



CENTRE FOR  
INTERNATIONAL  
ECONOMICS

# *NCP review of the Northern Territory Nursing Act*

*Prepared for Territory Health Services*

FINAL REPORT

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# Contents

<b>Executive summary</b>	<b>v</b>
<b>1 Introduction</b>	<b>1</b>
<b>2 The environment in which the Nursing Act operates</b>	<b>3</b>
The market for nursing services	3
<b>3 NCP principles</b>	<b>7</b>
<b>4 The legislation and its objectives</b>	<b>9</b>
The legislation	9
Objectives of the act	11
<b>5 Nature of restrictions on competition and their likely effects</b>	<b>14</b>
Restrictions on entry and exit	15
Restrictions on advertising	20
Restrictions on the quality, level or location of goods and services available	20
Restrictions on price and type of input used in the production process	21
<b>6 The balance between costs and benefits of restrictions</b>	<b>23</b>
Benefits	23
Costs	25
Balance between benefits and costs	26
<b>7 Alternative ways of achieving objectives</b>	<b>35</b>
<b>8 Recommendations</b>	<b>36</b>
<b><i>APPENDIX</i></b>	<b>39</b>
<b>Terms of reference</b>	<b>41</b>
<b>Boxes, charts and tables</b>	

CONTENTS

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1.1	Acts to be reviewed	2
2.1	Employment of nurses in the Northern Territory, 1996	4

## *Executive summary*

THE REVIEW OF THE *NURSING ACT* is one of 12 reviews being undertaken of the Northern Territory's health legislation under National Competition Policy (NCP) requirements.

This NCP review has followed the recommended steps for undertaking such reviews. After preliminary discussions an issues paper was developed which set out the:

- explicit and implicit objectives of the legislation;
- nature of every restriction on competition; and
- likely effects of the restrictions on competition and on the economy generally.

This report includes recommendations formed after public consultations following the release of the issues paper and the consideration of a submission from the Nursing Board. These consultations and the submission formed the basis of the

- assessment of the balance between the costs and benefits of the restrictions; and
- a consideration of alternative means of achieving the same results including nonlegislative approaches.

The guiding principles for professional registration to be in the public interest that evolved from this and the other reviews undertaken are as follow.

- Title protection — right to exclusive use of title — is in the public interest as it provides information not only about the initial qualifications but also about competency in that the registered professional is subject to the discipline of the board which has the right to impose penalties and to deregister the professional for professional misconduct.
- The board should have the powers to examine and declare practices of high public risk and cost as restricted practice areas, but be required to follow a procedure that ensures that such declarations are only made when there is a clear case of public interest.

- Appropriate fees should be charged for registration and the issue of certificates and licences to assist in covering the cost of the administration of the acts. Fees are not of sufficient magnitude to restrict entry.
- Qualifications required for eligibility for registration should be determined by the board and not listed in the act. The fairness of the board's decisions is enforced by the right to appeal, and supported by the mix of nursing professionals and persons with other competencies on the board.
- What constitutes good fame and character, fitness to practise and similar provisions should be clarified in the act, but judgement on satisfaction of these criteria should be left to the board.
- Similarly judgement of what constitutes professional misconduct, or unprofessional conduct, should not be encribed in the act. There is adequate case law to define these requirements for professions.
- Restrictions on advertising are unnecessary restrictions on competition and may limit information available to consumers. Advertising in a false or misleading manner may be considered professional misconduct, and the board would have the power to address this as outlined above.

Following these principles, it is recommended that the following sections of the act be rescinded:

- Section 70 — only persons who are registered or enrolled nurses in the Northern Territory, and who hold a current Northern Territory practising certificate, are permitted to practise nursing in the Northern Territory.
- Section 87 — anyone who is not a registered or enrolled nurse cannot use the court system to recover fees charged for nursing services performed.
- Section 73 — advertising of certain content is prohibited.

These sections of the act potentially limit competition. In practice, section 70 has not been used to prevent persons other than registered and enrolled nurses from practising nursing. Given the lack of definition of practising nursing, the section lacks meaning and hence does not provide any public protection.

In addition, recommendations to strengthen the public benefit by enhancing the information value of the professional title are made. These include requiring all board members to represent the public interest, clarification of what is meant by good character, and giving the board greater powers to require demonstrated competence for renewal of practising certificates.

Alternatives to professional registration for protecting public health are considered. It has been concluded that the benefits to the public through improved information and the support for professional conduct and competency provided by the activities

of the board under the act could not be achieved at lower cost by any alternatives such as public information initiatives or negative registration.





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# 1

## *Introduction*

THE CENTRE FOR INTERNATIONAL ECONOMICS (CIE), a private economic research consultancy, in conjunction with Desliens Business Consultants has been commissioned by Territory Health Services (THS) to undertake an independent review of the *Nursing 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 Northern 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 *Nursing Act* is one of 12 Northern Territory health acts being reviewed (box 1.1).

In undertaking this review we held preliminary consultations with stakeholders involved in the provision of nursing services in the Northern Territory, including officers of THS. A number of relevant documents were reviewed, including a 1998 review of the professional boards. An issues paper was prepared and made available on the THS website. The issues paper worked through the various steps of an NCP review and raised questions and issues to be addressed at each step of the review. The issues paper identified those parts of the act that potentially restrict competition.

Newspaper advertisements drew attention to the review and the issues paper and called for submissions from interested parties. Only one submission was received, from the Nursing Board of the Northern Territory. Further consultations were held with interested parties to discuss aspects of their submissions. This report documents the findings and recommendations of the review.

**1.1 Acts to be reviewed**

- *Nursing Act*
- *Dental Act*
- *Optometrists Act*
- *Radiographers Act*
- *Community Welfare Act*
  - Community Welfare Regulations
  - Community Welfare (Childcare) Regulations
- *Health Practitioners and Allied Professionals Registration 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 Nursing Act operates*

THE IMPACT OF GOVERNMENT LEGISLATION on competition depends very much on the actual and potential structure of the market. How big the market is, what type of services are wanted and who pays for the services are important, as are the features of supply.

The distinction between a registered nurse and an enrolled nurse is the level of qualifications. Enrolled nurses were formerly known as nurses' aides. They must have completed a one year program at a tertiary institution, or what is considered equivalent. Registered nurses now complete a three year university degree and have a practical training requirement. Nursing specialties can also be recorded. In the Northern Territory the only specialty recorded is midwifery, which is a restricted practice area requiring authorisation to practise.

Of 3186 registered nurses on the register at the end of 1999, 2319 listed Northern Territory addresses and, of 606 enrolled nurses on the roll, 490 listed Northern Territory addresses. The number of nurses in the nursing workforce is generally less than the number of nurses registered and enrolled. This is because many nurses continue to renew their registration and enrolment despite not actively seeking work in the industry. This may be for personal reasons, such as caring for a family, being overseas, or working in other industries. In 1996 the number of nurses working in the Northern Territory was 2207, made up of 1888 registered nurses and 319 enrolled nurses.

