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NCP review of the Northern Territory Community Welfare Act

Prepared for Territory Health Services

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Executive summary

THE REVIEW OF THE *Community Welfare Act* is one of 12 reviews being undertaken of the Northern Territory's health legislation under National Competition Policy (NCP) requirements. This report briefly describes NCP principles and procedures and provides some background information about the act and procedures adopted in its administration.

Subsequent chapters of the report follow the steps that must be taken in any NCP review, namely to:

- clarify the objectives of the legislation;
- identify the nature of every restriction on competition;
- analyse the likely effects of the restrictions on competition and on the economy generally;
- assess the balance between the costs and benefits of the restrictions; and
- consider alternative means of achieving the same results including nonlegislative approaches.

A final chapter makes recommendations arising from the review.

In chapter 4 it is reported that at the time the act was introduced, the then Minister said that 'the fundamental intention of the bill is to support the institution of the family, particularly in relation to its responsibility for the care of children'. This said, there appear to be three main categories of operational objectives in the provisions and administration of the act:

- the protection of children against maltreatment;
- the care of children for whom the Minister is given responsibility; and
- ensuring minimum standards in centre based childcare.

Features of the legislation that have been identified in chapter 5 as potentially restricting or leading to restriction of competition include:

- government as the sole provider of services concerned with the protection of children against maltreatment and government as the sole purchaser of services for children in care of the Minister;
- registration requirements for foster carers and licensing requirements for children's homes and childcare centres;
- prescriptions and standards for childcare centres ; and
- differences of treatment within classes of childcare centres and exclusions of forms of purchasable childcare from provisions of the act.

It is stressed that a number features of the legislation are *potentially* anti-competitive. Whether they *actually* restrict competition, and what their effects might be, depends on how they are administered and other features of the competitive environment.

Chapter 6 makes an assessment of the balance between public benefits and costs of the various restrictions on competition identified in chapter 5. These are categorised in terms of arrangements made for child protection, children in care of the Minister and centre based childcare. It is concluded that in general the public benefits of all three sets of arrangements exceed their public costs by a large margin, and that they therefore should be retained.

However, after a consideration of alternative means for achieving the legislation's objectives, the following recommendations are made which might lead to modifications of certain features of the act or regulations and standards made under it.

- Consideration should be given to either enforcing the licensing requirement for children's homes or removing it from the statute.
- To the maximum extent possible, standards for childcare should be written in terms of outcomes to be achieved rather than in terms of prescribed practices. Where practice prescription is deemed necessary, it should be accompanied by a statement of the outcome being sought, and the Minister should have the power to waive the prescription if, to his or her satisfaction, the licensee can demonstrate that the outcome can be achieved in an alternative way.
- The basis and status of standards for childcare as legislation and as a condition of being granted a licence for a childcare centre should be clarified. Without seeking to reduce the flexibility with which standards can be administered, if they are to be used as a basis for licensing they should unequivocally have the status of subsidiary legislation.

- Consideration should be given to broadening the scope of childcare activities that are brought within the licensing-regulation net to encompass all forms of purchasable childcare services. Such consideration should be subject to normal regulation impact assessment procedures.

1 Introduction

Background to the review

The Centre for International Economics (CIE), a private economic research consultancy, in conjunction with Desliens Business Consultants was commissioned by Territory Health Services (THS) to undertake an independent review of the *Community Welfare Act* in accordance with the principles for legislation review set out in the Competition Principles Agreement (CPA) entered into by all members (Commonwealth, states and territories) of the Council of Australian Governments in 1995. The review forms part of the Territory government's obligation under the CPA to review and, where appropriate, reform all laws that restrict competition by the year 2000. Legislative reviews along National Competition Policy (NCP) lines are currently being undertaken of health and health related acts in other states. The Commonwealth is also conducting NCP reviews of its health legislation.

The *Community Welfare Act* and its associated regulations is one of 12 Northern Territory pieces of health legislation being reviewed (box 1.1).

In undertaking this review we consulted with stakeholders and asked for submissions from any interested parties. An issues paper, designed to facilitate consultations and the preparation of submissions, was distributed in March of this year. Only two submissions were received, from THS and from Darwin Family Day Care Inc (a community based not-for-profit organisation). The review team also made itself available in Darwin, and by teleconferencing hookup with Alice Springs, in early April to receive comment on issues raised in the issues paper. Only limited response arose from this later consultation opportunity.

1.1 Acts to be reviewed

- ***Community Welfare Act***
  - **Community Welfare Regulations**
  - **Community Welfare (Childcare) Regulations**
- *Dental Act*
- *Optometrists Act*
- *Radiographers Act*
- *Health Practitioners and Allied Professionals Registration Act*
- *Nursing Act*
- *Mental Health and Related Services Act*
- *Public Health Act*
  - Public Health (Barber's Shops) Regulations
  - Public Health (Shops, Eating Houses, Boarding Houses, Hotels and Hostels) Regulations
- *Medical Act*
- *Private Hospitals and Nursing Homes Act*
- *Medical Services Act*
- *Hospital Management Boards Act*

2 *The environment in which the Community Welfare Act operates*

THE *COMMUNITY WELFARE ACT* deals with the protection and care of children. However, it does not deal with adoptions, which are the subject of a separate *Adoption of Children Act*.

The *Community Welfare Act* was introduced in 1983 to replace two previous pieces of child protection legislation, the *Child Welfare Act* of 1958 and the *Social Welfare Act* of 1964. The first of these had addressed the protection of children against abuse while the second had protected children in care of the Minister under court orders. The new consolidated act recognised for the first time the role of Aboriginal customary law and traditions in regard to the care of Aboriginal children. It also introduced provisions for the licensing of childcare centres. Previously childcare centres had been registered and required to meet certain minimum standards through regulations under the *Child Welfare Act*. The act also contains provisions for special assistance for families in difficulties and for restrictions on the employment of children.

In addressing child protection issues, the new consolidated act separated matters of management of children in need of care from matters relating to children who have committed offences against the criminal law — issues reported to have been confused under previous legislation. This said, pivotal machinery for the operation of child protection matters is the Family Matters Court, which is established under the act. This court has powers to hear applications and make orders in regard to children in need of care, and exercises its jurisdiction through a magistrate sitting alone. A separate *Juvenile Justice Act*, established at the same time as the *Community Welfare Act*, deals with criminal matters involving children.

