(b)) are to "... where appropriate, adopt a corporatisation model for these Government business enterprises..." and to impose on the GBE:

(i) full Commonwealth, State and Territory taxes or tax equivalent systems;

(ii) debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and

(iii) those regulations to which private sector businesses are normally subject, ... on an equivalent basis to private sector competitors.[35]

4.4 Pro-active Responses by GBEs to Possible Prices Oversight by the ACCC

GBEs might adopt, at various levels, proactive measures in response to those aspects of the national competition policy which affect their pricing.

4.5.1 Prices Oversight - State Bypass

First, GBEs might consider whether they would prefer to preclude the imposition of prices oversight by the ACCC by lobbying for "effective supervision of prices charged" at the State or Territory level. By ensuring that there is a prices oversight mechanism relating to the GBEs activities, which is independent of the GBE, has the prime objective of efficient resource allocation, applies to all significant GBEs that are monopoly or near monopoly suppliers, permits submissions by interested persons and publishes its pricing recommendations and the reasons for them, GBEs could preclude the finding that "the enterprise is not already subject to a source of price oversight advice which is independent ...".[36] Absent this finding, a State or Territory GBE cannot be made subject to a prices oversight mechanism administered by the ACCC unless the party to the Agreement that owns the GBE consents.[37] Monitoring may only be imposed on a State or Territory authority where the relevant State or Territory agrees and the NCC must not recommend "declaration" of a State or

---

[34] Subcl 2(4).
[35] Subcl 3(4)(b).
[36] Subcl 2(6)(a).
[37] Subcl 2(6); and new PS Act subs 21(1B)(b).

Territory authority unless it is satisfied that "... there is not effective supervision of prices charged by the authority ...".[38]

4.5.2 Accounting Separation

Secondly, and far more importantly, GBEs other than "significant [GBEs] which are classified as "Public Trading Enterprises" and "Public Financial Enterprises" under the Government Financial Statistics Classification"[39] and which do undertake "significant business activities as part of a broader range of functions",[40] might implement accounting separation procedures as a means of ensuring that the prices charged for goods and services take account, where appropriate, of:

- full Commonwealth, State and Territory taxes or tax equivalent systems;
- debt guarantee fees; and
- those regulations to which private sector businesses are normally subject.[41]

It should be noted that pricing (by GBEs within this description) so as to take account of these items is an *alternative* (for the parties to the Agreement) to imposing those charges on GBEs and adopting a corporatisation model for them.[42]

Moreover, such pricing need only be applied "where appropriate" and the parties to the Agreement are only required "... to implement the principles specified in those sub-clauses to the extent that the benefits to be realised from implementation outweigh the costs."[43]

GBEs do have the opportunity to take the accounting separation bit firmly between their teeth and to assume control of the costing process. The task of allocating costs gives much leeway to the organisation which moves swiftly and devises a costing regime favourable to its objectives. This is particularly so given that the commercial and non-commercial spheres of GBE activities acutely raise the intractable and difficult task of allocating joint and common costs. Allocating such costs is an arbitrary process where much of the initiative and control lies with the organisation and where outsiders face the real hurdle of asymmetric information.

Moving quickly and in effect staging a preemptive strike by adopting one's own preferred approach to cost allocation may help to stave off more intrusive cost accounting controls. In the context of telecommunications regulation, for example, the US trend has been towards highly detailed and sophisticated costing models (eg the BellCore model). In Australia, AUSTEL's COA/CAM Manual also imposes a detailed costing methodology. While it is possible to live with such intrusions, they may be avoidable by getting in first with a "light-handed" more rule of thumb approach.

---

38 New PS Act subs 21(1B)(b).
39 Subcl 3(4).
40 Subcl 3(5)
41 Subcl 3(5).
42 Subcl 3(5).
43 Subcl 3(6).

5.0 ACCESS RIGHTS

An important and much-discussed aspect of the CPR Bill is its introduction of a new Part IIIA to the TPA, providing for third party access to certain essential facilities.

5.1 The Hilmer Report: Access Rights

A key recommendation of the Hilmer Committee was that a new legal regime should be adopted to deal with concerns over access to "essential facilities" by creating a right of access in prescribed circumstances.[44] The Committee recommended that the general access regime should be "...capable of application to facilities owned by State or Territory Governments."[45] The "primary emphasis" should, the Committee believed, be placed on cooperative approaches to access determination based on the agreement of the government that owned the facility in question. However, "... the important national interests at stake in some circumstances may be sufficient to justify unilateral action."[46]

5.2 The Competition Policy Reform Bill 1995 (Cth.) *: Access to Services*

New s 44E (to be inserted at the second commencement time[47] by cl 54 of the CPR Bill) would ensure that the Crown in right of the Commonwealth and of each of the States and Territories would be bound by the access provisions in new Part IIIA, with no requirement that the Crown be carrying on a business. At the same time, clause 31 of the CPR Bill would amend the existing subs 2A(1) of the principal Act to ensure that subs 2A(1) is subject to new s 44E. Except where new s 44E applies, s 2A binds only the Crown in right of the Commonwealth and only so far as it "...carries on a business, either directly or by an authority of the Commonwealth."