### **The market for nursing services**

In 1996 the number of nurses per 100 000 people in the Northern Territory was 1213 compared with the Australian average of 1194. When part time work is taken into account, the comparison is 948 full time equivalent nurses per 100 000 in the Northern Territory to 931 across Australia. The ratio of nurses to hospital beds is also relatively high in the Northern Territory with 1.64 nurses per hospital bed compared with an Australian average of 1.4. The small and scattered nature of the Territory is one reason for the relatively high proportion of nurses to population.

However, remote areas find it difficult to attract both medical practitioners and nurses. Details are given in table 2.1.

### 2.1 Employment of nurses in the Northern Territory, 1996

	<i>Public sector</i>		<i>Private sector</i>	
	Registered nurses	Enrolled nurses	Registered nurses	Enrolled nurses
Acute–psychiatric hospital	921	174	136	15
Nursing home	38	35	40	44
Day procedure centre	22	7	5	2
Hostel			2	
Hospice	20			
Community health centre	423	2	43	24
Agency	11		2	
Development disability service	2		5	
School–child health service	29			
Tertiary education institution	40	2	4	
Prison medical service	9			
Defence forces	5	7	16	
Other	96	4	20	2
<b>Total</b>	<b>1 616</b>	<b>231</b>	<b>273</b>	<b>87</b>

Source: AIHW (Australian Institute of Health and Welfare) 1998, *Nursing Labour Force*, AGPS, Canberra.

#### *Public employment*

The majority of nurses in the Northern Territory are employed by THS and work either in the public hospital system or in community health centres.

In 1996 over 85 per cent of the registered nurses were working in the public sector. Of these 57 per cent were employed in acute–psychiatric hospitals (general hospitals) and 26 per cent in community health clinics. Other areas of public employment of nurses were nursing homes, school–child health services and tertiary education institutions.

Enrolled nurses are also more likely to be employed in the public sector in the Northern Territory. Seventy two per cent of enrolled nurses were employed in the public sector, 75 per cent of them in the acute–psychiatric hospitals and 15 per cent in nursing homes. Few enrolled nurses (less than 1 per cent) were employed in community health clinics.

#### *Private sector employment*

The level of private sector employment of nurses is comparatively low in the Northern Territory. Only 14 per cent of registered nurses and 28 per cent of the enrolled nurses were working in the private sector in 1996. This compares with 30 per cent and 32 per cent respectively in the private sector across Australia.

Of the registered nurses it is estimated that almost 50 per cent work in acute-psychiatric hospitals, 16 per cent in private medical rooms and 15 per cent in nursing homes. Less than 1 per cent are reported as working in an agency and only 2 per cent in a private nursing practice.

The largest source of private sector employment (50 per cent) for enrolled nurses is in nursing homes. The next biggest area of private employment is private medical rooms.

### *Nursing skills and Northern Territory requirements*

The high proportion of Aboriginal people and the relatively young population create demands for nursing services that differ from the Australian average. The demand for midwife and obstetric services is relatively high as is neonatal, infant and pediatric nursing. Accident and emergency and renal nursing are other areas of high demand. The Northern Territory has specific problems related to climate — skin cancer and tropical infectious and parasitic diseases — as well as problems arising from the high consumption of tobacco and alcohol, and poor nutrition. Primary care services — preventative and early intervention — are particularly important for the health of the Northern Territory population.

The majority of nurses (89 per cent) in the Northern Territory are clinicians. These nurses are mainly involved in the care and treatment of patients, including nursing diagnosis and preventative action. The level of experience of nurses in the Northern Territory is also higher than the Australian average, 20.5 per cent being level 3 clinical nurses, compared with 9 per cent across Australia. This may be a result of the recruitment program in the Northern Territory. In a number of locations nurses require this level of expertise — in part because nurses often have to work more independently due to the small size of the facilities and clinics. It is also in part because of the need to pay an adequate salary to attract nurses to the more remote areas.

Worldwide, nurses are moving into specialty areas. What they are allowed to do by medical practitioners is also expanding continuously. The only nursing specialty recorded and reported by the registrar of the *Nursing Act* is midwifery. This is a restricted practice area in the Northern Territory. Other states also record the specialties of mothercraft for enrolled nurses (also dental and mental health in Western Australia). For registered nurses other states and territories may record specialties such as psychiatric, mental health, mental retardation, mental deficiency, child health and infant.

In 1998 in the Northern Territory, shortages of nurses were identified in the areas of operating theatre, critical intensive care, neonatal, paediatric, renal and mental

health nursing. This problem is not unique to the Northern Territory; there is a shortage of specialty nurses across Australia.

### ***Other suppliers of services potentially affected by the act***

The act states that only registered and enrolled nurses can supply nursing services. In general, the public have a relatively poor understanding of the services nurses are trained to provide. However, there are a number of alternative service providers that effectively compete, in that they provide services that are substitutes for some services provided by registered and enrolled nurses.

- Registered midwives can provide midwifery services that may substitute for obstetric services.
- Registered nurses can provide primary care services that may substitute for services provided by general practitioners. However, under the *Poisons and Dangerous Drugs Act*, registered nurses have only limited powers to prescribe schedule 8 drugs and cannot refer patients to specialists.
- Aboriginal health workers can provide services similar to those of registered nurses.
- Nursing assistants, personal care assistants and carers provide some of the services that enrolled and possibly registered nurses also perform.
- Physiotherapists and other manipulative therapists can provide some similar services as those of nurses, particularly in the rehabilitation area.

### ***Government administration of the act***

The Professional Registration Boards section of THS administers the act. The main administrative activities associated with the act are:

- processing of applications for registration, enrolment and authorisation to practise in restricted areas, and issuing of certificates;
- maintenance of registers and the rolls;
- renewal of certificates to practise;
- convening of board meetings;
- organisation of board activities — for example, convening the Professional Review Tribunal; and
- administration of disciplinary decisions — for example, enforcement of fines, conditions on registration or enrolment, removal from the register or roll.

## 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 benefits and costs of the restrictions; and
- consider alternative means of achieving the same results including non-legislative 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 producers result in broadly based benefits throughout the community.

This does not mean that fewer rules and restrictions would necessarily be better. Competition itself cannot operate outside a framework of trust which is underpinned by general commercial, industrial, health and safety, and environmental laws. Some features of these laws themselves restrict actions that are deemed to undermine the operations of an efficient competitive economy.

# 4

## *The legislation and its objectives*

### **The legislation**

#### *History of the legislation*

The current act was enacted on 1 October 1999. It replaced the *Nursing Act* of 1982, which in turn replaced the *Nursing Act* of 1929. It does not continue the regulations that were in force under the 1982 act. The act establishes the Nursing Board of the Northern Territory, and provides for the registration and enrolment of nurses. The act has the potential to restrict who may practise nursing as well as creating the right of use of title. It also regulates the conduct of registered and enrolled nurses.

The previous act was seen as: punitive in nature; reflecting hospital based education rather than university education; not complementing mutual recognition; and not accommodating broad community representation. The new act was designed to overcome these problems. The legislation is modelled on the Tasmanian *Nursing Act 1995*.

#### *The main elements of the act*

The act has seven parts.