All matters covered by the act in relation to the protection of maltreated children and of children in care of the Minister are seen to be the responsibility of the Northern Territory administration. THS contracts out many functions for children in care of the Minister to non-government agencies. In 1998-99 funding for these purposes amounted to $387 000. THS

also makes extensive use of foster carers drawn from the community. Currently, some 120 volunteers assist in this way.

However, most services for the protection of children against abuse remain with THS. Actions to receive reports of alleged child maltreatment, and investigations of those reports, are undertaken by the Family and Children's Services (FACS) staff of THS. FACS may involve other individuals and agencies (both government and non-government) in actions to secure the safety of the child (such as the provision of out-of-home care). In all but very exceptional circumstances, applications for 'in need of care' orders are made only by FACS staff. Ongoing case management where maltreatment has occurred is managed by FACS staff, but services may be purchased from non-government providers.

Protection of maltreated children

It is mandatory to report the suspected maltreatment of a child. The act requires that officers of THS investigate reported maltreatment as soon as practicable. All cases of sexual abuse and serious cases of physical abuse are referred to police for joint investigation because of the possibility of criminal charges being laid. About half the reports received are substantiated and half of these are due to family problems for which services are offered, such as counselling, but no further actions need be taken. In only about 10 per cent of substantiated cases is it deemed necessary to remove the child from home and half of these return home within about two weeks.

Where a child is taken into custody, he or she may be held in a place of safety for up to 48 hours. Within that 48 hour period the officer must apply to a magistrate or judicial registrar for a holding order. A holding order may be made for up to 14 days. Within that period, the Minister must decide whether to make an application to the Family Matters Court, or return the child to his or her family, or make other satisfactory arrangements for the care of the child.

If the case is referred to the Family Matters Court, the court can place the child in the care of the Minister for an extended period, but it is also able to make a range of other orders such as directives to parents, joint guardianship between parents and other persons, or residence with another person considered suitable. Where custody is vested in the Minister, the court must review the order at least every two years.

Children in care of the Minister

The Minister has responsibility in respect of children in need of care. He or she can:

- give the child or its parents or guardians such assistance and guidance as is deemed required to ensure the adequacy of care within the child's home;
- on application from a parent or guardian, enter into an agreement to receive the child into care; or
- take such action as is deemed necessary to ensure adequate care of the child.

The Family Matters Court can also direct that a child be placed under guardianship of the Minister. The procedures that must be followed in placing a child in care of the Minister are spelled out in the act.

The rights and responsibilities of foster carers, who are community volunteers who care for children on behalf of the Minister, are spelled out in the act. Foster carers are required to be registered and to re-register every year while they have children under care. Before approved foster carers receive a child in care, they enter into an agreement with THS about the care to be given. This includes the provision of an allowance based on an Australian Institute of Health and Welfare scale to reimburse costs. Special allowances are made for some categories of need. THS insures foster carers against loss, damage and public liability.

THS administers a strict assessment process for foster carers (both applicants and re-applicants). This includes police checks as well as an assessment of parenting styles and problems experienced with children in their care. THS reports that there never are enough foster carers to meet needs. They have a core group with whom they work and regularly advertise for more. THS provides support services for foster carers and seeks to work with them at all times. The act requires that children in care of the Minister be visited by an authorised officer at least once in every two months.

Where a child in care of the Minister is an Aboriginal, the act requires that every effort be made to place the child with his or her extended family or with the Aboriginal community to which the child relates. For purposes of placing Aboriginal children in care, THS has contracted with Karu, a not-for-profit Aboriginal agency, to recruit and support Aboriginal foster carers and provide some out-of-home care and family support casework services.

Not all children under care of the Minister are with foster carers or in extended Aboriginal families or communities. Some reside in children's homes, which are defined in the act. The act specifies conditions of admission to a children's home and responsibilities for care. THS itself runs two cottage homes itself for this purpose in Darwin and contracts with a non-government home (St Mary's) in Alice Springs.

Children's homes are required to be licensed, but this provision of the act does not appear to have been implemented. Most children's homes in the Northern Territory are non-government and most children in them are not in ministerial custody. Some children from remote communities board there, some are children with disabilities and some are there for short term periods while other family members are sorting out difficulties unrelated to child protection issues.

About 180 children are in care of the Minister at any time, though many more go through the system each year. THS reports that some children in care of the Minister in the Northern Territory would be in a different status of care in other jurisdictions. This is because the states have specialised facilities for categories of care not available in the Northern Territory. Children with disabilities are cases in point.

Centre based childcare

Although THS contracts out some functions for children in care of the Minister and makes extensive use of foster carers drawn from the community, these are not seen to be areas of commercial activity or private responsibility. However, there are childcare activities in the Northern Territory that are serviced by independent not-for-profit and commercial operators. The act regulates and sets some minimum standards within the centre based sector of that industry. Childcare centres, which are defined in the act as:

> ...premises in which more than five children (including children of persons providing child care on the premises) who have not attained the age of six years and who have not enrolled for primary education at school ... are cared for:
>
> (a) for reward or gain, whether monetary or otherwise;
>
> (b) as a community service; or
>
> (c) incidental to a community service or commercial enterprise,

are required to be licensed. Licensees are required to keep a register of every child received into the centre and are subject to inspection and some

other requirements. There is no legislated provision for family based care (five or less children under the age of six years) to be licensed.

The act makes direct provision for a number of restrictions on the operations of childcare centres (maximum periods in childcare centres; drugs not to be administered). It also allows regulations to be made. Current regulations in respect to child protection and children in need of care are limited to the specification of forms required for applications, orders, affidavits, etc. However, current regulations in respect to childcare centres are more substantive, specifying certain requirements for care and enabling the Minister to gazette standards related to building, qualifications of operators and staff, and conduct. The standards currently gazetted are essentially those endorsed by all state-territory and Commonwealth ministers.