The NCC may recommend the declaration of a service (including one supplied by a Commonwealth, State or Territory instrumentality) and the designated Minister may declare a service where satisfied of all of the following matters:

- that the service is not the subject of an access undertaking in operation under s 44ZW;
- that access or increased access to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service;
- that it would be uneconomical for anyone to develop another facility to provide the service;

---

44 Ch 11.
45 Recommendation 11.7.
46 Ibid.
47 A day to be fixed by Proclamation, otherwise after six months from the date of Royal assent. CPR Bill cl 2(2).

- that the service is of national significance, having regard to the size of the facility or the importance of the facility to constitutional trade or commerce or the importance of the facility to the national economy;

- that access to the service can be provided without undue risk to human health or safety;

- that access to the service is not already the subject of an effective access regime;

- that access or increased access to the service would not be contrary to the public interest.[48]

5.3 Pro-active Responses by GBEs to the Possible Declaration of Services

Pro-active steps can be taken by GBEs. The staggered commencement dates applying to parts of the CPR Bill will allow GBEs some time to adapt to the changes to the regulatory environment and to work out a strategy, especially on whether to enter into an access undertaking.

5.3.1 Access Undertakings

GBEs should consider whether they should enter into access undertakings in order to preclude declaration of the service(s) they provide. The NCC cannot recommend declaration of, and the Minister cannot declare, a service that is the subject of an access declaration under s 44ZW.[49]

Section 44ZW would permit a person who is or expects to be the provider of a service to give to the ACCC a written undertaking setting out details of the terms and conditions on which the provider undertakes to provide access to the service. If the ACCC accepts the undertaking, it comes into operation at the time of acceptance and continues in operation until the expiry date that it specifies, unless it is earlier withdrawn.[50] The provider may withdraw or vary the undertaking, with the consent of the ACCC, at any time.[51] Once the ACCC has published the undertaking and invited and considered timely submissions,[52] it may accept the undertaking "... if it thinks it appropriate to do so having regard to the following matters":

(a) the legitimate business interests of the provider;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of persons who might want access to the service;

(d) whether access to the service is already the subject of an access regime;

---

48 New ss 44G, 44H, to be inserted by cl 54.
49 Ss 44G(1), 44H(3).
50 44ZW(5)
51 S 44ZW(7).
52 S 44ZW(4).

(e) any other matters that the Commission thinks are relevant.[53]

The ACCC cannot accept such an undertaking in respect of a service that has been declared.[54]

Where an access undertaking is in operation, the procedures concerning "access disputes" do not apply. Therefore, the ACCC does not have arbitration powers in respect of disputes relating to access nor the power to make a written determination on access. However, access undertakings are enforceable in the Federal Court,[55] as are ACCC determinations in respect of access disputes concerning declared services.[56]

If the ACCC thinks that the provider of an access undertaking has breached any of the undertaking's terms, the ACCC may apply to the Federal Court for an order enforcing the undertaking. The Federal Court may, if it is satisfied that the provider has breached a term of the undertaking, make all or any of the following orders:

- an order directing the provider to comply with that term of the undertaking;
- an order directing the provider to compensate any other person who has suffered loss or damage as a result of the breach;
- any other order that the Court thinks appropriate.[57]

On the vital issue of the content of an access undertaking, neither the ACCC nor the NCC has any power to require that an access undertaking incorporate any specific provision. The only particular requirement the Act would impose as to content is that it must specify the date on which it is to expire.[58]

A number of advantages flow from providing an undertaking:

- The owner may offer access on terms which are better than those which it could negotiate with potential users. The facility owner has the chance to make very conservative undertakings as to access terms and conditions, bearing in mind that, in any particular case, the terms and conditions could vary considerably.
- An undertaking may be made for a specified period, thereby enabling the owner to plan its future commitments effectively. One of the worst potential problems facing an owner is an unexpected access request which interferes with production, budgeting, administration and employment planning. Providing access may also require additional personnel, revised safety operations and additional capital outlays.