- The first part of the act consists of the title, commencement clauses and definitions.
- The second part establishes the Nursing Board and sets out the membership, functions, powers and objectives of the board.
- The third part provides for the registration and enrolment of nurses. It sets out the requirements for full and interim registration and enrolment including application requirements. Authorisations to practise in restricted practice areas are set out. The keeping of the register and roll, and issuing and renewal of certificates are also set out in this part of the act.

- Part 4 deals with discipline. It sets out the matters in respect to which complaints can be made and the complaint procedures, including the establishment of a Professional Review Tribunal.
- Part 5 provides for the right of appeal and the hearing of appeals.
- Part 6 sets out the offences that will attract disciplinary action under the act. These include the offences of practising nursing if unregistered, use of certain titles, advertising offences and other offences.
- Part 7 sets out obligations to provide information on nursing practitioners, body corporates and employers. It also sets out administrative and legal issues including:
  - fees penalties and fines to be paid to the board;
  - no right of recovery of fees for nursing services if not provided by a registered or enrolled person; and
  - punishments of conduct constituting and offence by a person or bodies corporate.

This part of the act also sets out repeal, savings and transitional processes from the previous act.

### ***Links with other jurisdictions***

Each state and territory in Australia has its own nursing act. All register nurses and regulate the scope of their activities. Mutual recognition operates throughout Australia through the *Mutual Recognition Act* and New Zealand through the *Trans-Tasman Mutual Recognition Act 1992*. The purpose of these acts is to ensure that a person registered in one or more jurisdictions would be accepted as qualified in all other jurisdictions. Nurses who have obtained registration in another state or New Zealand can obtain registration or enrolment in the Northern Territory by providing details and identification. Registration under mutual recognition is the same cost as initial registration in the Northern Territory.

The legislation regulating nursing varies somewhat between states. However, efforts are being made to ensure consistency — the Australian Council of Nursing has the responsibility to ensure consistency of legislation across the states. While the objective is for consistent policies and standards, each state and territory remains responsible for managing the competency of their nurses. There are no significant differences in the eligibility for registration but some difference in the restrictions on structure and conduct. For example, New South Wales legislation does not grant an exclusive right to practise nursing, except for midwifery services. There is also considerable variation across the states and territories on registered specialties. Western Australia records the most specialties and Northern Territory the least (midwifery).

The submission by the Nursing Board points out that given the *Mutual Recognition Act of 1992* and subsequent decisions by the Administrative Appeals Tribunal regarding applications under the provisions of this act, the differences in registration have all but been removed for practical purposes. The submission concludes that a nationally uniform approach is unlikely to impact on the supply of nurses in the Northern Territory.

### *Other legislation*

In the federal sphere there is no legislation that impacts directly on nurses. The *Health Insurance Act*, which provides for Medicare provider numbers for medical practitioners, impacts on the nursing profession only in that it precludes the users of the health services provided by nurses and other health practitioners from accessing Medicare rebates for services provided.

Three Northern Territory acts that impact on the nursing profession.

- The *Poisons and Dangerous Drugs Act* gives right to supply Schedule 1, 2, 3, 4 or 8 drugs to a registered nurse who has been approved, or is a member of a class of registered nurses approved by the Chief Health Officer by notice in the *Gazette* (section 29 (4A)). Registered nurses do not have the right to sell (prescribe) a schedule 1, 4, 7 or 8 substance.
- The *Health and Community Services Complaints Commission Act* established in July 1998. This set up procedures for the public to make complaints about all aspects of the health care systems, including nurses and nursing services. The Commissioner for Health and Community Service Complaints has the powers of investigation, conciliation and recommendation.
- The *Consumer Affairs and Fair Trading Act* provides penalties for false or misleading advertising. While the majority of nurses in the Territory are employed in the public sector, and most others are not in private nursing businesses, such private nursing businesses are beginning to grow in number and the range of services offered and their conduct would be subject to this legislation.

## **Objectives of the act**

### *Stated objectives*

The act is 'An act to provide for the registration and enrolment of nurses and the regulation of the practice of nursing and for related purposes'.

The objectives of the board can be read as the objectives of the act. These are to protect the public and professional interest by:

- ensuring that nursing services provided to the public are of the highest possible standard;
- ensuring that persons practise nursing according to the highest professional standards; and
- guarding against unlawful, unsafe, incompetent and unethical nursing practices.

Apart from the objective of updating the legislation to reflect the changes in nurse education and the need to ensure greater community representation, the second reading speech does not provide further guidance on the objectives of the act.

### *Key features of the act and implicit objectives*

The *Nursing Act* provides the right of title to registered and enrolled nurses. It also appears to provide the right of practice, though this is not enforced and is probably not capable of being enforced. The *Nursing Act* makes it illegal to practise nursing unless a registered or enrolled nurse holds a practising certificate.

Only certified registered or enrolled nurses can practise nursing, hold themselves out to be entitled to practise nursing, and/or practise a profession or trade under the title 'nurse', 'registered (or enrolled) nurse', 'qualified nurse' or any other title that is proscribed.

While to practise nursing is not defined by the act, a nursing practice is defined to include: 'nursing clinical practice, nursing education practice, nursing management practice and nursing research practice'.

The act provides for penalties for those who are not certified nurses to practise nursing, hold themselves out to be qualified to practise nursing or to practise a profession under the titles described above.

The act also sets out a two level disciplinary process by which the board deals with most offences under the act. Only for serious offences, or cases where the nurse fails to cooperate with the board's inquiries, will the matter be brought before the Professional Review Tribunal. The defendant has the right to appeal decisions of the tribunal to the local court, as does the board.

There were five complaints during the last year. Most were handled at the board level. No complaints have yet been brought to the tribunal, which was established in late 1999. This low level of complaints compares with a level of 160 complaints to the South Australian Nurses Board in 1996.

One of the reasons for replacing the previous act was to allow for a greater range of disciplinary action to better reflect the severity of the offence. The penalties that may be imposed by the board or tribunal range from fines to loss of certificate to practise and deregistration. Fines can be imposed for:

- offences of dishonesty;
- advertising offences;
- failure to notify the board of civil claims or convictions;
- offences relating to assessments and inquiries, including failure to attend; and/or
- failure to comply with orders of the board, tribunal or committee convened by the board.

The general reasoning behind the registration of professions and the regulation of their activities is to:

- ensure a level of competency that is adequate to protect the public from harmful practices — the right of title may be sufficient to deliver this objective, but when the cost of failure to prevent consumers choosing other service providers is considered high, the right to practise is seen as providing stronger protection; and
- convey information to the client that the person has achieved a minimum standard of training — right of title is a cost effective method of providing this information to service users.

# 5

## *Nature of restrictions on competition and their likely effects*

ALL LEGISLATION REGULATES BEHAVIOUR in some way, but not all regulation necessarily restricts competition. The National Competition Council (NCC), the Commonwealth body set up to advise on progress in meeting NCP obligations, has suggested seven ways in which regulation might restrict competition (NCC, *Legislation Review Compendium*, April 1997, p. 4). According to the NCC, legislation 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 costs on business; or
- provides advantages to some firms over others by, for example, sheltering some activities from pressures of competition.