The Commonwealth's *Quality Improvement and Accreditation System,* which is aimed at addressing quality issues of centre based care beyond state-territory minimum licensing standards, is also a significant area of government involvement. This is a self-monitoring system, but accreditation under it is a prerequisite for Commonwealth assistance to parents. There is no regulation of other aspects of private-community childcare, such as home based or after school hours care. However, national standards have been endorsed not only for centre based care, but also for family day care and outside school hours care. Family day care consists of coordinated services provided in the carer's own home, the coordination being provided with Commonwealth government assistance. Family day care schemes are all community based not-for-profit organisations. Although there is no legislated regulation of family day care schemes, family day carers are required under national standards to be registered with each scheme, registration being dependent on a number of formal obligations being met.

Currently, 49 childcare centres are licensed in the Northern Territory, nine of which are commercial for-profit. The operation and mix of these facilities is strongly influenced by Commonwealth funding arrangements. There are 2223 licensed day care centre based childcare places in the Territory and 890 children are in family day care. THS has estimated that some 2200 children up to four years of age access other forms of home based care.

3 *NCP principles*

UNDER THE CPA, nearly 2000 pieces of Commonwealth, state and territory legislation are being reviewed over a six year period. The guiding principle behind these reviews and the reforms that follow them is that legislation (encompassing activities of authorities set up under that legislation and any regulations, rules, etc. authorised under it) should not restrict competition unless it can be demonstrated that the:

- benefits of the restriction to the community as a whole outweigh the costs; and
- objectives of the legislation can only be achieved by restricting competition.

It is significant to note that *both* of these criteria are required to be met if a restriction is to be retained. This means that even if a restriction passes a net public benefit test, it should not be retained if there are other less restrictive ways of achieving that outcome. Also, if a restriction is to be retained, it is necessary to demonstrate that to keep it will result in a public net benefit. It is not sufficient to demonstrate that its removal would result in no or little net benefit.

It is important when assessing the benefits and costs of a restriction that distinctions are made between private benefits and costs, industry benefits and costs and communitywide benefits and costs.

The CPA does not define how any piece of legislation should be reviewed. However, it does state that, without limiting the issues that can be addressed, it should:

- clarify the objectives of the legislation;
- identify the nature of every restriction on competition;
- analyse the likely effects of the restrictions on competition and on the economy generally;
- assess and balance the costs and benefits of the restrictions; and
- consider alternative means of achieving the same results including nonlegislative approaches.

The CPA lists a range of public interest issues that are to be taken into account where relevant in assessing the benefits and costs of any restrictions. These include:

- ecological sustainability;
- social welfare and equity;
- occupational health and safety;
- industrial relations and access and equity;
- economic and regional development including employment and investment growth;
- interests of consumers;
- competitiveness of Australian businesses; and
- efficient resource allocation.

Thus, NCP recognises that unrestricted competitive markets may not result in best community outcomes. However, the NCP and the legislative review process is underpinned by the view that free interactions between consumers and suppliers result in broadly based benefits throughout the community.

In this context, it is important to bear in mind that suppliers encompass a wide range of activities. A particular objective for introducing NCP was to extend competition laws to unincorporated businesses and government services. So suppliers in the context of reviews of health legislation encompass the professions as well as government agencies.

It is also important to bear in mind that NCP is not based on a view that fewer rules and restrictions are necessarily better. Competition itself cannot operate outside a framework of trust which is underpinned by general commercial, industrial, health and safety, and environmental laws. Many features of these laws themselves restrict actions that are deemed to undermine the operations of an efficient competitive economy.

4 The objectives of the legislation

AN INITIAL TASK FOR AN NCP REVIEW is to clarify the objectives of the legislation. These may be stated in the act and/or in its subsidiary regulations, orders, etc. Objectives might also be stated in second reading speeches and government policy statements. If they are not explicit in these ways, they may be implied from ministerial directives and the ways in which these are administered. These may be the way in which objectives need to be interpreted, particularly when legislation is old but ministerial and administrative thinking has moved on.

The only objectives stated for the *Community Welfare Act* within the legislation are in its subtitle: 'an act to provide for the protection and care of children and the promotion of family welfare, and for other purposes'. When he introduced the legislation in 1983, the Northern Territory's then Minister for Community Development said that 'the fundamental intention of the bill is to support the institution of the family, particularly in relation to its responsibility for the care of children'.

Such 'other purposes' as are enabled by the act are all derivative of child protection and family welfare. They include such things as the establishment of the Family Matters Court, the purpose for which was said by the then Minister 'to decide how a child's welfare can best be protected, with the least possible disruption to important family relationships'.

The act is based firmly on the premise that it is the community's responsibility to ensure the welfare of children who cannot take care of themselves and who fall outside the capabilities of their immediate family for care. The welfare of such children is seen to be a 'common good' shared by the whole community. Indeed, Australia has an international obligation under the *UN Convention on the Rights of the Child* to ensure, among other things, that:

> ...institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.

The convention also makes provision for state parties to 'render appropriate assistance to parents' and to 'ensure the development of institutions, facilities and services for the care of children'. Specific reference is also made to states taking 'all appropriate measures to ensure that children of working parents have[ing] the right to benefit from childcare services and facilities for which they are eligible'.

The vast majority of actions and responsibilities regulated under the act are oriented to these ends. This said, there appear to be three main categories of operational objectives in the provisions and administration of the act:

- the protection of children against maltreatment;
- the care of children for whom the Minister is given responsibility; and
- ensuring minimum standards in centre based childcare.

The second of these might be extended to cover the care of all children accommodated in children's homes, but the provision of the act which enables this — namely, the licensing of children's homes — does not appear to have been implemented.

5 *The nature and effects of restrictions on competition*

HAVING CLARIFIED OBJECTIVES of the legislation and the principles under which it operates, the next two tasks for an NCP review are to:

- identify the nature of any restrictions on competition that operate as a result of the act or the procedures adopted under the act; and
- analyse their effects on competition and on the economy generally.

Although these are identified in the legislative review procedures as separate steps, for legislation such as the *Community Welfare Act*, which does not set out primarily to regulate commercial activities, it might be preferable to handle them together.