---

53 S 44ZW(3).
54 S 44ZX.
55 New s 44ZZF.
56 New s 44ZZ.
57 New s 44ZZF(2).
58 New subs 44ZW(2).

- An undertaking establishes a framework for determining the terms and conditions of access from the beginning. This may carry a psychological advantage in any future consideration by the ACCC. It also capitalises on the information advantage which the facility owner has over the access-seeker. The facility owner is in the best position to evaluate its economic interests in owning and operating the facility. It is usually only through the operation of a facility that accurate costs and revenue data can be obtained.

- The owner which gives an undertaking is in a position to give a favourable view of its interests. The ACCC is bound to consider those interests.

- Giving an undertaking enables the owner to introduce information relating to its legitimate business interests at an early stage. By contrast, the NCC may only recommend that the service be declared by the minister once the statutory criteria under the CPR are satisfied. None of the criteria involve the legitimate business interests of the owner. The owner's business interests are only considered at the later stage when the ACCC considers whether to make an access decision. By this time the access-seeker may have built up a degree of momentum and gathered sufficient supporting material to tip the access scales in its favour.

The ACCC might apply pressure to encourage the inclusion of a particular provision in an undertaking by refusing to accept the undertaking. However, the ACCC must have regard to the matters listed in new subs 44ZW(3) (including "any other matters that the Commission thinks are relevant") when determining whether it is "appropriate" to accept the undertaking. The ACCC's decision would be judicially reviewable. By making an undertaking that is accepted by the ACCC, a GBE would succeed in largely retaining control over the rules to which it is subject.

An access undertaking is a considerably more flexible instrument than an access determination. An undertaking may be varied or withdrawn by the provider at any time, subject to the consent of the ACCC.[59] However, no criteria are provided to guide the ACCC in deciding whether to give its consent or not.

A determination, in contrast, may only be varied by the ACCC, on the application of any party to that determination, and provided that no other party objects.[60] As a marginal note indicates, "[i]f the parties cannot agree on a variation, a new access dispute can be notified under section 44O." Any delay, expense and uncertainty occasioned by the access dispute procedure would be likely to give other parties to the determination considerable power to maintain the *status quo*.

5.3.2 Negotiated Access Arrangements

The access regime is built on an assumption that in most cases access disputes or requests will be determined by negotiation between the parties. The provisions enabling a decision to be made by the NCC or ACCC under the regime are intended

[59] New subs 44ZW(7).
[60] New s 44ZQ(1).

only as a last resort. However, negotiation is unlikely to work unless the basic conditions required for effective bargaining are present (see generally S Breyer, *Regulation and its Reform* (1982) 177-81). Those conditions will not always apply, in which event service owners will be in a position to protect and preserve their commercial advantages.

There are a number of possible ways in which the facility owner may be able to take control of the negotiation process:

- A facility owner may have the ability to slow the process of negotiation down or to hold out for a high price or other self-preferential terms.

- In coming to the negotiating table, the facility owner will often have significant information advantages about the cost structure of the facility and in the industry generally. This information asymmetry can be decisive in pricing negotiations. The difficulties experienced by Clear in negotiating interconnect prices with Telecom New Zealand are one case in point - the parties have been unable to arrive at a workable solution despite years of discussion and multimillion dollar litigation.

The problems highlighted by the Clear saga have not been resolved under the CPR. For instance, there is no framework of pricing principles of the kind established in 1991 for interconnect pricing in Australian telecommunications. Nor is there is an investigative or audit mechanism suitable for extracting or checking the costing information required to make an informed and even-handed decision on pricing.

In some cases it may well be in the facility owner's interests to provide access. This is particularly so where:

- The facility is under-utilised, or where the terms incorporate a contribution to the capital cost of the facility is an agreed term.

- There is a risk that one access decision under the CPR might open the way for many more. This risk may not be worth taking and can be managed by strategic negotiation of access with a preferred party.

6.0 CONCLUSION - PROACTIVE MANAGEMENT AND CHANGING CULTURES

The new competition laws have profound implications for GBEs. Sound planning requires that account be taken of the options and strategic choices which are available. Proactive management is essential.

The ideal of proactive management is one thing, achieving it quite another. Adjusting to the new competition laws will require much more than theory - a change in organisational culture may often be needed. As CD Foster has observed of the UK experience with privatisation,

> ... privatizations often require a revolution in the enterprise's culture before they can become effective. If that revolution does not happen, and the enterprise is not already efficient, there must be a chance that it will be less

able to respond to any other changes and to the competition or regulation or both that emerges. Indeed, such a culture change is perhaps the *sine qua non* of efficiency.