The review is required to identify the *nature* of restrictions in the act which limit competition. Some of these may be more *potential* than *real*. For example, registration potentially limits market entry, but if it is used solely to require certain standards for market participants and is not used to limit their size or numbers, it should not be considered to have any actual impact on market entry.

The actual impact of each restriction on competition or potential restriction on competition needs to be assessed prior to any evaluation of the balance between benefits and costs to the community.

Efficient competition cannot take place in a totally unrestricted way but requires a body of laws which set the rules in terms of property rights, the types of commercial and industrial relationships permitted, and obligations within commercial relationships for health and safety and for the environment. Indeed, part IV of the *Trade Practices Act 1974* (which is an integral part of NCP) prohibits a range of actions which, while they might otherwise be used by

individual market players to promote their competitiveness, are considered anticompetitive in an economywide context.

A competitive industry is generally considered to be one in which:

- there are no restraints on firms or consumers entering or leaving the industry;
- there are no constraints on the free flow of information between suppliers and consumers; and
- prices paid and received for the industry's outputs and inputs are determined by the independent actions of many suppliers to and consumers in the markets for those services.

The *Nursing Act* contains a number of regulations that could be classified as restricting or potentially restricting competition under several of the headings used by the NCC as follows.

## Restrictions on entry and exit

The restrictions imposed by the *Nursing Act* involving registration requirements, rights to title and of practice, and right to recover fees fall into this category.

### *Registration requirements*

The *Nursing Act* allows for registration and enrolment of persons who meet the requirements for registration and enrolment in three areas:

- registered nurse;
- enrolled nurse; and
- authorisation to practise in restricted areas (currently, the only restricted area is midwifery).

### *Registration fees*

The cost of initial registration is \$75. Renewal is \$50 a year. No additional fee is charged for the practising certificate — however, a fee is charged for replacing lost or destroyed certificates. The fee for authorisation for midwifery is \$25.

### *Qualifications*

The qualifications for registration or enrolment are set out in section 17 of the act. A person may apply for registration or enrolment if the person has:



- successfully completed an accredited course in nursing in the Northern Territory;
- successfully completed a course in nursing outside the Northern Territory that the board considers is at least substantially equivalent to an accredited course in nursing; or
- experience and training in nursing practice that the board considers is at least substantially equivalent to the successful completion of an accredited course in nursing.

An accredited course is one accredited by the board. This section gives the board the discretion to approve or not a qualification on an application by application basis. The nursing board in each state or territory sets out the requirements for the educational institutions in their jurisdiction. The board submission notes that the required competencies for all nursing undergraduate preparation in Australia is standardised, with all states and territories utilising the Australian Nursing Council Incorporated (ANCI) National Competencies as the outcome measure and the minimum competence requirement for registration or enrolment. Assessment of overseas nursing qualifications is undertaken by ANCI on behalf of the board, with boards in all states and territories agreeing on the criteria for assessment. This approach to qualifications required for registration has effectively resulted in uniform requirements, and assists in the operation of mutual recognition. It also prevents any problems a state or territory might experience in being a 'dumping ground' where less qualified persons seek registration in that state or territory.

Section 46 (5) of the act states that the board must not issue a practising certificate to a registered or enrolled nurse who has not practised for longer than five years unless the board is satisfied that the nurse complies with the requirements of section 19. Section 19 gives the criteria for entitlement to registration or enrolment, of which the key element is sufficient competence and capacity to practise.

This provision is the only one in any of the health professional registration acts that provides for some form of competency check on persons renewing registration. In all other acts, as long as registration is maintained there is not further requirement to demonstrate competency. While it may be seen as restricting reentry to the profession, the allowance under section 19 mitigates this effect by putting the same requirements on these persons as on new entrants, so it cannot be considered anticompetitive in itself.

### *Entitlement*

Section 19 lists the requirements for entitlement to register or enroll. An applicant is entitled to be registered or enrolled as a nurse if the board is satisfied that the applicant:

- is eligible to apply for registration or enrolment
- has sufficient competence and capacity to practise
- is of good character
- has an adequate command of the English language.

What is good character is not defined in the act. The board submission sets out the basis for defining good character as:

- absence of relevant conviction for indictable offences, statutory offences relating to the professional's practice, and findings of guilt in either civil or disciplinary proceedings in any jurisdiction; and
- absence of relevant current criminal or disciplinary investigations in a foreign (outside the Northern Territory) jurisdiction.

The submission goes on to inform that the ANCI Code of Professional Conduct and the ANCI Code of Ethics, which have been proclaimed by the board pursuant to section 10 of the act, are used as a guide in board decisions. The applicant has right of appeal.

The standard used nationally for the assessment of English language competency of nurses is the Overseas English Test for nurses; a test specifically developed by Language Australia to reflect the level of English competence required to safely practise in Australia.

The board sets the standards of competency and capacity to practise; they are not described in the act.

If professional standards for carrying out certain professional services are set too high relative to the standards needed to meet consumer requirements for the service they wish to purchase, then the standard setting process will exclude suitable service providers and restrict competition to the detriment of consumers. This is an issue only if exclusive right of practise is provided by the act.

### *Right to practise*

The act restricts the right to practise nursing to those persons holding a practising certificate issued under the act (Section 70a). A nursing practice is defined as including clinical, educational, management and research nursing practices. The act does not specify nursing practice beyond this definition. This leaves the definition of what is a nursing practice to the discretion of the board. The board has adopted the ANCI National Competency for Registered and Enrolled Nurses and the Australian College of Midwives as a component of the Nursing Code. The board submission states that in determining what is or is not nursing or midwifery, it would make reference to these nationally adopted standards.

Section 70(1)(a) states that a person who is not a registered or enrolled nurse and who does not hold a practising certificate must not practise nursing. The other elements in subsection (1) reinforce requirements in other acts that specify functions to be carried out only by a registered or enrolled nurse. Subsection (2) exempts persons holding an interim registration or enrolment from the section.

The penalty for contravention of this section of the act is \$5000. It should be noted that, strictly read, the penalty could be applied not only when a fee is charged for nursing services provided but also when services are provided at no charge.

This restriction is clearly anticompetitive in that it makes it an offence for a person other than a registered or enrolled nurse to provide nursing services. Practising nursing includes conducting research into nursing practice. The granting of exclusive right of practice may not have been the intent of the restriction, but can be interpreted in this way. The fact that what constitutes practising nursing is not specified in the act may increase rather than reduce the power of this restriction. While the interpretation of the current board is clearly that it reduces the power of this restriction, this interpretation may change with a change in the composition of the board.

The interpretation of this provision that it grants exclusive right of practice is supported by section 87. It states that a person, or body corporate has no right to recover a fee or charge for nursing services unless they, or the employee who provided the service, were a registered or enrolled nurse at the time the service was performed.

Some exceptions to section 70 are provided in section 90, which states that the act does not prohibit certain practices. These relate to assistance in emergency, organ or patient transfer interstate and as part of training under supervision. The exception 90(b) states that nothing in this act prohibits a person providing care to another person or using lawful traditional or cultural practices in caring for another person. The division between 'providing care' and 'practising nursing' is not defined by the act.