The Competition Principles Agreement, which underpins the NCP legislative review program, does not define what constitutes a restriction on competition. However, the National Competition Council (NCC), which has been set up to advise the federal treasurer on progress by states and territories toward fulfilling NCP agreements and to provide guidance on reviews, has suggested seven ways in which legislation might limit competition (NCC, *Legislation Review Compendium*, April 1997, p. 4). According to the NCC, an act (together with its subsidiary regulations, procedures, etc.) could restrict competition if it:

- governs the entry and exit of firms or individuals into or out of markets;
- controls prices or production levels;
- restricts the quality, level or location of goods and services available;
- restricts advertising and promotional activities;
- restricts price or type of input used in the production process;
- is likely to confer significant cost on business; or
- provides advantages to some firms over others by, for example, sheltering some activities from pressures of competition.

Those features of the *Community Welfare Act* that are oriented to the protection of children against maltreatment or to children in care of the Minister do not match well with the indicators of potential restrictions listed above. However, there may be greater scope for the application of these indicators with respect to those features of the act relating to centre based childcare. It is in this area that there is scope for commercial involvement in the 'market', and the divisions between activities that are regulated and those that are not are somewhat arbitrary. It is also in this area that there is greatest scope for choice by purchasers of services.

In examining legislation in an NCP review, many of the features identified in terms of NCC criteria may be more *potentially* anticompetitive than *actually* so. The actual impact of each potential restriction needs to be assessed prior to any evaluation of the balance between their costs and benefits to the community. This said, the act contains few potentially anti-competitive features, but those that are identified need to be considered in terms of the NCC criteria.

Several features of the act potentially restrict entry to the provision of child protection and care services. However, nothing in the act controls prices. The sole reference to remuneration is with respect to allowances provided for foster care, which must form part of an agreement between THS and the foster carers. In practice, this appears to be based on cost recovery and is not a price for a service. Nor does anything in the act restrict the advertising or promotion of services. Several features of the act in regard to child protection and children in care of the Minister regulate the quality and location of services, but not in a commercial context. The only areas in which quality, location, input controls or discrimination between classes of business could be conceived as being potentially anticompetitive is in regard to the regulation of centre based childcare.

Restrictions on entry

Government is the sole funder and provider of services concerned with the protection of children against maltreatment (though non-government agencies may be involved in some aspects of provision). It is also the major funder and purchaser of services for children in care of the Minister. Although the responsibility for ensuring protection and care in these circumstances is mandated to THS and some responsibilities are required to be fulfilled by government personnel and institutions, the act does not restrict non-government personnel from participating in all of these functions.

Being a sole funder, purchaser and/or provider of services may appear to represent the ultimate in anticompetitiveness. However, the paramountcy of community responsibility, and Australia's UN obligations, may make the status quo in these regards a 'given' for an NCP review. THS maintains that its arrangements for the provision of child protection are consistent with all other jurisdictions in Australia, New Zealand, the United Kingdom and Canada.

The only other features of the act that directly affect entry to service provision are the registration requirements for foster carers and the licensing requirements for children's homes and childcare centres. While THS's assessment process, which goes hand in hand with registration, may limit the numbers of persons who would like to become foster carers as well as the numbers who are accepted, in principle these requirements should not be considered impediments to competition. Rather, they are quality assurance requirements of the purchaser. Furthermore, in view of THS's report that there are never enough foster carers to meet the needs, there is minimal concern that in practice these requirements have been used to exclude persons from foster parenthood for commercial reasons. And, while foster carers receive payments to help offset costs incurred, foster parenting is not a commercial activity. Persons undertake it to serve the community.

Although the act requires that children's homes be licensed, this requirement has not been implemented in practice. This raises the issue of whether there is a need for this requirement in legislation and, if so, under what conditions the benefits of implementing it exceed the costs. However, it also suggests that, except in the unlikely circumstance of the legislated requirement having discouraged a potential provider from establishing a home, as it now stands the requirement is not an impediment to competition.

Considerable discretion is given to the Minister in the act and its regulations to grant, refuse or cancel a childcare centre licence. The Minister may have regard to published standards and specifications in making decisions about an applicant's suitability to conduct a childcare centre, but is not limited to those standards and specifications. Apart from power given to the Minister to fix a minimum amount of indemnity insurance, no other commercial criteria are specified which suggest that licensing could be used as an anticompetitive device.

Restrictions on the quality of services

The act requires that children not be permitted to remain in a childcare centre for more than a prescribed period. Currently, such a prescription is made only in regard to centres that do not have an outdoor play space, in which case the child cannot remain in care for more than four hours in any period of eight hours. The only other restriction specified in the act is that drugs are not permitted to be administered to any child except as authorised by a parent or other legal custodian of the child.

The regulations make provision for the publication of standards for childcare centres, maximum numbers of children in care and condition of licence. The published standards specify minimum ratios of staff, including qualified staff, to children in care.

Restrictions that discriminate between classes of business

Some features of the act in respect to centre based childcare may be seen as potentially discriminating between classes of business. A prescription on the maximum period in which a child can be in centre based care is currently made only in regard to centres that do not have an outdoor play space. Furthermore, a requirement of the regulations is that if a childcare centre does not have an outdoor play space, a notice to that fact must be displayed together with the requirement that the child must not remain for longer than the prescribed period.

The THS submission reported that this prescription has precluded one childcare centre in the Territory operating as a long-day care centre. That service has criticised the prescription on the grounds that it has reduced its viability in the face of other childcare centres with outdoor play areas. THS went on to say that the provision is there in the interests of children who may otherwise spend the majority of their waking hours inside a shopping centre childcare service that does not have an outdoor play area. However, they considered that the restriction could be framed in more outcome oriented terms, so that children's developmental needs become the focus rather than a time limit.

THS also made the observation that small childcare centres of between six and 16 children have found it difficult to enter the market. But this is due largely to requirements of the Australian building code and the Northern Territory's *Fire Services* and *Town Planning Acts*. (It is the *Town Planning Act* that has different requirements for centers having more or less than 16 children in care.) Other than a requirement for a licensee to be over the age

of 21, which is a national standard, THS claimed that all provisions of the act are applied equitably to any entrant to the childcare centre market and do not favour one category of service provider over another.

However, a potentially discriminatory feature of the act in regard to purchasable childcare is that it applies only to centre based care. Family day care and other home based arrangements, which compete in the market for the care of children under six years, are not regulated in the Northern Territory other than the requirement that no more than five such children can be in any unlicensed home based care situation.