### *Use of title*

The act provides the right of title through restricting the use of certain titles (section 72), and prohibiting 'false claims' (section 71).

Section 72 deals with practising a profession or trade under specified titles. The titles 'registered nurse', 'licensed nurse' and 'qualified nurse' are restricted to a person who is a registered nurse, the title 'enrolled nurse' to enrolled nurses and the titles 'authorised nurse' and 'midwife' to a person authorised to practise in the

restrictive practice area of midwifery. Only persons in these three categories are entitled to practise a profession or trade under the title 'nurse'.

The penalty for violation of this section of the act is \$2500.

Section 71 states that:

- a person who is not a registered or enrolled nurse must not hold himself or herself out, or allow himself or herself to be held out, as being a registered or enrolled nurse or as being in any way authorised or qualified to practise nursing;
- a person who does not hold a practising certificate must not hold himself or herself out, or allow himself or herself to be held out, as being in any way entitled to practise nursing; and
- a person who does not hold an authorisation to practise in a restricted practice area must not hold himself or herself out, or allow himself or herself to be held out, as being in any way authorised to practise in that restricted practice area.

The penalty for violating this section is \$5000.

The right of title provides information to consumers, in that only persons with appropriate qualifications, and assessed by the board as of good character, can use the title. It is anticompetitive only if it prevents persons with qualifications and training, that the public perceives to qualify them to supply services the public considers as nursing services, from providing these services through their inability to use a term that describes their services.

### ***Right to recover fees***

The act restricts any person who is not registered or enrolled from using the court system to recover fees charged for nursing services performed.

Section 87 excludes from the right to recover a fee or other remuneration for nursing services all persons who are not registered and enrolled nurses who hold a practising certificate (with the exception of persons with interim registration or enrolment); and, for services in a restricted practice area, persons who hold an authorisation to practise in that restricted practice area. For a body corporate, the section restricts the right to recover fees for services to those services provided by registered and enrolled nurses.

This restriction means that a person who is not a registered or enrolled nurse, or a body that employs persons who are not registered or enrolled nurses, cannot recover bad debts. The justification behind such provisions is that they strengthen the consumer's ability to respond to inadequate or poor service by not paying the

fee. The provision is incongruous if section 70 is read to mean that it is illegal for a person to supply such nursing services unless being a registered or enrolled nurse.

## Restrictions on advertising

Section 73 of the act makes it an offence to advertise a nursing practice or nursing service in a manner that:

- is or is intended to be false or misleading;
- offers a discount, gift or other inducement to attract business unless the advertisement sets out full particulars of the offer;
- refers to or cites actual or purported testimonials; or
- unfavourably compares another nursing practice or other nursing services with that nursing practice or those nursing services.

The penalty for such advertising is \$2500 or, in the case of a body corporate, \$5000.

It has been suggested that such restrictions are necessary to ensure ethical conduct in the industry. The restrictions are said to prevent misrepresentation of benefits of services, helping to prevent over servicing and the provision of services that are potentially damaging to the consumer. Nurses or a nursing company who advertise in a false or misleading way could be prosecuted under the *Fair Trading Act*, which establishes procedures and penalties for such behaviour. However, there is concern that only major transgressions would be deterred by trade practices legislation, while the board can address even minor infringements easily and at low cost.

Section 52(2)(n) provides for complaints to be made if a nurse behaves in a fraudulent or dishonest manner in a nursing practice. This may be sufficient to meet this concern.

## Restrictions on the quality, level or location of goods and services available

### *Matters that constitute grounds for complaint*

Section 52 lists the specific matters in respect of which complaints may be made. Subsection (1) lists grounds for complaint. The list is not exclusive and other matters can be raised as grounds for complaint at the discretion of the board. The

main elements of the list refer to meeting the qualifications required for registration and enrolment. However, the list also includes:

- does not have the capacity to practise competently; and
- is guilty of professional misconduct.

The capacity to practise competently is not defined by the act.

Subsection (2) enforces the requirement to hold a practising certificate and, for restricted practice areas, an authorisation to practise. It also enforces the board's disciplinary procedures by requiring fines to be paid and undertakings to be honoured.

In addition to these requirements, subsection (2) lists that a nurse is guilty of misconduct if the nurse:

- contravenes the *Nursing Code* (the *Nursing Code* is prepared by the board (section 10) and contains the policies and guidelines for the purpose of providing practical guidance to nurses in general practice and in restricted practice areas);
- contravenes a foreign nursing law;
- is negligent or incompetent in nursing practice; or
- behaves in a fraudulent or dishonest manner in nursing practice.

Given the open nature of the definition of capacity and competency, such provisions could potentially be used to restrict reasonable conduct. However, the *Nursing Code* and case law provide principles for the determination of professional misconduct, or unprofessional conduct, and given the right of appeal, it is unlikely that such provisions would be used in this way.

## Restrictions on price and type of input used in the production process

The reporting requirements of a body corporate involved in nursing set out in the legislation may have an impact on competition through restricting the inputs used in production.

Section 81 of the act requires that a body corporate that provides nursing services or causes or allows nursing services to be provided in its name or on its behalf must provide the board with information as required by the board. Information that may be required includes:

- a copy of its memorandum and articles of association or any other document relating to its constitution or rules;

- any information required by the notice concerning its membership, shareholdings, officers or employees; and
- any other information required by the notice concerning the body corporate's structure, management or operations.

The penalty for not providing this information as requested is \$10 000.

This section may impose additional costs on the business in record keeping and in administrative costs of having to provide the information. The requirement also may impact on how a business is conducted if there were a perception that information was not being treated commercial in confidence.

A minor impact on competition may be in additional costs imposed through sections 66 and 67, which govern the rights of inspectors to enter premises and request documents and/or undertake other forms of investigation that may disrupt production such as the examining and testing of equipment.

## 6

## *The balance between costs and benefits of restrictions*

IN ITS ASSESSMENT OF THE BENEFITS AND COSTS of the various restrictions on competition which are apparent in the *Nursing Act*, the review will need to establish whether there are market failures in the provision of nursing services which justify the various restrictions. Unrestricted markets might fail to deliver best community outcomes if:

- benefits flow to sectors of the community which do not contribute to costs or costs are imposed on those who do not receive benefits (externalities);
- information available to one group is not available to others with whom they do business (information asymmetry);
- economies of scale are so large that only one provider would survive in the market (natural monopoly); or
- goods and services are provided in ways from which no potential user can be excluded (public goods).

The existence of externalities and the presence of information asymmetry are key considerations behind some of the restrictions that are routinely included in health acts.

### **Benefits**

Quantitative assessments of the benefits of the restrictions imposed by the act are very difficult. The benefits are often based on a likely reduction of adverse outcomes from low probability, high cost events that may result from incompetent practice. The benefits hence rest on:

- the effectiveness of the act in preventing incompetent delivery of practice;
- the probability that incompetent practitioners will result in injury or misdiagnosis that results in public and/or private harm; and
- the cost — private and public — that the harm or misdiagnosis imposes.