Darwin Family Day Care Inc. argued strongly that family day care services (together with centre based care) are significantly disadvantaged by private home based carers not having any restrictions or requirements on the services they provide, provided they keep within the limit of the number of children they care for. They pointed out that family day care schemes are community based not-for-profit arrangements. Whereas there are no formal licensing or other regulations of their activities in the Northern Territory, all carers within these schemes are required to be registered under national standards to which the Commonwealth is a party through the funding of coordination units in each scheme.

Darwin Family Day Care claimed that registration is costly to their carers in terms of both money and effort. To become registered, a carer has to go through initial training, currently of four full days and must pass a practical test and formal interview. They must obtain a senior first aid certificate, go through a criminal record check, present a suitable medical certificate, have their premises inspected (and possibly upgraded) to ensure they meet safety standards, and take out public indemnity insurance. Darwin Family Day Care claimed that its carers, in meeting these requirements, are significantly disadvantaged compared with for-profit home based care providers who are not obliged to meet any of these requirements or costs.

In New South Wales, Western Australia and Tasmania, all care provided in private homes is regulated, while in Queensland, South Australia and the ACT family day care is either licensed or directly administered by the state.

6 *The balance between benefits and costs of each restriction*

THE FOURTH REQUIREMENT OF THE NCP review process is to assess the balance between the costs and benefits of any potential restrictions on competition. That is, there is a requirement to consider whether restrictions on competition are in the public interest. The guiding principle of NCP requires the onus of proof in this regard to be with those who argue for the maintenance of any restrictions.

The case for restrictions on competition being in the public interest (that is, their social benefits exceeding their social costs) is usually made on grounds of 'market failure' in an unrestricted market. Some of the traditional market failure arguments do not appear to be of any relevance in the case of the *Community Welfare Act*. For example, one traditional argument for restrictions is to ensure that those who benefit from an activity pay for it. This criterion is of no relevance for those sections of the act relating to the protection of children against maltreatment and children in care of the Minister, though it could be of relevance for those sections dealing with purchased childcare.

The overriding argument for the restrictive provisions in the act is that a 'market' driven delivery system of childcare would fail to deliver community expectations about the protection of children and the promotion of family welfare. This is because children in the situations these provisions focus on are incapable of making informed choices and some families do not have the capabilities to provide the care for children that the community requires and which it is Australia's international obligation to ensure is provided. The welfare of individual children is seen to be a 'common good' the benefits of which are shared by the whole community.

It is in terms of this market failure argument in the broad that the assessment of public interest must be made for those sections of the act dealing with child protection and children in care of the Minister. However, for those sections of the act dealing with centre based care, the more traditional market failure criteria are of relevance. This is not to say that the welfare of

children in purchased care is not a common good that can justify public expenditure and social controls. But an assumption in this 'market' is that parents and guardians are able to make choices about care for their children, even though it may be necessary for the community to specify standards and other requirements to ensure that choices can be reliably informed.

Benefits of the potential restrictions on competition

The benefits of restrictions on the provision of child protection and care services need to be assessed in terms of the objectives of the act. The fundamental intention of the act when it was legislated in 1983 was said by the then Chief Minister to be to 'support the institution of the family, particularly in relation to its responsibility for the care of children'.

Those features of the act that relate to centre based childcare are directed towards this intention. They support families through endeavouring to ensure appropriate standards of one form of childcare available to them. However, those features dealing with child protection and children in care of the Minister are more directly concerned with the welfare of the children as such. The Minister can give assistance and guidance to parents and guardians in order to keep a child with its family. However, while support for the families of children in need and for families who care for those children is a major concern at all stages, it is not a primary focus of the act.

The benefits of outcomes actually achieved by any restrictions on competition within the act should be assessed against expectations in the community that:

- children are being appropriately protected against maltreatment;
- children in care of the Minister are being appropriately cared for;
- standards for centre based childcare are appropriate and being maintained;
- the institution of the family with children in these situations or caring for children in these situations is being appropriately supported; and
- Australia's international obligations under the *UN Charter on the Rights of the Child* are being met.

Costs of the potential restrictions on competition

The social costs of restrictions on the provision of child protection and care services could be of three types:

- administrative, enforcement and compliance costs;
- efficiency losses caused by appropriate services not being provided or such services as are provided not being supplied at least cost; and
- restrictions on choice by users.

The Northern Territory is reported in the *Report on Government Services 2000* of the Steering Committee for the Review of Commonwealth–State Service Provision (SCRCSSP) (AusInfo, Canberra, 2000) to have spent $139.50 per child on child protection and supported placement in 1998-99, compared with $121.30 for Australia as a whole. From that report there do not appear to be any significant differences between jurisdictions in the role of government in the provision of child protection and supported placement services. Thus, it is not possible to determine the extent to which administrative, enforcement and compliance costs would be higher or lower if these services were not so tightly mandated to government but were provided and/or administered in other ways while still meeting community and international expectations about protection and care.

While THS remains the sole provider of child protection services, it is difficult without detailed audit and benchmarking studies to assess whether there are any consequential efficiency losses. This might be less of an issue where services are contracted out, as some are in the case of children in care of the Minister. The whole concept of social costs imposed by restrictions on choice by users is of doubtful meaning for restrictions in the areas of child protection and children in care of the Minister. This is because they relate to children who cannot make choices for their own best interest and who fall outside the capabilities of families to make such choices for them. Child protection activities are, in a sense, law enforcement activities.

An NCP review is required to consider the total social costs of restrictions, not the costs to any one sector alone. Any savings by government in outsourcing or devolving responsibilities in the areas of child protection or children in care of the Minister may or may not reduce the current considerable social costs in these areas of the act.

The social costs of any restrictions on competition in the act in regard to centre based childcare are of a different nature. Total government (Commonwealth and Northern Territory) costs of administering centre

based childcare is reported by SCRCSSP to have been $2.30 per hour in 1997-98. A similar cost was involved in the administration of family day care. No comment was received by the review team to questions raised in the issues paper on whether different requirements imposed on various categories of childcare centres, or the absence of regulation on alternative forms of childcare, impose costs on childcare provision and limit choices by parents and guardians for their children.

The balance between benefits and costs

Earlier chapters of this report have described three features of the act requiring an assessment of the net public benefit of any potential restrictions on competition. These are: the protection of maltreated children; children in care of the Minister; and centre base childcare. These form the headings under which the following assessments of the balance between the benefits and costs are made.