The benefits of any restrictions on competition in nursing in the Northern Territory need to be assessed with respect to the stated or implicit objectives of the



legislation. The objectives of the board, which can be read as the objectives of the legislation, become the benchmark against which the legislation should be assessed. The board's stated objectives are to:

- ensure that nursing services provided to the public are of the highest possible standard;
- ensure that persons practise nursing according to the highest professional standards; and
- guard against unlawful, unsafe, incompetent and unethical nursing practices.

In addition, the overriding objective of NCP itself, which is to encourage efficiency by means of a more competitive economy, must be considered, as should the public interest issues nominated in the NCP agreements — namely, the environment, employment, regional effects and consumer interests as well as the competitiveness of business.

Notwithstanding any conclusions drawn about the role of restrictions in achieving the objectives of the legislation, the nature of any community benefits that flow from the objectives need to be assessed.

The fundamental justification for government intervention in professions is market failure due to asymmetric information and externalities. Asymmetric information arises when consumers do not generally have the training or capacity to judge the quality of a service. Registration and enrolment means that employers and consumers do not need to engage in testing of qualifications and can safely assume that a level of qualification has been achieved and that the person is (or was) competent to practise nursing.

Externalities occur when the services provided to a consumer result in impacts on other consumers. It is widely accepted that the community as a whole benefits from improvements in the health of its citizens. And public health can be threatened by failure to isolate and adequately treat contagious diseases. It could be argued that ensuring competency of nurses and professional practice benefits both the general health of the community and assists in control of infectious diseases.

A further benefit of the *Nursing Act* is that it might reduce costs to employers of nurses in disciplinary procedures. In the public sector in particular, labour laws can make it difficult to dismiss an employee for incompetence. If such incompetence is in contravention of the *Nursing Code*, or other elements of the act, then disciplinary action can be initiated through the board. The process also ensures a fair hearing for the defendant. The board submission also raises the issue that while employers can dismiss workers for incompetence this does not prevent the person from continuing to practise in that profession under the professional title.

Whether restrictions on competition are required to achieve these benefits needs to be considered.

## Costs

Costs of the restrictions to medical practice and to the community can be of several types:

- administrative, enforcement and compliance costs
- efficiency losses
- imposts on consumers.

Unlike the situation in most other Australian jurisdictions, professional regulation in the Northern Territory is not self-funding. Annual registration fees charged do not cover the cost of the board's administrative and enforcement activities. It is estimated that the Northern Territory government, through THS, currently contributes about \$350 000 per year to the operation of all professional boards. The community as a whole, through the budgetary process, picks up this bill.

This is also likely to be the case with compliance costs. Nurses are required to gain certain qualifications, pay registration and enrolment fees, and abide by codes of practice. Hospitals and other companies may be required to employ nurses to perform tasks that they do not think require nursing skills as these tasks are classified by the board as nursing practices. Reporting requirements on organisations that employ nurses also impose costs.

The regulations are also likely to involve some efficiency losses in the way services are provided to consumers. The main issue comes with what constitutes 'practising nursing'. As this is not defined by the act, it is the responsibility of the board to make a judgement as to what could be described as providing a nursing service and what is providing care. There are a number of services provided by nurses that could also be provided by nursing assistants, personal care workers and other health professionals. These are services that do not require the full level of training necessary to qualify as a registered or enrolled nurse. As a result, the consumer may be paying more for such services should a restriction on right to practise be enforced.

While the act does not appear to have been interpreted in this restrictive manner, with hospitals and other employers employing persons other than nurses to perform some services that might be classified as practising nursing, if the act were so used this would impose a cost on the public from restricted competition.

## Balance between benefits and costs

The NCP review process requires that the balance between benefits and costs be assessed.

### *Registration requirements*

The requirements for registration or enrolment are set out in Part 3 of the act. Sections of particular relevance are:

- qualifications (section 17)
- application and fees (section 18)
- entitlement (section 19) which requires:
  - eligibility (qualifications)
  - sufficient competence and capacity to practise
  - good character, and
  - adequate command of the English language.

Potentially anticompetitive elements of these requirements arise from the exclusion of persons who might be competent to provide nursing services but are prevented from registering.

### *Benefits*

The benefits that come from these restrictions accrue mainly through the attempt to ensure that all registered nurses are competent to practise. These provisions protect the public from professionals of known bad reputation. They exclude those professionals liable to impose damage on service users through physical or communication inadequacies. They also provide a clear guide to the profession's view of the worth of the qualifications of those registered.

The agreement between the states and territories to abide by the decisions of ANCI on qualifications for registration provides a mechanism to ensure consistency across states and territories of an appropriate qualification level. These qualifications have been judged by the national standards organisation as necessary and sufficient to ensure competency. The public can be sure that persons registered have received adequate training for competency.

The requirement (section 46 (5)) that persons who have not practised for 5 years be required to demonstrate competency is of considerable public benefit as it provides a check to ensure that skills are up to date in an environment of rapid technological advance.

Requirements of competency and capacity to practise provide the Board with some discretion in their judgement. While potentially this and the requirement of good character could be used to restrict entry, this is unlikely as the criteria for this judgement are widely accepted to be set by the *Nurses Code* and by case law. The right of any applicant refused registration or enrolment to appeal in a court of law, is sufficient protection against any such abuse of power by the board. The composition of the board, with substantial representation from persons other than members of the profession, also provides protection.

The lack of definition of good character is not seen as a concern. Indeed, the board submission states:

It is considered necessary that good character is not defined as the types of issues that the board would consider in making this assessment change in accordance with societal values and to enshrine them in legislation may well lead to a situation whereby the board is legally obliged to consider issues which may no longer be relevant.

The benefit of this provision may be strengthened if the act were to clarify what criteria it uses to assess good character and capacity and competence to practise.

A small benefit may be derived from the fee in preventing frivolous applications that have administrative costs. The other advantage of the fee is that it provides a message to applicants that the board provides them, as well as the public, with benefits. By working to ensure competency in the profession, registration provides each participant with protection of the profession's reputation.

#### *Balance of benefits and costs*

If qualifications are set too high, they impose a cost through reducing entry into the profession. However, with the right to practise nursing not enforced, the potential costs are greatly reduced.

Given the right to appeal, and the composition of the board, board discretion on what constitutes good character and competency is not considered to provide sufficient power for the board to limit entry to the profession, or to discriminate against members of the profession. There is no evidence to suggest that these provisions have been used in an anticompetitive manner.

A requirement that all members of the board represent the public interest would strengthen the public confidence that the board was setting the conditions for eligibility in a way that is of greatest public benefit. Currently, only one member of the board is required to represent the public interest.

The fees and registration requirements impose small costs on applicants, financial and in compliance. However, these are considered negligible compared with the gains to the profession in reputation and professional income from registration. The public funding of the boards is also appropriate given that the benefits of registration greatly exceed the small costs to the taxpayer in subsidising the operations of the boards. However, as some of the benefits of registration also accrue to the professional, a case can be made for the board to be self-funding through registration and enrolment fees.

The criteria for assessment of good character and capacity to practise should be set out in the act. All members of the board should be required to represent the public interest.

### *Right of title*

The act provides for exclusive right of title under section 72. It also prohibits 'false claims' under section 71.

### *Benefits*

The primary benefit of the right of title and prevention of false claims is that it provides information to consumers and purchasers of nursing services. The use of the title can be taken as a guarantee that the person has qualifications and meets the criteria of good character and competence as set out by the board. The title also indicates that the person so titled is subject to the disciplinary process and there is a clear and responsive avenue for complaint should services not be seen to be provided competently.

Registration and associated right of title is a cost effective way of providing assurance on qualifications and competency. This is of particular value where the consumer does not have the capacity to assess the competence of the practitioner.

Where purchasers — employers rather than the final consumer — have the capacity to judge competency, the threat of loss of registration acts as a greater discipline on the conduct of the practitioner than would loss of employment. These provisions also protect the employee from long term implications of a dismissal based unfairly on claims of incompetence.

The right of title and all it involves gives a sense of professional identity, in the eyes of the public, and the profession. This tends to improve standards and confidence, both of which have positive outcomes for consumers. As consumers have better information on which to base their health care decisions, overall health outcomes are higher than would otherwise be the case, with consequent savings for the government.

### *Costs*

As the right of title by itself does not prevent other health practitioners from providing those nursing services which they are trained to provide, it is not anti-competitive. Anyone who meets the eligibility for registration and enrolment are entitled to register or enroll on application and payment of a fee. The requirements discussed above are not considered sufficiently onerous to prevent entry of suitably trained professionals.

The main cost is the administrative cost of running the register and roll and conducting board business.

### *Balance of benefits and costs*

In view of the information value of right of title, relatively low administrative costs, and the considerable efficiencies that come from a single point for checking qualifications and competency, the right of title is of net public benefit.

That said, the titles so protected should be restricted to those commonly used by the profession. Those titles listed in section 72 are reasonable, however, it does allow for 'any other title that is prescribed'. Variant titles such as nursing assistant should not be considered to violate the right of title. If titles are prescribed that might lock out professionals trained in overlapping but non-registrable or differently registered professions, then the right of title would be anticompetitive. But, as it stands, the right of title provision is of considerable public benefit.

The board submission concurs.

By limiting the titles a person may use who provides health services does not in any way restrict the services a person may provide (with exception of those functions that are legislatively required to be undertaken by certain persons such as storage and administration of scheduled substances). It simply ensures that a person purporting to provide health care services does not do so in a manner that implies they are qualified or competent in a manner that could be misleading to the public.

The right of title protection (sections 71 and 72) should therefore be retained in the act.

### *Right to practise*

Section 70 of the act makes it an offence for a person who is not registered or enrolled to practise nursing. section 90(b) allows for persons to provide care for other persons. Neither practising nursing or providing care are defined by the act.

The board submission contends that section 70 does not provide right to practise. Generally such provisions are linked to the right to charge for the provision of the restricted services. However, given that the right to recover fees for nursing services is restricted to those services provided by registered and enrolled nurses (section 87), the interpretation of section 70 as granting right to practise seems reasonable.

The act allows for the establishment of restricted practice areas (section 28(2)). However, currently only midwifery is a restricted practice area. Qualifications in midwifery are required for authorisation to practise to be granted. The act makes it an offence for registered and enrolled nurses to practise in restricted practice area unless they are authorised to do so (section 52(2)(f)).

### *Benefits*

The benefit of restricting the right to practise depends on three things.

- The likelihood that registered and enrolled nurses are competent — while the registration procedures greatly improve the probability that a nurse is competent they are not a guarantee.
- The cost of incompetent practice — many nursing practices are generally unlikely to result in serious injury or long-term health problems, and hence public costs, if performed by a person who is not sufficiently competent. However, with the increasing complexity of nursing practices the number of practices of this nature is increasing. As many of these practices are likely to be conducted as part of a team, the probability of incompetent practice is relatively low.
- The probability that unregistered practitioners would perform nursing practices that they are not competent to perform — nursing services that are directly purchased by consumers tend to be less complex making it easier for the consumer to assess quality and competency of the practitioner. The more complex nursing services tend to be purchased by organisations with a high degree of expertise in assessing the competency of nursing staff.

In the case of practising nursing, the three criteria for large benefits from restrictions on the right to practise are not satisfied.

### *Costs*

The costs of restricting the right to practise nursing depend on how practising nursing is defined. If it encompasses a significant number of services that other health practitioners are competent to practise, then the costs may be significant. In such a situation, consumers are denied a greater choice of provider and competition

for the provision of the service is substantially reduced. While this may not currently be the case, and indeed there is no evidence to suggest that the act has been used to limit competition, it does allow for such actions.

### *Balance of benefits and costs*

The costs of restricting the right to practise nursing may be large relative to the small benefits it provides. There is no obvious benefit to restricting the right to practise nursing to registered and enrolled nurses. Title protection is sufficient to inform consumers of the competency of the service provider.

The possible exception is in areas of nursing where the risk of injury or health problems arising from incompetent practice are high. There may be a case for providing the board with the power to restrict practices of this nature. A case would have to be made by the board that such a restriction was in the public interest. Discussions with the profession suggested that title protection provides sufficient protection in the only restricted practice area currently listed in the act — midwifery.

In restricted practice areas, it would be of benefit if the board were to consider qualifications other than nursing qualifications to assess whether the qualification provides competency in the restricted practice area. Currently the act requires that the person be a registered nurse before they can apply for authorisation to practise in a restricted practice area.

Regardless of whether the section does provide right to practise, the board submission recommends its removal. They argue that:

Section 70 of the act is in essence a replication of the powers provided for in section 71 and therefore it is recommended that the section is not required as sufficient public protection powers exist within section 71 to protect consumers from persons providing nursing services who do not have the necessary competence or educational preparation to do so safely.

Section 71(2) makes it an offence for any person who does not hold a practising certificate to hold him or herself out as entitled to practise nursing unless registered or enrolled.

Sections 87 (1) and (2) prevent the recovery of fees for any nursing service provided by persons other than registered and enrolled nurses. This provision is inconsistent with the ability of consumers to select their provider from practitioners other than registered and enrolled nurses. It is not required for title protection. The board submission states that the intent of the section is:



The restriction of individuals claiming fees for services that they were not qualified or licensed to perform i.e. making fraudulent claims to health service funders such as the Commonwealth through the Veterans Affairs Scheme or Private Health Funds.

While this may be the intent, the restriction can be used to preclude other health practitioners from offering nursing services that they are competent to provide. If the funding from the Commonwealth or private health funds is contingent on the services being provided by a registered or enrolled nurse, then this is sufficient legal ground for these organisations to dispute fees charged by persons other than those that meet the requirements to provide the services.

Section 70, which appears to give the right to practise, should be repealed.

Section 28 should be amended to allow persons other than registered nurses to apply for authorisation to practise in restricted practise areas. They would be subject to the same competency tests and demonstration of validity of qualifications as registered nurses applying for such authorisation, and have the same right of appeal.