Protection of maltreated children

THS funds all child protection services and provides the majority of them through FACS. Procedures that must be followed under the act define these matters as duty of the Minister, under whose powers of delegation these functions are fulfilled. FACS staff may involve other individuals and agencies (both government and non-government) in some of its actions to secure the safety of children and to provide services for children under case management, but there are no rights of contestability in these areas. In this sense this whole set of activities is anticompetitive. But to evaluate them in that context would be to miss the point of the government's obligations for the protection of maltreated children.

In this regard, THS submitted that 'child protection activities are, in a sense, law enforcement activities. They are about receiving reports, investigating reports, instigating court action, and carrying out the orders of the court. It is appropriate that there be one agency to do these things in the same way that there is a police force concerned with certain aspects of law, a customs service, an immigration service, etc.

> Whether or not child protection services are provided by THS or a contracted non-government agency there will be no choice for children and families. The safest way to organise child protection services, if the community expectations that children be protected as far as possible from maltreatment are to be met, is that one agency has primary responsibility for receiving and investigating reports and for ensuring the safety of the child. All jurisdictions in Australia

and those overseas with a similar legal system follow the same general pattern for organising child protection.

These benefits are clearly very important for a humane society that values the rights of the child and is committed to meet its international treaty obligations in these regards. Further, there is a commonality of policy commitment within Australia on these matters from which it would be inappropriate for the Northern Territory to deviate.

No evidence was presented to the review team that suggested that the administrative, enforcement or compliance costs of child protection would be reduced by a system which required the Minister to fulfil his/her duty under the act in a more contestable manner. Nor did any potential alternative providers submit that efficiency could be improved by allowing them to enter this 'market'. In this area of social policy, the issue of costs imposed by restricting choice by users is, as pointed out by THS, 'something of a red herring'. These procedures are based on the premise that it is the community's responsibility to ensure the welfare of children who cannot make choices about their own protection and who fall outside the capabilities of their immediate family to make informed choices for them.

It can be concluded that the benefits of the child protection features of the act which mandate complete control to the Minister exceed their costs by a large margin and there is a strong net benefit case for their retention.

Children in care of the Minister

A significant part of the act relates to the rights, powers, duties, obligations and liabilities of the Minister in regard to children placed under his or her care. Some of these follow on from children placed under protection orders, but there are also other categories of children for whom the Minister may exercise custody.

Government is the major funder and purchaser through THS of services for children in care of the Minister, but the act does not restrict other government agencies or non-government agencies or personnel from participating in the provision of care. This might be by permitting and facilitating the child to remain with his or her parents, placing the child with foster carers, placing the child in a children's home, or by providing accommodation and care in any other ways that the Minister considers most appropriate.

The two features of the arrangements for children in care of the Minister that were identified in the preceding chapter as potential restrictions on competition are the registration requirements for foster carers and the

licensing requirements for children's homes. The discussion in that chapter concluded that neither is likely to limit competition in practice. THS's assessment process, which goes hand in hand with the registration of foster carers, is in fact a quality assurance requirement of the purchaser. There is no evidence that it is being used to limit entry for any anticompetitive commercial reason, as THS never has enough foster carers to meet its needs.

The requirement of the act that children's homes be licensed goes well beyond an assessment of the net public benefits of procedures for children in care of the Minister, since many children cared for in some homes are there under other arrangements. Nevertheless, an option for the Minister is to place children under his or her care in a *licensed* children's home. The review team understands that none of the children's homes in the Northern Territory are licensed, so in practice this requirement is unlikely to have been a restriction on competition. The team was not informed that any prospective provider of children's home services, either to provide services for THS or for other purposes of care, had not entered the market because of costs of licensing requirements, or for fear of liability in the absence of licensing opportunities, even though licensing is a statutory requirement.

Thus, although the statutory licensing requirement does not appear to restrict competition, the question remains as to whether licensing should be enforced or the requirement rescinded. The Minister appears to be legally vulnerable by the requirement of the act that if a child in his or her care is placed in a children's home, that home must be licensed. Apart from this point in law, there may be no need for licensing of children's homes into which THS places children, since contractual agreement between THS and the home could cover all necessary quality standards and liability issues. (The act requires that a licensed children's home enter into an agreement with a parent, guardian or any person having custody of a child before any child is received into the home.)

Licensing might be an issue for situations of care in which THS is not a party. The review team did not receive any information regarding children's home care of children not in care of the Minister. Whether licensing is a preferred means of monitoring care in these situations is therefore an issue that has not been resolved, but its absence in practice has been assessed as not being anticompetitive. However, it appears that a policy decision should be taken either to enforce licensing or to remove it from the statute. Apart from this issue, it can be concluded that the benefits of all features of the act which relate to the responsibilities of the Minister for children in his or her care exceed their costs by a large margin and there is a strong net benefit case for their retention.

Centre base childcare

The major features of the act that were identified in the preceding chapter as potentially restricting competition relate to centre based childcare. Unlike child protection and children in care of the Minister, this feature of the act impinges significantly on commercial activity by catering for the needs of working parents. Of the 49 childcare centres in the Northern Territory, nine are for-profit operations, but all operate in a commercial environment in the sense that they charge for service and depend on fees for their viability. This said, the Commonwealth's funding arrangements and its *Quality Improvement Accreditation System* interact strongly with the commercial impacts of the Northern Territory's regulatory framework for centre based child care.

Under the Northern Territory's act, childcare centres are required to be licensed and the licensee must keep a register of every child received into the centre. Licensed childcare centres are subject to inspection at any time. Both the act and the childcare regulations under the act give the Minister discretion in regard to the granting of licences, but no evidence was received that this discretion, or the right of inspection, had been used in terms of any commercial criteria or in any anticompetitive way. Nor was the direct cost of licensing raised as an impediment to entry to the childcare centre market. Nor were the indirect costs of meeting national childcare centre standards seen to discriminate between categories of centre care providers.

Only two features of government regulation were identified in the preceding chapter as limiting competition between childcare centres. THS observed that small centres catering for between six and 16 children have found it difficult to enter the market. But this is due largely to requirements of the *Building Code of Australia*, and the Northern Territory's *Fire Services* and *Town Planning Acts* rather than to the *Community Welfare Act*.