Sections 87(1) and (2), right to recover fees, should be repealed.

### *Restrictions of advertising*

The intent of section 73 is clearly to ensure that accurate information is provided to the public. However, two elements go beyond that. These are subsections (c) and (d), which respectively make it an offence to advertise a nursing service or nursing practice in a manner that refers to or cites actual (or purported) testimonials, or unfavourably compares another nursing practice or other nursing services with that nursing practice or those nursing services.

### *Benefits*

This provision helps to prevent misleading advertising, which would distort consumer choice. Such distortions may impose costs on the consumer — they do not end up with the service they thought they were purchasing — and costs on the public if services so purchased result in additional health costs.

While the *Fair Trading Act* provides protection from false or misleading advertising, provisions in the act empower the board to deal with infringements in a cost effective and timely fashion (board submission). The power to deregister is a strong penalty that only the board can apply and may be more effective than the penalties under the *Fair Trading Act* for deterring minor infringements.

*Costs*

The costs of the provision come from those elements that prevent what could be seen as legitimate advertising as long as it can be proven true. Preventing the publication of this information reduces information to consumers.

*Balance of benefits and costs*

The ability of the board, which is in touch with the profession, to deal with false or misleading advertising is of public benefit as it reduces the cost of ensuring information provided in advertising is valid.

However, preventing actual testimonials from being used or truthful comparisons (say on price) does restrict information that may be valuable to the consumer in judging the appropriateness of a service for their need. Removal of the restrictions on this behaviour is unlikely to release a barrage of advertising, as most consumers would find this distasteful, and nursing services are still predominantly employed in health care units which provide a wider range of services than nursing services.

The powers of the board to address professional misconduct and section 52(2)(n) which lists behaving in a fraudulent or dishonest manner as a matter for complaint, can be considered sufficient to provide the board with mechanisms to protect the public from such advertising.

Section 73 on advertising should be repealed.

***Restrictions due to matters constituting grounds for complaint***

Section 52 lists the specific matters in respect for which grounds for complaint may be made. It leaves the definition of professional misconduct open for the board to decide.

*Assessment of balance*

By providing for a disciplinary process, this section strengthens the information provided by the use of title. Title implies attainment of qualification, good character and competency, in that no complaints have been made against the person so titled.

The board submission points out the use of the *Nursing Code* as the standard for professional conduct. It also highlights the common law standing for determining professional misconduct, which is a departure from accepted practices and conduct that would be criticised by fellow practitioners of good repute and competence.

In view of the right to appeal, and the use of the *Nursing Code* to define professional conduct, the costs in terms of the potential for the provision to be used to discriminate against members of the profession is negligible.

The public benefit of the section clearly exceeds any cost that might arise.

Section 52 should be retained.

### ***Restrictions on information to be provided by body corporates***

Section 81 requires that a body corporate that provides nursing services or causes or allows nursing services to be provided in its name or on its behalf, must provide specific information to the board. At issue is whether this imposes significant costs on the business, and whether the information could potentially be used in an anticompetitive manner.

#### ***Balance of benefits and costs***

The board submission argues that such information is necessary for the board to fulfil its functions as set out in sections 6 and 7, and it is not information that any business would not need to keep for its own records. No case was presented that these information requirements were onerous.

Similarly no case was made that there were any concerns about the use of such information by the board. As the board submission points out to do so would be *ultra vires* (acting outside of your legal power).

Section 81 should be retained.

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# 7

## *Alternative ways of achieving objectives*

NCP REVIEWS ARE REQUIRED to consider whether there are alternative means for achieving the same results as those which restrict competition, including nonlegislative approaches. The issues paper invited interested parties to comment on this proposition and to suggest less regulatory ways of delivering safe and high quality health care to Northern Territory service users.

There is a range of alternative, perhaps less costly, mechanisms that might be considered to achieve the act's implicit objective of protecting the health of the Northern Territory public. These include:

- providing enhanced information to consumers, including official warnings, advertising campaigns and publication of pamphlets about specific professional and occupational services;
- listing or certification schemes which require practitioners to inform a central authority about educational qualifications and previous experience in the industry as a substitute for the specification of allowable practices; and
- so-called negative registration where service providers are not screened before starting practice, but only prohibited from practising if shortcomings in their operations are identified.

These alternatives have traditionally been rejected in the case of most professionals providing health services. None of the submissions received responded to these alternatives. Nor were any of them advanced in discussions as being likely candidates for practical, less costly alternatives to the registration procedures assessed in the preceding chapter.

# 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 from retention must be demonstrated.

An overall net benefit can be concluded for the current registration system, which gives right of title to nurses, some features of which restrict competition (at least potentially). Without making a judgement about the strength of this net benefit, the review has concluded that it could be strengthened if certain changes were made to the act. Therefore, the status quo is not being recommended.

In regard to the overall intent and scope of the legislation, the following recommendations are made.

- Legislation to protect the public against unqualified practitioners using the title nurse or variant specified in the act, or implying that they are qualified in those professions should be retained. As in the present legislation, right of title should be restricted to those who are registered within a particular professional category and hold a current certificate to practise (sections 71 and 72).
- The present reference in the legislation that implies restricted right to practise (section 70) should be rescinded.
- The preclusion on the right to recover fees by unregistered practitioners (section 87) should be rescinded.
- Provision should be made for certain treatments or procedures which are assessed to have a high probability of causing serious damage if practised by persons with inappropriate qualifications and experience to be restricted to persons who can demonstrate they have appropriate qualifications and experience to practise them. Such restrictions should have the status of subordinate legislation, their introduction being subject to normal regulation impact assessment procedures.

For matters dealing with registration and certification *per se*, no change is proposed regarding the structure of the current board, which permits the majority of members to come from the profession.

- The legislation should explicitly require all members of the board unequivocally to serve the public interest, and for this reason no person should be appointed singly to represent the public interest (as implied in section 5(d)).

In regard to the powers and discretion of the board, it is recommended that:

- The board should be empowered to require the demonstration to its satisfaction of continuing competence as a condition of obtaining a certificate to practise. The board may judge that this goes beyond the current provision requiring registered and enrolled nurses who have not practised for five years to demonstrate competency.
- the intent of good character and capacity to practise criteria should be clarified in the legislation along the lines of demonstrating to the satisfaction of the board:
  - adequate physical and mental health,
  - absence of relevant convictions for indictable offences, statutory offences relating to the professional's practice, and findings of guilt in either civil or disciplinary proceedings in any jurisdiction, and
  - absence of relevant current criminal or disciplinary investigations in a jurisdiction outside of the Northern Territory;
- there should be a mandatory requirement to inform the board of any changes in status in these regards; and
- the board should be empowered to suspend or cancel registration on the basis of any such adverse information, subject to normal appeal procedures.

As regards the conduct of nurses who offer nursing services, the case law basis for professional misconduct is considered to be sufficient to prevent false and misleading advertising.

- The prohibition of certain advertising behaviour should therefore be rescinded (section 73).



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## *Appendix*





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## *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.