The other feature is the report by THS of a claim by one childcare centre that the prescription placing a maximum period in which a child can be in centre based care without access to outdoor play space has reduced its viability in competition with centres having outdoor space. While THS defended the intent of the prescription, it conceded that such a restriction could be framed in a more outcome oriented way.

THS maintained that minimum standards for centre based childcare deliver public benefits of a high order. Longitudinal research undertaken in Sweden, the UK and USA was cited as indicating a return to the community of some $7 for each $1 invested in good quality early childhood

services. Key determinants of good quality were said to include the number of staff, group size, staff training-knowledge and remuneration. THS said that these components need to be taken into account when determining reliable effective childcare.

THS also maintained that the current legislative approach of regulating centre based child care, which specifies certain things in the act itself, others in regulations and the gazetting of standards which can be attached as conditions of granting a licence, has allowed considerable flexibility in the achievement of these benefits. In these ways government was said to have encouraged innovative services, extended hours of care, integrated services etc. In regard to the gazetted standards, it must be stressed that the Northern Territory has adopted those developed jointly by the state-territory and Commonwealth ministers.

No costs of the licensing system for childcare centres were brought to the attention of the review team from within the industry. THS noted that the costs to the Northern Territory government of enforcing childcare provisions is $1.70 per licensed place per week. THS said that it would be difficult to disaggregate compliance costs of providers from the costs of providing an unregulated service, as the standard would then be that established by the provider, presumably according to the market demand and professional practise.

The mandatory *Quality Improvement and Accreditation System* as a basis for Commonwealth funding would also greatly complicate any such assessment. Indeed, in the absence of licensing by THS there may be no noticeable undermining of standards because of mandatory participation in this system as a condition of Commonwealth funding. This said, it is acknowledged that the Commonwealth and state-territory governments have different but complementary roles in the area of child services.

The major cost imposed by the system appears not to come from licensing of childcare centres as such, with its attendant administrative, enforcement and compliance costs, but rather the potential distortion placed in the market by not imposing similar requirements on other sectors of the childcare industry. THS acknowledged that the current regulatory scope does appear anomalous, stating:

> If the legislation acknowledges some risk to children, and if the intent is to protect children being provided with care services outside the family, and to ensure that service standards promote their welfare, then about 91 per cent of these children are not currently included in the scope (there are about 24 000 aged 0–12 in the target group, and 2223 licensed places).

Even though family day care is not regulated in the Northern Territory, Darwin Family Day Care Inc. indicated that under national standards for the sector and Commonwealth funding for coordinators within the various schemes, the lack of coverage of all sectors of childcare under the act has anticompetitive consequences. It considers that, by default, private home based carers are favoured.

If there is an anomaly about the scope of children at risk, then there is likely also to be a corresponding competitive disadvantage of centre based care providers compared with providers of other forms of child care in the market. Many, but not all, other Australian jurisdictions cover a wider range of childcare options in their comparable legislation. Family day care is licensed or otherwise regulated in other jurisdictions except Victoria and the ACT. Some other informal home based care and creches are also licensed in some of the states.

It can be concluded that the benefits of the regulation of childcare centres by way of licensing exceed their costs and there is a strong net benefit case for their retention. However, three qualifications to this conclusion need to be considered. These come from the evaluation of alternative means of achieving the objectives of the legislation that is undertaken in the following chapter.

7 *Alternative means of achieving objectives*

NCP REVIEWS ARE REQUIRED to consider whether there are alternative means for achieving the same result as those which restrict competition, including nonlegislative approaches. The key question is whether the implicit objectives of the act – 'to support the institution of the family, particularly in relation to its responsibility for the care of children' – as it has been developed in terms of child protection, children in care of the Minister and ensuring minimum standards for children in centre based care, can be achieved effectively and efficiently in less regulatory ways than at present. Meeting Australia's international obligations under the *UN Convention on the Rights of the Child* is an important consideration in this regard.

The issues paper prepared for this review raised a number of alternative approaches that might be considered. These centred on:

- creating more opportunities for people or organisations other than from FACS in the provision of services for child protection children in care of the Minister;
- adherence to and improvement of standards in ways that do not depend on licensing;
- opportunities for formulating standards in less prescriptive and more outcomes oriented ways; and
- the benefits of having separate legislation dealing with non-commercial child protection and children in care of the Minister issues on the one hand, and issues of childcare which could be purchased on the other.

It is acknowledged that this last issue is not essentially an issue of restrictions on competition, but might be an avenue for creating a more neutral competitive environment for purchased childcare.

THS responded to a number of questions about alternative approaches to achieving objectives raised in the issues paper. It saw no scope for ensuring the same objectives of the legislation for child protection and children in

care of the Minister through the use of less restrictive measures. It claimed that many strategies within the existing legislation can and are used to promote the protection of children through the provision of financial assistance to, for example, community awareness programs. The fact that government is the sole provider of child protection investigation services was said not to preclude community involvement, or the delivery of associated services by others. THS also claimed that the use of less restrictive measures would compromise community expectations and Australia's obligations under the *UN Convention on the Rights of the Child.*

THS considered that non-legislated codes of ethics, which already exist for professionals in the area, would not by themselves be adequate to ensure community expectations about child protection and other services for children. Whereas codes of ethics regulate to some extent the way in which service providers relate to clients, they do not ensure that governments meet their obligations to protect vulnerable members of the community.

In respect to opportunities for reformulating standards more in terms of performance based rules that focus on outcomes rather than in terms of prescriptive rules that focus on inputs, THS considered that there is no scope in respect of child protection and out-of home care. It said that there may be scope for a set of underpinning principles and practice standards that may then provide a basis for reframing some elements of existing childcare service standards as outcomes. But, given the vulnerability of the clients, there will continue to be a need to prescribe core inputs, such as equipment and resources, care competencies, a charter of rights and responsibilities of parties, and the attitudes and mechanisms associated with continuous improvement.

THS discussed at some length the separation of legislation into two components — one dealing with crisis intervention and statutory response with the child as the primary focus, and the other dealing with the care of children in the voluntary absence of family care (this being as much a service for families as for children). THS observed that the scope of the current legislation is broad in that it aims to protect children, provide for their care in the involuntary and voluntary absence of family, promote family welfare, and provide for community welfare. There would be advantages and disadvantages in separating these objectives into separate pieces of legislation. However, THS did not see this as fundamentally an issue of competition policy or as a priority area for legislative reform at this time. It considered it to be an issue for government, but said that the question will be considered in the context of any future review of legislation.

THS was somewhat equivocal on the issue of whether all forms of purchasable childcare should be covered by legislation. However, it ended with the statement:

> If the premise is accepted that good quality early childhood programs contribute to the social and economic good, then enforceable minimum standards should apply to all as part of a quality assurance framework which includes purchaser education, complaints resolution mechanisms, professional practise, and a culture of continuous improvement.

The only other comment received on alternative approaches came from Darwin Family Day Care Inc. who said in its submission that nonlegislated codes of ethics and practices would not reasonably assure outcomes. It suggested that monitoring all private carers, with legislative backing, is the best means for achieving the various objectives in the provision of child protection and care services.

The review team concurs with the view of THS that there are no feasible alternatives to the current legislative approach, with its restrictions on competition, to the protection of children against maltreatment and the care of children for whom the Minister has responsibility. However, in the preceding chapter it was foreshadowed that three qualifications would be made to the general conclusion that the benefits of the regulation of childcare centres by way of licensing exceed their costs and there is a strong net benefit case for their retention. These follow from a consideration of some alternative approaches.

The first qualification is that standards should, to the maximum extent possible, be written in terms of outcomes to be achieved rather than in terms of prescribed practices. Without judging the extent to which this might be possible, where practice prescription is deemed necessary, it should be accompanied by a statement of the outcome being sought, and the Minister should have the power to waive the prescription if, to his or her satisfaction, the licensee can demonstrate that the outcome can be achieved in an alternative way.

The second qualification is that the basis and status of standards as legislation and as a condition of being granted a licence should be clarified. Although the childcare regulations specify that the Minister may publish a document setting out what he or she considers to be appropriate standards for centres, and the Minister may have regard to them in granting a licence, the statutory status of these standards is not clear. THS reported that there has been some criticism that the majority of conditions of licence are contained in a standards handbook rather than in regulations.

The third qualification is that consideration be given to broadening the scope of childcare activities that are brought within the licensing net. While this might be seen as increasing regulation and restraints on competition, it could also be procompetitive by creating a more neutral regulatory framework. Any such extension should, of course, be subject to the normal regulation impact assessment procedures. In line with contemporary nationwide approaches, this would involve public consultation and require an explicit statement of the objective(s) sought, an evaluation of alternative options, and an assessment of its benefits and costs in terms of minimising risks to children, maximising their development opportunities and on competition.

8 *Recommendations*

THE FINAL TASK FOR THIS REVIEW is to make clear recommendations that flow from the foregoing analysis. A requirement of the terms of reference is that if change is not recommended and restrictions on competition are to be retained, a strong net benefit for retention must be demonstrated.

In the light of this requirement, no recommendation is made with respect to arrangements for the protection of children at risk of maltreatment, there being a strong net benefit from retaining current legislated restrictions on competition.

Similarly, and for the same reason, no recommendation is made with respect to arrangements for children in care of the Minister. However, and in a slightly wider context of the care of all children accommodated in children's homes, it is recommended that consideration should be given to either enforcing the licensing requirement for children's homes or removing it from the statute.

Also, because it is concluded that the regulation of childcare centres by way of licensing exceed their costs and there is a strong net benefit case for their retention, no recommendation is made to remove licensing. However, to ensure that minimum standards of care are maintained for all children in voluntary care, and that various sectors of this 'market' are not competitively disadvantaged, the following recommendations are made.

- To the maximum extent possible, standards for childcare should be written in terms of outcomes to be achieved rather than in terms of prescribed practices. Where practice prescription is deemed necessary, it should be accompanied by a statement of the outcome being sought, and the Minister should have the power to waive the prescription if, to his/her satisfaction, the licensee can demonstrate that the outcome can be achieved in an alternative way.

- The basis and status of standards for childcare as legislation and as a condition of being granted a licence for a childcare centre should be clarified. Without seeking to reduce the flexibility with which standards can be administered, if they are to be used as a basis for licensing they should unequivocally have the status of subsidiary legislation.

Consideration should be given to broadening the scope of childcare activities that are brought within the licensing-regulation net to encompass all forms of purchasable childcare services. Such consideration should be subject to normal regulation impact assessment procedures.

Appendix

Terms of reference

THE REVIEW OF THE LEGISLATION shall be conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement. The underlying principle for the review is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Without limiting the scope of the review, the review is to:

- clarify the objectives of the legislation, clearly identifying the intent of the legislation in terms of the problems it is intended to address, its relevance to the economy and contemporary issues and whether or not the legislation remains an appropriate vehicle to achieve those objectives;
- identify the nature of the restrictions to competition for all relevant provisions of the specified legislation. This analysis should draw on the seven ways identified by the National Competition Council in which legislation could restrict competition, which include:
  - governs the entry or exit of firms or individuals into or out of markets,
  - controls prices or production levels,
  - restricts the quality, level or location of goods or services available,
  - restricts advertising and promotional activities,
  - restricts price or type of input used in the production process,
  - is likely to confer significant costs on business, or
  - provides some advantages to some firms over others by, for example, shielding some activities from the pressure of competition;
- analyse the likely effect of any restriction on competition and on the economy generally;

- assess and balance the costs and benefits of the restrictions for each anticompetitive provision identified;
- consider alternative means for achieving the same result and make recommendations including nonlegislative approaches; and
- clearly make recommendations. These should flow clearly from the analysis conducted in the review. If change is not recommended and restrictions to competition are to be retained, a strong net benefit for retention must be demonstrated.

When considering the matters referred to above, the review should, where relevant, consider:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and equity;
- interests of consumers generally or of a class of consumers;
- government legislation and policies relating to ecologically sustainable development;
- economic and regional development including employment and investment growth;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

The review shall consider and take account of relevant legislation in other Australian jurisdictions and any recent reforms or reform proposals including those relating to competition policy in other jurisdictions.

The review shall consult with and take submissions from those organisations currently involved with the provision of health services, other interested territory and Commonwealth government organisations, other state and territory regulatory and competition review authorities, affected members of the medical profession and their organisations and members of the public.